BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MINERAL POINT SCHOOL DISTRICT

and

MINERAL POINT EDUCATIONAL SUPPORT PERSONNEL

Case 26
No. 57004
MA-10486

Appearances:

Ms. Priscilla Ruth MacDougall, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Union.

Kramer, Brownlee, & Infield, LLC, by **Ms. Eileen A. Brownlee**, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809, appearing on behalf of the School District.

ARBITRATION AWARD

The Mineral Point Educational Support Personnel, hereinafter referred to as the Union, and the Mineral Point School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the subcontracting of bus services. Hearing on the matter was held in Mineral Point, Wisconsin on April 27, 1999. A stenographic transcript of the proceedings was prepared and received by the undersigned by May 24, 1999. Written arguments and reply briefs were received by the undersigned by June 29, 1999. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

"Did the District violate the parties' collective bargaining agreement when it entered into a contract for transportation services with the Verona Bus Company?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

. . .

ARTICLE III

MANAGEMENT RIGHTS

Management retains all rights of possession, care, control, and management that it has by law, and retains the right to exercise these functions under the terms of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly, and unequivocally restricted by the express terms of this Agreement. The rights include, but are not limited by enumeration to, the following rights:

1. To direct all operations of the school system;

. . .

11. To determine the methods, means and personnel by which school system operations are to be conducted;

. . .

13. To contract for goods and those services which are not currently provided by present staff members on a regular basis;

. . .

ARTICLE V

GRIEVANCE PROCEDURE

. . .

E. The arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this agreement. Findings of the arbitrator shall be final and binding upon both parties.

. . .

BACKGROUND

The District and the Union have been parties to a series of collective bargaining agreements. Initially bus drivers were not included in the bargaining unit. In 1993, after an election directed by the Wisconsin Employment Relations Commission, bus drivers were accreted to the bargaining unit. The 1989-1991 collective bargaining agreement contained the following management rights provision:

> "5. The Board, at its discretion, may contract for goods and services as long as the work historically performed by bargaining unit employees or normally within the scope of work performed by bargaining unit employees, and the hours of bargaining unit employees is not affected."

In 1991 the current contract language was voluntarily agreed to. In 1995 the District sought unsuccessfully through Interest Arbitration a change in Article III, paragraph 13 that would allow it to subcontract at will. In 1997 the District again unsuccessfully sought a change in Article III, paragraph 13 through Interest Arbitration that would allow it to subcontract at will only bus services.

Prior to the start of the 1998-99 school year the District entered into a contract with Verona Bus Service to operate the District's transportation services. On September 10, 1998 and December 9, 1998 grievances were filed concerning the District's subcontracting of regular bus routes. The matters were consolidated and processed to arbitration in accord with the parties' grievance procedure. The first matter occurred when Jerry Cenite, who had resigned as a bus driver in 1996, approached Todd Schmitz for reemployment. Schmitz informed Cenite there were no openings but when an employe retired Schmitz hired Cenite as an employe of the Verona Bus Company to drive the retired employe's route. The second matter occurred when the Union became aware that Schmitz , who had been the District's transportation manager and who drove a bus route, was now an employe of the Verona Bus Company and still driving a bus route. Also during this time the District eliminated the position of transportation secretary occupied by Patty Palzkill and transferred her to another secretarial position. No grievance was filed over this matter. The record also demonstrates no employe was laid off or has lost work opportunities because of the Districts's actions.

Union's Position

The Union asserts the District violated the collective bargaining agreement's provision against subcontracting when it hired employes of the Verona Bus Company. The Union acknowledges that the language was changed in 1991 but asserts this was done at the District's urging because it wanted to do certain repair work and not run afoul of the language. In support

of this position the Union points to the testimony of South West Education Association Director Leroy Roberts (Tr. 15-27). The Union also points out the District has sought to change Article III, paragraph 13, in two separate Interest Arbitration cases and lost both times. The Union also points out that the District has not in the past used the subcontracting language to subcontract out any bargaining unit work.

The Union also argues the District's position that it can subcontract out any bargaining unit position (work) when a position becomes vacant is preposterous, unsupported by any bargaining history or past practice, violates Sec. 111.70 Wis. Stats. as bad faith bargaining of a mandatory subject of bargaining by potentially reducing the bargaining unit to zero such that the entirety of the District's support staff could be employes of another employer. The Union points out the subject of subcontracting is a mandatory subject of bargaining and twice the District has taken this issue to interest arbitration. The Union concludes the District's subcontracting of bargaining unit work that was performed exclusively by bargaining unit members is bad faith bargaining.

The Union also asserts this is a first step in the elimination of the bargaining unit over the passage of time. The Union asserts that for such a drastic result to be allowed to take place both parties' clear intent to allow the same is necessary. The Union concludes the District did not demonstrate any such intent.

The Union would have the undersigned sustain the grievance, to admonish the District for its bad faith actions, and to direct the District to hire Cenite and make him whole.

District's Position

The District contends it did not violate the collective bargaining agreement when it permitted drivers employed by Verona Bus Company to drive school buses. The District points out it would agree with the Union's interpretation concerning the instant matters if it had occurred prior to 1991. However, the District asserts the present language clearly allows it to subcontract work so long as no present staff member is deprived of work.

The District also points out that under the pre-1991 language work historically performed by bargaining unit members would remain bargaining unit work. The District asserts that the language change in 1991 eliminated the protection concerning historically performed work. The District argues that the focus thus changed from both protection of work and protection of workers to only the latter. Here the District also points out the District's reserved management rights was strengthened with the addition of the clause except for: "...rights explicitly, clearly, and unequivocally restricted by the express terms..." of this agreement. The District points out it did in 1993 eliminate a maintenance position and had a manager assume these duties and no grievance was filed.

The District does acknowledge it did attempt to seek changes in Article III, paragraph 13, but points out that the Union, in arguing its case, submitted as an exhibit a claim that similar language in other contracts supported its position. These provisions provided that the employer could subcontract out for goods and services provided bargaining unit members were not laid off or reduced in hours. The District points out this occurred again when the 1996-1998 agreement went to interest arbitration.

The District acknowledges that the Verona Bus Company did hire an employe to replace the District's retired employe. However, the District asserts the Union's interpretation is inconsistent with the plain language of the agreement. The District points out no present staff member was deprived of work. The District argues the Union's contention would render meaningless the word "present" in the collective bargaining agreement. The District asserts that had the parties intended to protect the work rather than the present bargaining unit members it would have been sufficient to state that contracting was allowed except for "current work performed by staff members." The District points out arbitrators avoid rendering contract language superfluous and that the undersigned does not have the authority to change, alter or modify the terms of the agreement.

The District also points out the interpretation of the agreement sought by the Union is inconsistent with past practice. The District asserts the Union did not protest when a maintenance position was eliminated and the work transferred to a non-bargaining unit position, remained silent when the bus drivers were accreted and Schmitz drove a regular school bus route, and when the transportation secretary's duties were eliminated and she was assigned to other duties.

The District also asserts that any ambiguity of the language must be resolved it the District's favor because of the reserved rights provision of the Management Rights Article. Further, even if there were two reasonable interpretations of the language the past practice favors the District's interpretation.

The District also points out that Schmitz had never been a member of the bargaining unit. The District argues the only "present staff member" he replaced was himself and therefore the Union's argument is irrelevant.

The District would have the undersigned deny the grievance. The District also argues that should the Undersigned conclude the District's actions violated the collective bargaining agreement the remedy should be limited to making Cenite whole for lost wages being the difference between his Verona Bus Company rate of pay and the pay rate he would of received under the collective bargaining agreement.

Union's Reply Brief

The Union argues the District's assertion it can subcontract the position and work of any bargaining unit member when the member quits, retires or dies is contrary to the parties bargaining history, past practice and the two interest arbitration awards. The Union argues that without presenting any evidence or testimony the District asserted that the protection previously applicable to bargaining unit work was eliminated by the provision at issue in this matter. However, the Union argues that as the instant language is ambiguous and the District initially proposed it, it is the District's burden to prove its interpretation of the language. The Union also asserts the District's interpretation would be contrary to Wisconsin public policy concerning good faith bargaining and anti-fragmentation of bargaining units and contrary to two interest arbitration awards. The Union also points out it has always been the practice of the District to replace bargaining unit employes with bargaining unit employes, not employes of another employer. The Union also asserts that the District acknowledged at the arbitration hearing that the contract language was ambiguous when it did not object to the Union's evidence of the bargaining history respecting the working and meaning of the language in dispute. Here the Union points out it is not asking the undersigned to add to or modify the collective bargaining agreement but to clarify and interpret contract language. The Union also asserts the District's interpretation negates a primary purpose of collective bargaining: job security for all employes doing work recognized as bargaining unit work. The Union asserts that having lost twice in interest arbitration its bid to obtain subcontracting rights the District is trying to assert it already had the right to subcontract any vacated bargaining unit position.

District's Reply Brief

The District does not dispute that subcontracting is a mandatory subject of bargaining and points out the parties have repeatedly discussed and bargained this subject. The District also acknowledged that it attempted on two occasions in interest arbitration to gain the right to lay off employes and subcontract their work, as opposed to contraction out their work through attrition. The District asserts it is unreasonable that because it was unsuccessful in extending its rights to contract out for goods and services it should be forever precluded from using the rights that currently exist.

DISCUSSION

A careful review of Article III, paragraph 13, demonstrates that the District is prohibited from contracting out work that is currently provided by present staff members. The Undersigned sees no ambiguity in this language. Current work being performed by the present staff members can not be subcontracted. Thus it is the Union's burden to demonstrate the current work of a present staff member was subcontracted. Further, contrary to the Union's assertion, the District claim that the protection previously applicable to bargaining unit work (work historically

performed by bargaining unit employes) was eliminated by the provision at issue in this matter is correct. The 1989 language clearly protected work as well as bargaining unit members. The current language limits the subcontracting prohibition to work performed currently by present staff members. It order to be successful, it was necessary for the Union to demonstrate not only current work was subcontracted, but also, it was work of a present staff member. The Union assertions about past practice, bargaining history and arbitral precedent are irrelevant if the language is clear.

The undersigned would note here that it was the Union that argued in interest arbitration that the instant language is comparable to "… provided employes are not laid off or have their hours reduced." The undersigned finds no basis for a claim that the District has committed bad faith bargaining because it acted under an interpretation the Union itself argued in a different forum. Nor can it be deemed bad faith because the District exercised a contractual right. In effect, the Union argument the District can not subcontract because it has always replaced a departing employe would render paragraph 13, meaningless, a result both sides have acknowledged the undersigned does not have the ability to do.

The record demonstrates that when an employe retired the District subcontracted the work of the vacated position. No employe was laid off. No employe had their hours reduced. Thus no current work which was being performed by a present staff member was contracted out. Absent a showing that the current work of a present staff member was contracted out, the actions of the District did not violate the collective bargaining agreement. The same holds true for the work performed by Schmitz. At no time was he ever a member of the bargaining unit. Therefore the District could not have contracted out the current work of present staff member when it contracted out the bus route he had been driving.

The Union has also argued the net result of the District's actions could be the elimination of the entire bargaining unit. The Union has also asserted it would be absurd for it to enter into such an intent. However, it had argued in both interest arbitration cases that the current language is similar to its comparables. Clearly the comparables have entered into such agreements and thus the undersigned must conclude that the Union was aware of the intent of Article III, paragraph 13, prior to the District's actions in the instant matter.

Therefore, based upon the above and foregoing, and the evidence, testimony and arguments presented the undersigned concludes the District did not violate the parties' collective bargaining agreement when it entered into a contract for transportation services with the Verona Bus Company. The grievance is therefore denied.

AWARD

The District did not violate the parties' collective bargaining agreement when it entered into a contract for transportation services with the Verona Bus Company.

Dated at Madison, Wisconsin, this 15th day of November, 1999.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

EJB/gjc
5970