BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS "GENERAL" LOCAL NO. 200

and

ALLIANT FOODSERVICE, INC.

Case 1
No. 56789
A-5715

(James Avery – Contracting Out Grievance)

Appearances:

Previant, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill M. Hartley**, 1555 North RiverCenter Drive, Suite 202, Milwaukee, WI 53212, appearing on behalf of the Union.

Vedder, Price, Kaufman & Kammholz, by **Attorney Edward C. Jepson, Jr.**, 222 North LaSalle Street, Chicago, IL 60601, appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters "General" Local No. 200 (hereinafter referred to as the Union) and Alliant Foodservice, Inc. (hereinafter referred to as the Employer or the Company) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over the Company's contracting for certain hauling work. The undersigned was so designated. The matter was held in abeyance for a time while the parties attempted to reach a voluntary settlement Those efforts were ultimately unsuccessful, and a hearing was held on May 24, 2001, in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs, which were exchanged through the Arbitrator on July 19, 2001, whereupon the record was closed.

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Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties stipulated that the issue before the Arbitrator is:

> Did the Company violate the collective bargaining agreement when it contracted with an outside carrier to perform backhaul work previously performed by the bargaining unit; and if so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I. RECOGNITION

Sec. 1. The Employer recognizes the Union as the sole collective bargaining representative on all matters pertaining to wages, hours and working conditions for all truck drivers and warehousepersons, excluding all salespersons, office clericals, guards, and supervisors as defined in the "Act", and all other employees of the Employer at its W137 N9245, Hwy 145, Menomonee Falls, Wisconsin location.

. . .

ARTICLE III. MANAGEMENT

Sec. 1. The Union recognizes that all inherent management functions and rights which are not expressly modified or restricted by a specific provision of this Agreement are retained and vested exclusively in the Employer.

. . .

ARTICLE XII. SENIORITY

Sec. 1. Definition: (a) Seniority is defined as the length of continuous service with the Employer since the Employee's date of hire. Drivers, Warehouse

> employees and Green Bay Drivers shall each be separate seniority groups.
> b) When 2 or more candidates are qualified, seniority shall prevail in all matters pertaining to employment.
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> . . .
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> **Sec. 7.** Each calendar year the Company will post a bid offering all Bargaining Unit employees the ability to bid for all positions covered by this agreement. The bid will list the jobs, the shifts, and the hours of the bid being offered. Employees will sign for the jobs and the Employer will award the jobs based on the employee's seniority and the ability to perform the job. The bid will be posted for a ten (10) day period. The bidding process will be complete on or about the first week of December.

BACKGROUND

The Company is food distributor. The Union is the exclusive bargaining representative for drivers and warehousepersons at the Company's Milwaukee, Wisconsin facility. The grievant in this case, James Avery, is a driver working out of the Milwaukee facility and a steward for the Union.

Most of the Company's drivers are engaged in delivery product to customers from the Milwaukee warehouse. Avery and other drivers had, for many years, also performed backhauling work from the Chicago area. Backhauling involves picking up product from vendors and transporting it to the Milwaukee warehouse for later delivery to customers. Avery bid into the job, which occupied his entire schedule, four days per week, ten hours per day. On two of the days, Avery would pick up product in Chicago after first making deliveries in Michigan. On the other two days, Avery would typically deadhead to Chicago, running empty from Milwaukee and returning with the picked-up product. Avery averaged 15 hours of overtime per week while performing the backhauling work. Avery did the bulk of the backhauling work in Chicago, though other drivers would typically do some of this work at least two days per week. The backhauling routes were claimed by seniority, and were generally considered desirable work because there were fewer stops to be made.

In addition to the drivers in the bargaining unit, the Company would use contractors to do some hauling. Typically this would involve a situation in which, because of vacations or an unplanned pick-up, a driver was not available for a backhaul, or for a "hotshot" delivery when a delivery was missed or the wrong product was delivered, and the Company needed to quickly correct the error. Some routes were routinely handled by contractors. Contractors typically handled hauling to a customer in Rochelle, Illinois, and, in 1996, a backhauling route to Champaign, Illinois, was contracted out. When contractors handled backhauling work, the contractor's driver would unload the product at the warehouse. Local 200 members handled

unloading of product hauled by bargaining unit drivers. The Union challenged the use of contractors for hotshot deliveries, and the parties settled the case on the basis of the work being shared between unit members and contractors. The Union has never challenged the Company's right to use contractors for hauling when unit drivers are occupied with other work or otherwise unavailable.

In the late winter of 1999, the Company transferred the Michigan deliveries that Avery had been making to its Detroit warehouse. On March 8, 1999, Avery was advised that the Chicago backhaul routes would be eliminated and the work transferred to a private contractor. The transfer was initially supposed to be completed in March, but was delayed until June because the Michigan customers initially resisted the change from the Milwaukee warehouse to the Detroit warehouse.

The instant grievance was filed, protesting the contracting of the Chicago backhaul routes. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration. At the arbitration hearing, in addition to the facts recited above, the following testimony was taken:

James Avery testified that it was common for routes to be eliminated when customers were lost or work was transferred to other warehouses, but not by reason of having the routes subcontracted. He was aware of the elimination of the Champaign backhaul route in the mid-90's and also knew that deliveries were still being received from Champaign after that elimination. He explained that the Union did not file a grievance because this happened at about the same time that the Company was sold, and he assumed the elimination of the route was tied to the sale, since the Champaign warehouse was owned by Kraft Foods, the former owner of the Company. He also acknowledged that the Union had never filed a grievance over the use of contractors to fill-in when unit members were not available, since they recognized the Company's need to adequately service customers and had no wish to prevent it from doing so. However, he distinguished the complete elimination of backhauling in Chicago from the occasional use of contractors to supplement the bargaining unit. Avery said that the size of the bargaining unit had not diminished with the contracting of the Chicago backhaul routes, and that he did not know of anyone who had lost regular hours, though he felt he had probably lost some overtime opportunities.

Frank Rosiak, Jr. testified that he is the Company's Transportation Manager at Milwaukee. He was involved in the decision to eliminate the Champaign backhaul route in the spring of 1996 and have it covered by a contractor. That decision was based purely on economics, since it cost less than half as much to use a contractor for that work. Rosiak said it had nothing to do with the sale of the Company by Kraft Foods, since that took place in January of 1995. There were no layoffs as a result of the contracting out of the Champaign route, and no grievance was filed. Rosiak also testified that the Company regularly used contractors on the Chicago backhaul route, usually to cover an upswing in demand for

deliveries or if the regular driver was off work. These decisions were not discussed with the Union. Rosiak said there was one backhaul route to Rochelle, Illinois, that was primarily serviced by contractors, though unit drivers would sometimes do pick-ups there as well.

Robert Stefani testified that he is the Company's Regional Vice President of Operations. He stated that the Company is in a very competitive business with extremely small profit margins, and thus has a strong need to control costs. Stefani made the decision to eliminate the Chicago backhaul route and use contractors. The decision was based entirely on costs. According to Stefani, the cost of performing backhauls with bargaining unit personnel was at least 25-30% more than the cost of using contractors, even before the labor costs of unloading and overtime for the drivers, and the fixed costs for equipment were factored in. Before deciding to eliminate the backhaul route, he considered the potential impact on the bargaining unit and determined that no layoffs would result from the contracting out the Chicago route. Stefani stated that there had been no layoffs as a result of the contracting or since that time.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that the Company clearly violated the collective bargaining agreement by contracting out unit work and that the grievance must be sustained. While the contract does not contain a specific subcontracting clause, it does contain Recognition, Seniority and Wage clauses. Arbitrators have long recognized that the inclusion of such clauses is inconsistent with an unfettered right to give away the work of the bargaining unit. If the Employer is free to contract out the work, which is the subject of the labor agreement, the contract is rendered meaningless. Moreover, contracting out the work of the bargaining unit violates the basic presumption of fair dealing, which underlies every labor contract. Reading the collective bargaining as a coherent whole, and taking into account the assumptions of the parties that they are negotiating a meaningful document which comprehensively governs the work performed by the bargaining unit, the Arbitrator must read the labor agreement as restricting the Company's right to subcontract bargaining unit work.

The Union recognizes that the contract contains a relatively broad management rights clause, but points to arbitral authority holding that a general reservation of management rights cannot overcome the Union's compelling interest in preserving the work of the bargaining unit. Neither can the Company's attempt to justify the contracting out of unit work on economic grounds be accepted. To say that contracting out can be justified by economic considerations is to say that workers can be penalized for their success at the bargaining table, and that a Company can contract out work whenever it feels it is in its interest to do so. Rather than

being a defense to a contract violation, subcontracting for economic reasons is more properly viewed as an admission of a contract violation – evasion of the wage and fringe benefit clauses of the contract.

The Union dismisses any argument that it has acquiesced in subcontracting in the past. Admittedly, the Company has used some contract carriers on Illinois routes in the past, but that usage has been sporadic and only in response to unanticipated needs, such as an inability to cover a job with bargaining unit members. It is a far different thing to permanently contract out work that is normally and regularly performed by unit members. The Union's willingness to recognize the Company's needs in those unusual circumstances should not now be turned against it. Likewise, the Company's contracting out of the Champaign, Illinois route several years before this subcontract is not a valid comparison. In that case, the Union understood that the reason for the contracting out was that the Company's ownership had changed, and the route had essentially been eliminated. This belief may have been mistaken, but that is beside the point. The Union's sincere belief adequately explains the reason for not grieving the decision, and thus the contracting of the Champaign route does nothing to illustrate the contractual rights of the parties in this case.

The Union agrees that there have been no layoffs as a result of this contracting, but asserts that this is not relevant to the determination of a contract violation. Whether the bargaining unit is abolished in one fell swoop or eaten away through attrition, over the long run the impact of subcontracting is the same. The jobs covered by the contract are eliminated, and the wage clause, the seniority protections, the recognition of the Union, and eventually the contract as a whole are rendered nullities. That end result would not be allowed and the whittling away that leads to it should not be allowed.

For all of these reasons, the Union asks that the grievance be sustained and that the Company be ordered to immediately restore the backhauling work to the bargaining unit.

The Position of the Company

The Company takes the position that the grievance is utterly without merit and must be denied. It is well settled that the Union bears the burden of proof in language interpretation cases and here the Union has failed to provide any proof in support of the grievance. While the Union challenges the Company's right to employ outside contractors, it offers no proof of a negotiated limit on that right. The reason for this failure is simply that there is no such restriction or limitation. The contract is silent as to subcontracting, and thus the only obligation of the Company is that which attaches to all management rights – to act reasonably and in good faith. The record shows that the Company has met this standard.

The subcontract in this case was prompted by legitimate and non-discriminatory economic concerns. The Company competes in a low margin business and the work which has been subcontracted usually featured Company drivers dead-heading trucks to Chicago.

Plainly, it is economically unreasonable to require such a wasteful use of Company resources. Conversely, it is economically reasonable to contract out such work, since the contractor then bears the cost of the empty truck.

In addition to the economic justification for this contracting decision, the Company's conduct does not appreciably impact the bargaining unit. The Company has, for years, used contractors to haul product when Company employees were not available or when the runs took place outside of the normal schedule. Indeed, an entire route to Champaign, Illinois, was eliminated in 1996, and the Company then used contractors to service its clients. This was done without protest from the Union. The work has been shared between bargaining unit members and contractors in the past without any objection, and this case is not materially different from those cases.

Moreover, the Company asserts that the work in issue in this case is a *de minimis* portion of the unit's jurisdiction. The work at issue is picking up product from vendors, while the primary work of the Company is distributing product. The contracted work is a narrow and minor task relative to the overall work of the Company. Further, the evidence adduced at hearing shows that 1 driver out of 45 worked full-time on this work and he reported no loss of earnings or benefits as a consequence of the contracting out.

Measured by a standard of reasonableness, the Company maintains that the contracting decision in this case must be upheld. It was amply justified by economic considerations and was consistent with the past practice of the Company. Further, the contracting was narrowly targeted to a task, which was tangential to the primary work of the unit, and had a minimal impact on the bargaining unit and the employees. Accordingly, the grievance must be denied.

DISCUSSION

The question before the Arbitrator is whether the Company had the right to replace bargaining unit personnel with a contractor on the Chicago backhaul routes. The contract is silent as to contracting out – it neither specifically prohibits it nor expressly allows it. The Union argues that the effect of the contract's silence on this point is that subcontracting is prohibited, by necessary implication flowing from the Recognition, Seniority and Wage Clauses of the contract. For its part, the Company argues that the effect of the contract's silence is to render its managerial decision-making subject to review under a general standard of reasonableness.

The Union's position has some support in reported arbitration awards, but it reflects what is distinctly a minority view. The great majority of reported arbitration decisions on the subject of implied limitation on subcontracting do, as the Union argues, hold that there is no unfettered right to subcontract. 1/ However, the mainstream of opinion does not extend to saying that subcontracting is flatly prohibited. Instead, the scope of management's right is defined on a case-by-case basis, and turns on the reasons for the decision and the impact on the

union and the workforce. As suggested by the Company's argument, this is generally referred to as a test of reasonableness and reflects an effort to balance the employer's interest in promoting efficiency and economy with the union's interest in protecting jobs and the integrity of its bargaining unit. 2/ Depending upon the facts of a given case, arbitrators have weighed a wide variety of factors considered in attempting to determine whether management has met this standard. Among these are:

1/ "When the contract is silent, many arbitrators hold that the employer retains the right to subcontract in pursuit of efficiency. No arbitrator, however, deems this authority to be unfettered." Antoine, et. al., The Common Law of the Workplace, (BNA, 1998) at page 113.

2/ See, generally, Volz, et. al., Elkouri and Elkouri, How Arbitration Works, 5th Edition (BNA, 1997), pages 746-757, and cases cited therein; also, Wolf in Bornstein, et. al., Labor and Employment Arbitration, 2nd Edition (Matthew Bender), Chapter 25, at pages 25-28 through 25-37; The Common Law of the Workplace, at page 114.

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1. The existence of any past practice of subcontracting work;

2. The justification offered for transferring the work outside of the bargaining unit and whether it represents a sound business reason;

3. The effect of the transfer of work on the union itself and the integrity of the bargaining unit;

4. The effect of the subcontract on individual bargaining unit employees, and whether employees are thereby deprived of their jobs, regular or overtime earnings, or promotional opportunities, or are discriminated against;

5. The type of work subcontracted and whether it is the customary work of the employees, or merely marginal or incidental, and whether such work is often the target of subcontracting in the industry;

6. The availability of properly qualified employees to perform the work if it was retained in the bargaining unit;

7. The availability of the equipment and facilities to perform the work within the bargaining unit;

8. The frequency with which the work was performed in the bargaining unit;

9. The extent to which the subcontract represents a permanent removal of the work from the bargaining unit;

10. Whether there are unusual circumstances, such as time limits, emergencies, or outside forces which mandate performance of the work by a subcontractor;

11. Whether the parties have negotiated over subcontracting in the past, and the outcome of such negotiations. 3/

3/ See, Elkouri and Elkouri, How Arbitration Works, at pages 751-753, and cases cited therein.

In this case, there is no evidence of a prior history of contract negotiations over subcontracting and that criterion does not bear on determining the reasonableness of the decision. Certain other criteria cut in favor of the Union's position. The work of running backhauls from Chicago has been done by subcontractors, but it has principally been performed by bargaining unit members and the subcontracting has usually been prompted by the unavailability of unit drivers when a pick-up was needed. The work is being permanently removed from the bargaining unit, notwithstanding the availability of qualified drivers and necessary equipment and facilities within the Company's own operation. There are no "time limits, emergencies, or outside forces" mandating the use of a contractor for the work. The decision is wholly within the Company's control and was made purely for reasons of reducing costs, primarily labor costs.

Other factors cut in favor of the Company's decision. As noted, the decision to subcontract was not aimed at punishing or undermining the bargaining unit – it was a business decision based on the cost of backhauling with Company personnel and equipment versus the cost of having the work done by contractors. This particular factor cannot be viewed as controlling, however, since it would justify all but the most blatantly retaliatory subcontracts. Assuming a competent and rational management, all decisions should have the effect of either increasing efficiency or reducing costs. In this case, the legitimate reasons for the decision do not stand alone in support of the overall reasonableness of the decision. Also weighing in the Company's favor are the facts that the size of the bargaining unit is not affected, no employee was laid off as a result of the subcontract, no employee lost hours as a result of the subcontract and no employee demonstrably lost overtime hours as a result of the subcontract. That said, the strongest support for management's position comes from the nature of the contracted work and the past practices of the parties.

The work of backhauling product from vendors is not the principal work of the bargaining unit. Delivering product is what the drivers primarily do. Moreover, in about half of the cases, the Chicago backhauling work required deadheading, which is obviously an expensive and extremely inefficient proposition for the Company. The transfer of the Michigan routes to the Detroit warehouse would exacerbate this problem, as it would eliminate the delivery runs that allowed Avery to avoid deadheading on two of the four days he backhauled from Chicago.

More important than any other factor in this particular case, is the past practice of allowing contractors to perform backhauling. While I agree with the Union that the use of contractors for "hotshot" deliveries and pick-ups and the occasional use of contractors to supplement the drivers on established routes does not open the door to widespread contracting, the Company has for years primarily used contractors on a backhaul route to Rochelle, Illinois, and has exclusively used contractors for backhauling on the former Champaign route since the mid-1990's. Avery explained at the hearing that he assumed the elimination of the Champaign route was the result of the sale of the Company, but as the Company pointed out, the contracting of this route took place well over a year after the Company was sold, and Avery conceded that he knew the route was still being serviced, since product was still coming into Milwaukee from Champaign. The most reasonable interpretation of the record is that the Company contracted this backhauling for economic reasons, that the Union knew or should have known that a contractor was being used for the Champaign route, and that the Union made no protest. This clearly demonstrates the Company's belief that the use of contractors was allowable in these situations. It also suggests that the Union understood that a contractor might be appropriately used where there was a compelling justification. At a minimum, the past use of contractors for this work supports the Company's argument that the contracting here was a reasonable exercise of management's rights.

The issue before the Arbitrator is whether the contract evinces a mutual intent by the parties to prohibit the subcontracting at issue here. The contract is silent, leaving the decision to stand or fall on the test of reasonableness. Given the lack of substantial impact on the unit or unit employees, the specific nature of the work at issue, the strong business justification for using a contractor on this specific work and the practice of using contractors on backhaul routes in the past, including the complete elimination of a backhaul route in favor of contractors, I conclude that the balance in this case favors the decision of the Company.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Company did not violate the collective bargaining agreement when it contracted with an outside carrier to perform backhaul work previously performed by the bargaining unit. The grievance is denied.

Dated at Racine, Wisconsin, this 11th day of October, 2001.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator

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