

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WISCONSIN COUNCIL 40, AFSCME,  
AFL-CIO LOCAL UNION 736**

and

**CHIPPEWA COUNTY  
(HIGHWAY DEPARTMENT)**

Case 212  
No. 58108  
MA-10843

*(Subcontracting Grievance)*

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Appearances:

**Mr. Steve Day**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, on behalf of the Union.

Weld, Riley, Prenn and Ricci, S.C., 36240 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by **Ms. Victoria L. Seltun**, on behalf of the County.

**ARBITRATION AWARD**

The above-captioned parties, herein "Union" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Chippewa Falls, Wisconsin on April 11, 2000. There, the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was not transcribed and both parties filed briefs and reply briefs that were received by July 11, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

### **ISSUE**

The parties have agreed to the following issue:

Did the County violate the contract when it subcontracted mechanical work on trucks 22 and 30 on August 20 or August 30, and/or September 2, 1999, and, if so, what is the appropriate remedy?

### **BACKGROUND**

The County on August 22 or 30 (the date is unclear), and on September 2, 1999 (unless otherwise stated, all dates herein refer to 1999), sent trucks Nos. 22 and 30 to outside vendors for repairs. FABCO Equipment Inc. fixed a fuel line problem on truck 22 for a total cost of \$613.47. (Joint Exhibit 3). Northwest Trucks estimated that it would cost about \$12,000-\$14,000 to fix truck 30 and it submitted a \$1557.76 bill for stripping down the engine (Joint Exhibit 4). The County decided that truck 30 was not worth repairing and no repairs have been made on it.

Union officer Archie Mooney testified that various Highway Department employees could have performed the work on trucks 22 and 30 had they been asked, including those who formerly worked as Mechanics. He said that Mechanics normally do not do any warranty work; that they also do not perform any work requiring special tools; and that they no longer paint trucks. On cross-examination, he stated that major alignments and painting are usually performed by outside vendors.

Mechanic Joseph Simon testified that Mechanics could have performed the work on truck 22 and that they could have stripped down the engine on truck 30. On cross-examination, he testified that there were only two Mechanics in the shop when this work was performed and that Mechanic Jim Gordon did not want to work on truck 22.

Highway Commissioner Bruce Stelzner testified that former Mechanic Jerry Yamriska quit on August 13; that Gordon then became the only remaining truck Mechanic; that truck 22 previously had "engine problems" that were "not resolved" even though it had been worked on; that the County on other occasions had sent its trucks to FABCO for repairs; that truck 30 broke down on the road and that it has not been repaired because of the high repair costs; that Mechanics worked "significant overtime" after Mechanic Yamriska quit; and that the County regularly sends its trucks out for repairs if it either does not have the right equipment to repair them or if the Mechanics do not have time to repair them. He also said that Mechanics could have performed a substantial amount of the work represented by the bills submitted by outside vendors (County Exhibits 9-15), and that repairs are prioritized to keep work crews busy.

On cross-examination, he testified that non-mechanics before September were never called in to work on trucks when Mechanics were unavailable because he feared that grievances would be filed if they were called in; that he does not know whether work areas were interrupted when trucks 22 and 30 were sent in for repairs; and that Mechanics could have turned down the repair work on truck 22 because they were already scheduled for overtime and/or because they were working on other projects.

Shop Supervisor Burt Wright testified that Mechanic Gordon, who then was the only Mechanic working in the shop, tried to fix truck 22 but to no avail and that Gordon declined to work on it anymore. He also said that truck 22 was sent out to repair because it was immediately needed for hot mix loading; that the engine in truck 30 froze up because Gordon did not check a bolt and that the oil therefore leaked out; that he never asked Gordon to fix it; that the decision to send truck 30 out for repairs was based solely on staffing needs; that tearing down the engine for truck 30 was very time-consuming; and that no non-shop employees have ever been asked to perform shop-mechanic work. On cross-examination, he said that Mechanics Simon and Gordon could have worked on trucks 22 and 30 and that he did not know how long truck 22 was out of action.

Union President Matthew Hartman testified that the Union would not have grieved if non-Mechanics were called in to perform the disputed work.

Recalled as a witness, Mooney testified that he did not know about most of the repair work referenced in Company Exhibits 9-15. On cross-examination, he acknowledged that bargaining unit employees picked up the vehicles referenced in County Exhibits 9-15 after the outside work on them was completed.

Simon also was recalled as a witness and said that he and other Highway Department employees could have worked on truck 30.

### **POSITIONS OF THE PARTIES**

The Union claims that the County violated Article 15 of the contract because the “language history and construction of Article 15 supports the Union’s grievance” and because only management employees under that language can perform bargaining unit work, but then only if it is occasional and/or involves an emergency or minor work – which was not the case here. The Union also argues that there is no past practice on this issue; that “the practice has been limited to the subcontracting of warranty work, truck painting and special tool work”; that there were no Mechanic staffing problems as alleged by the County; and that the County’s concern over efficiency cannot override the language in Article 15.

The County, in turn, contends that the “plain language” in the contract gives it the right to subcontract the kind of work found here; that its right “to assign work and direct the workforce includes the right to subcontract occasional work to avoid the creation of overtime”; and that the subcontracting here was “reasonable, done in good faith and for legitimate business reasons.” It also maintains “There was no evidence offered by the Union . . . that the parties intended such a limiting interpretation of Article 15” and that a well-developed past practice supports what it did here.

### **DISCUSSION**

The County correctly points out that it retains certain rights under Article 2 of the contract, entitled “Management Rights”, which states in pertinent part:

The County possess the sole right to determine the methods, means and personnel by which County operations are to be conducted. These rights include, but are not limited to, the following:

. . .

C. to hire, promote, schedule and assign employees;

. . .

F. to maintain efficiency of County operations;

. . .

I. to determine the methods and means in personnel by which County operations are to be conducted.

No employee shall be reduced in classification or rate of pay by the County’s exercise of these rights unless the action by said County is authorized by other sections of this Contract. . .

However, this language must be read alongside Article 15 which provides:

“No one outside of the Highway Division shall perform work normally done by Highway Department Union employees, except in cases of emergency and occasional work or minor work performed by management in good faith.”

This language is not a model of clarity because: (1), it does not identify the “work normally done by Highway Department Union employees. . .”; (2), it does not elaborate on what constitutes “emergency and occasional work or minor work performed by management”; and (3), it does not elaborate on the phrase “good faith”. (Does it include, for example, the County’s efforts to limit overtime?)

In addition, this language can be construed to mean either that “No one outside of the Highway Department shall perform work normally done by Highway Department employees, except in cases of emergency and occasional work. . .” in which case any non-Highway Department employees can do it, or “No one outside of the Highway Department should perform work normally done by Highway Department employees, except in cases of emergency and occasional work or minor work. . .”, in which case only management can perform any of these listed exceptions. In other words, do the words “except in cases of emergency and occasional work” relate back and represent a blanket exception to the performance of bargaining unit work or do they instead relate forward to mean that only management can perform “emergency and occasional work or minor work. . .”? Given these ambiguities, it is necessary to consider parol evidence such as bargaining history and past practice to discern how this proviso is to be applied here.

As for bargaining history, the record reveals that the Union over the years succeeded in obtaining contractual language which placed more and more restrictions on the County’s right to subcontract work. (See Union Exhibits 1 and 2 which detail the changes in this language). By agreeing to this language, the County substantially reduced the freedom of action it otherwise enjoys under Article 2 to run its affairs as it sees fit. However, there was no testimony about what the parties then said in negotiations regarding how this language is to be applied. The question then becomes how this language has been applied in the past.

As to that, Highway Commissioner Stelzner testified that the County over the years has subcontracted out certain work and County Exhibits 9-15 reflect some of the bills for that work.

Thus, County Exhibit 9 shows that Mack Sales before September 8 (when the instant grievance was filed), worked on vehicles on about three separate occasions to install a main seal, to change air lines, to fix a door latch, and to install an extra air tank. County Exhibit 10 shows that Truckaline Suspension Center before September 8 worked on vehicles on about five separate occasions to remove and reinstall axles and springs and to do wheel alignments. County Exhibit 11 shows that Cummings Great Lakes, Inc., before September 8 worked on vehicles on about six separate occasions to replace a governor control, to install a fuel injection pump, to tighten clamps on the charge air pipes, to work on fuel pumps, and to repair a starter. County Exhibit 12 shows that Northwest Trucks before September 8 worked on vehicles on about seven separate occasions to make steering repairs, to make miscellaneous

transmission and engine repairs, and to make steering gear repairs. County Exhibits 14 and 15 show that Truckaline Suspension Center before September 8 worked on vehicles on about nine separate occasions to perform wheel alignments, to remove and reinstall axles, and to repair springs and related equipment.

This past practice shows that outside vendors have regularly worked on County equipment and that there is no merit to the Union's claim that outside vendors are prohibited from working on County equipment. Bargaining unit employees must have been aware of this practice since they delivered and picked up such equipment and since shop employees must have known about some of the repairs that were performed on the very vehicles they were servicing.

Moreover, shop supervisor Wright testified that he expressly asked Mechanic Gordon to fix truck 22 before it was sent out for repairs and that Gordon was unable to do so. Given Gordon's failure to repair that problem and his refusal to work on it any longer, it simply is too unreasonable to expect the County to poll its other employees to see whether they were willing and able to do that work when it had to be repaired immediately. Hence, the County at that point was entitled to farm out that work to someone who knew how to fix the problem -- particularly since the Company in the past has subcontracted out diagnostic work involving fuel lines.

As for truck 30, Supervisor Wright testified that its engine froze up because Gordon had failed to secure a bolt, thereby causing all of the oil to drain from the engine. The stripping down of truck 30's engine took an inordinate amount of time -- time that the County could legitimately insist be spent on other duties since Gordon was then the only truck Mechanic in the shop and since, but for one day, Gordon worked overtime every day from August 19 to September 16 (Company Exhibit 5). In addition, since it also involved a great deal of time, the County could legitimately insist that the engine's overhaul be performed by outside vendors. In those circumstances, the County acted in good faith in having an outside vendor examine truck 30's engine, as that was consistent with the wide range of repairs represented in County Exhibits 9-15.

Moreover, County Exhibits 9-15 establish that a past practice has developed which enables the County to subcontract out the kind of occasional work in dispute here. By only grieving one of those instances and by then withdrawing that grievance (Union Exhibits 4 and 5), the Union has tacitly agreed that all other such work can be performed by outside vendors, which is consistent with Highway Commissioner Stelzner's testimony that Mechanics could have performed much of the work that was contracted out.

For all these reasons, the grievance is denied.

However, in so ruling, it must be noted that my decision is limited to the very narrow facts of this case which show that the County was shorthanded when it subcontracted out the work in dispute; that Gordon himself refused to work any longer on truck 22; and that he already had received a substantial amount of overtime when this subcontracting occurred. As a result, nothing herein should be misconstrued to mean that the County is free to subcontract under all other circumstances.

In light of the above, it is my

**AWARD**

1. That the County did not violate the contract when it subcontracted mechanical work on trucks 22 and 30 on August 20 or August 30, and/or September 2, 1999.
2. The grievance is therefore denied.

Dated at Madison, Wisconsin this 31st day of July, 2000.

Amedeo Greco /s/

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Amedeo Greco, Arbitrator

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