BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE AND SOUTHERN WISCONSIN DISTRICT COUNCIL OF CARPENTERS

and

HALLMARK DRYWALL, INC.

Case 3
No. 59718
A-5920

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Mr. Matthew R. Robbins**, on behalf of the Milwaukee and Southern Wisconsin District Council of Carpenters.

Lee, Kilkelly, Paulson & Younger, S.C., Attorneys at Law, by **Mr. Jeffrey W. Younger**, on behalf of Hallmark Drywall, Inc.

ARBITRATION AWARD

Milwaukee and Southern Wisconsin District Council of Carpenters, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Hallmark Drywall, Inc., hereinafter Hallmark, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Hallmark subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on April 30, 2001, in Madison, Wisconsin. There was no stenographic transcript made of the hearing. The parties' post-hearing briefing schedule was completed by July 3, 2001. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues and agreed the Arbitrator will frame the issues to be decided.

The Union would state the issues as follows:
Did the Employer violate the labor agreement by entering into an agreement for work to be performed by Midwest Drywall? If so, what is the remedy?

Hallmark states the issues as being:

Did Hallmark Drywall, Inc. violate Article 14 of the collective bargaining agreement by subletting work on the Hawthorn Suites to a non-union contractor?

The Arbitrator concludes that the issues are as follows:
Did Hallmark Drywall, Inc., violate the collective bargaining agreement by entering into an agreement whereby it gave up work which was then to be performed by Midwest Drywall? If so, what is the remedy?

CONTRACT PROVISIONS

The following provision of the parties' Agreement is cited:

ARTICLE XIV
SUBCONTRACTING

SECTION 14.1.

(a) It is agreed that any work sublet and to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work and when a portion of said work to be sublet is under the jurisdiction of this Agreement, the work shall be sublet to a subcontractor signatory to an Agreement with the Milwaukee & Southern Wisconsin District Council of Carpenters or any of its affiliates.

(b) When situations arise wherein the low bidder is not signatory to this Agreement and before the letting of such work, the Contractor must notify the Union in order that the Union has an opportunity to meet with the Contractor and subcontractor in an attempt to work toward a solution of having the work in question done by members of the bargaining unit.

(c) If the Contractor does not notify and meet with the Union paragraph (a) applies and paragraph (b) does not.

BACKGROUND

The Union and Hallmark are signatory to a collective bargaining agreement that has been in effect at all relevant times. The work in question involves the Hawthorn Suites project in Madison, Wisconsin.

Hallmark is one of the largest drywallers in this area and has always been a union contractor. The number of employees it has depends on the number and size of the projects it is working on, having approximately 170 employed doing drywall work or installing studs at time of hearing. Rick Grosse is the President and he and his spouse, and another party, are the owners of Hallmark.

DL Designs, hereinafter Design, is owned by Art Sandridge and is a builder and general contractor. Design is the general contractor on the Hawthorn Suites project and was originally one of the owners of the Hawthorn project. Work on the project commenced in May of 2000 with a completion date of late April of 2001.

In July of 2000, Hallmark contracted to do the following work on the Hawthorn project:

> Description
> PROVIDE ALL LABOR, MATERIAL AND EQUIPMENT NECESSARY TO COMPLETE THE SCOPE OF LISTED IN DIVISION 05400 LIGHT GAUGE METAL FRAMING, PORTION OF DIVISION 06100 ROUGH CARPENTRY, DIVISION 07202 BUILDING INSULATION, DIVISION 09250 GYPSUM WALLBOARD INCLUDING THERMAL AND SOUND INSULATION WITHIN STEEL STUD CAVITIES, STEEL STUD, EXTERIOR GYPSUM SHEATHING, INTERIOR WALLS HUNG, TAPED AND FINISHED WITH A ORANGE PEEL TEXTURE, CEILINGS TO HAVE A POPCORN TEXTURE, IN ACCORDANCE WITH PLANS AND SPECIFICATIONS PREPARED BY STRANG, INC. AND D/L DESIGN BLDRS. OF WIS. DATED 5.5.2000 INCLUDING ALL TAXES, PERMITS AND FEES.

Hallmark was to be paid the sum of $736,770.00 for the work with a 5% retainage.

Hallmark commenced work on the project, however, the owners of the project encountered financial difficulties and had to seek new financing. In the meantime, Hallmark and the other subcontractors on the job were not being paid. Hallmark pulled off the project in September of 2000 after it had completed the steel stud work and sheathing for 6½ floors, as well as interior framing. No significant amount of drywalling had been done at that point.

Hallmark was owed approximately $200,000.00 for the work it had completed at the time it ceased working on the project.

Design and the other owners eventually decided to turn over ownership on the Hawthorn project to Great Lakes Companies, hereinafter GLC, with Design remaining as the general contractor on the project. GLC made its proposal to take over ownership in mid-November, 2000, but wanted to keep the same completion date, even though the subcontractors had not worked on the project for approximately 60 days. GLC also wanted to increase the retainage to 15% in order to insure that the work would be completed on time. GLC ultimately obtained the required financing and became owner of the project in 2001.

Discussions began with Hallmark and the other subcontractors in late November to get them back on the project. Both Sandridge and Grosse testified that Grosse was leery of returning to the project because of still being owed $200,000.00 for the work already done and concern about the completion date along with the increased retainage GLC wanted. Grosse did not think he had enough people available to finish the work in the time allotted because of other projects Hallmark was on. In those discussions and proposals, Hallmark, through its attorneys, proposed that the completion time be extended by the amount of time it was off the project and that extension was eventually agreed to. However, because the land for the project was leased from Dane County, and that lease required that a hotel be on the site and open by June 1, 2001, the target date for completion was only extended to mid-May of 2001, from the original late April date.

Also during the discussions between Grosse and Sandridge in December, when the former indicated Hallmark could not meet the completion time, the subject of giving up the drywall work (hanging and taping) arose. Grosse suggested a number of companies he thought could do the work within the time limits, including a Carl Kieth. Grosse indicated that Kieth was non-union and that Hallmark could not subcontract the work to him. According to Grosse and Sandridge, that is the only conversation they had regarding Kieth.

Kieth and Grosse have known each other off and on for approximately 20 years, but their last contact was 10-12 years ago when Kieth had been a union drywall contractor in Illinois. According to Grosse, approximately a year ago he had contacted a “Tony” about doing some work for him (Grosse), but Tony was non-union and would not unionize. In their conversations, Tony mentioned that he was doing some work for Kieth. Grosse called Kieth and told him about the work and gave him Sandridge’s name and phone number. After contacting Sandridge, Kieth came and looked at the Hawthorn project and then informed Sandridge he could do the work within the time limits.

Kieth does not have any regular employees of his own; rather he contracts with someone, in this case, "Tony", to provide people to do the job. Under this arrangement, Kieth (d/b/a Midwest Drywall) pays Tony, who then provides the workers and pays them whatever amount he pays them. Kieth is responsible for overseeing their work and is also responsible for the work that is done.

In December of 2000, Hallmark reached an agreement with Design to return to the project. In January, 2001, Hallmark agreed to give up the hanging and taping of drywall on floors 2, 3 and 4 or a total of $38,550.00. In February, 2001, Hallmark agreed to give up the taping and hanging of drywall on floors 5, 6, 7 and 8, an additional total of $57,550.00. In all, Hallmark gave up a total of $96,100.00 for the drywall work which was then performed by Midwest Drywall pursuant to its contract with Design. Hallmark also received some other additional work on the project.

According to Grosse, Hallmark had 13 other projects going in January of 2001, besides Hawthorn Suites, and had approximately 110 employees working at the time. Grosse did not feel he had the number of employees available that would be needed to complete all of the work in the original contract with Design within the allotted time, especially the drywall work.

Hallmark employees were working on the project at the same time as Midwest was working, but Hallmark did not supervise the work performed by Midwest, nor was it responsible in any manner for the work that was done. Hallmark did have to coordinate with Midwest to the extent of letting Midwest know when Hallmark had completed its insulation and interior framing work on a floor so that Midwest could commence the drywall work. Kieth had 10-15 people working on the project for Midwest and supervised the work and visited the work site daily. Hallmark remained responsible for the clean-up on the floors after the work was done and also supplied the materials required for the drywalling pursuant to its original contract with Design.

In February of 2001, Gerry Hollick, Business Representative for the Union, contacted Sandridge about Midwest working on the Hawthorn Suites project. Hollick testified he asked Sandridge how he had heard of Midwest, and was told that Grosse had referred Midwest to him (Sandridge) because Grosse wanted out of that part of the work (drywalling). An organizer for the Union visited the project site and later reported to Greg Sefcik, the Union's Assistant Business Manager and Business Representative, that Midwest was working on the Hawthorn Suites project. Sefcik then requested information from Hallmark. After receiving the information, Sefcik met with Grosse. According to Sefcik, Grosse said there was nothing to resolve as the general contractor had taken the work out of the contract. Sefcik asked Grosse if he had recommended Midwest to Sandridge and Grosse answered that he had.

Sefcik also testified that the Union had workers available for referral for drywall work in January of 2001 and that Hallmark had requested referrals from the Union in January for work on other projects.

Sefcik further testified that a similar dispute had arose with Hallmark in 1995 involving a verbal agreement between Hallmark and a non-union subcontractor that work would be taken out of Hallmark's contract and given to the subcontractor. A grievance was filed and resolved when Hallmark agreed to pay the Union $5000.00.

A grievance was filed in the instant case in February, 2001. The parties attempted to resolve their dispute, but were unsuccessful and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that this case involves an employer who sought to circumvent the terms and conditions of its agreement with the Union, particularly, the subcontracting clause. Citing a number of arbitration awards and arbitration texts, the Union notes arbitrators have long recognized that every labor agreement has an implied covenant of good faith dealing, especially in the context of subcontracting issues. In that regard, an employer violates the agreement when it takes action which subverts the agreement and seeks to deprive the other party of the benefit of their bargain.

In this case, other than an explicit confession, there cannot be stronger evidence of Hallmark's attempt to circumvent the Agreement, Hallmark's sole defense being that "It didn't subcontract the work, the owner did." However, the facts show that this is not a case of an owner choosing to subcontract part of the work directly, rather, the entire procedure in this case was at the instigation of Hallmark. The Union asserts Hallmark and the Union are signatory to a labor agreement which provides for set wages and benefits, and which requires Hallmark to obtain referrals from the Union. The Agreement also contains a subcontracting provision which provides that work may only be sublet to a union subcontractor. Further, the parties have previously recognized that using the subterfuge of having the owner contract for drywall work violated their agreement. In 1995, an identical grievance was filed by the Union and Hallmark settled the grievance by paying $5,000.00.

In this case, Hallmark originally contracted with Design to perform steel studs, insulation and drywall work on the Hawthorn project. In fall of 2000, the project was shut down for between 60 and 90 days as a result of financial problems. Before continuing work on the project, Hallmark entered into an agreement with Design and the future owner which

assured it would receive past due payments and which also specifically provided that the time for Hallmark to perform its work was extended by the same period of time that Hallmark had been off the project due to the contractor's failure to make payments. Thus, the time in which Hallmark was to perform its work was expressly extended by the 60 to 90 days the project was shut down. However, at the end of January, Hallmark claimed it did not want to do the drywall work because of insufficient labor being available. This was the sole reason offered by Hallmark for its subsequent conduct. However, the Union had numerous drywall employees available for referral, but Hallmark did not contact the Union in that regard. This is even though the Union responded throughout the spring of 2001 to other requests from Hallmark for drywall employees, all of which were filled. Hallmark also made no effort to obtain a union subcontractor to do the drywall work, even though there are numerous union drywall contractors in the area. Hallmark employees continued to perform the steel stud, clean-up and insulating work on the project and also additional add-ons of this work as well.

More telling is the process by which Midwest came on the project. Grosse advised Design to use Midwest. Sandridge had never heard of Midwest and was given a name and phone number to contact by Hallmark. Midwest is not signatory to a union agreement and had in fact come into existence only in the last six months, had no other jobs, and had no regular employees. Thus, Hallmark claiming that it could not do the work because of a labor shortage, then advised the general contractor to give the work to a company that had just come into existence and had no regular employees or other jobs. Further, Hallmark provided all of the tools and materials for the work to be performed by Midwest. Midwest was simply a conduit, and it was only after Kieth obtained the job that he contacted a labor broker, or a "coyote", to provide drywall workers. Kieth never paid those employees directly, instead paying the labor broker.

Hallmark's deep involvement in the process is demonstrated by the change orders which specifically refer to Midwest performing the work. The net result was that Hallmark was able by this method to obtain a low wage source of drywall labor. Hallmark made no mention of this arrangement to the Union, and it was only after an organizer visited the job site that the evasion was discovered. The instant grievance was filed shortly thereafter, the grievance identical to that which was the subject of the 1995 settlement. During a meeting on the grievance Grosse admitted to Assistant Business Manager Sefcik that he had told the owner to use Midwest.

While Hallmark portrays itself as simply returning work to the owner that it was not able to perform, it is clear that it was deeply involved in the arrangement of subcontracting the work to Midwest. While Grosse said he had known Kieth for 10 to 15 years previously, but had not contacted him in many years, the question arises as to why he would recommend someone he had not heard from in years, and was not even certain whether they were still in the business. The Union questions why he would recommend someone who had no regular

employees, and whose company had been incorporated less than a year previously. Hallmark provided all of the materials and tools to perform the work, and used its own employees to perform the more difficult parts of the remaining work, simply substituting the labor broker's workforce for the union workforce for the drywall work.

The Union asserts that if Hallmark was really worried about manning the job, it would have contacted the Union and inquired about referrals, or it could have contacted the Union about the availability of union drywall subcontractors. Instead, Hallmark engaged in this arrangement in order to reduce labor costs on the project. It was an evasion of the Agreement that Grosse had used before and which had been recognized as a violation of the Agreement. To not sustain the instant grievance would fatally undermine the entire collective bargaining agreement, allowing Hallmark to substitute low wage labor and evade the wage and fringe benefit provisions of the Agreement, as well as the subcontracting provision, by simply arranging for the owner at any time during the project to sign a subcontract and issue a change order.

The Union concludes that this is a textbook violation of the duty of good faith dealing, with Hallmark engaging in an arrangement to evade the subcontracting provision in the Agreement. Such conduct should not be countenanced and the Arbitrator should sustain the grievance and order Hallmark to make the Union employees on the Union's out-of-work list whole for all losses.

Hallmark

According to Hallmark, the allegation is that it has violated Section 14.1(a) of the labor agreement. It notes that it had obligations under a principal contract with Design and asserts that for it to "sublet" within the meaning of Section 14.1(a), Hallmark must enter into a contract with another entity to perform some or all of Hallmark's obligations under its contract with Design. If Hallmark does so, it remains ultimately responsible to Design for performance for all of its obligations under the principal contract, and assumes the risk that its subcontractor will perform Hallmark's obligations in a timely and workmanlike manner. If there is any failure in performance by the subcontractor, Design must look to Hallmark to remedy the problem. Hallmark, having privity of contract with the subcontractor, would then be able to pursue its own remedy against the subcontractor. If Hallmark sublets all or portions of its obligations, there are financial implications. Under its contract with Design, Hallmark must perform its obligations for a set price, and while expecting to make a profit, risks a loss if the cost is greater than the contract price. In a sublet situation, Hallmark retains the financial risks and rewards, and remains responsible for the work performed by itself and by the subcontractor.

Hallmark asserts that it did not sublet any work to any entity. There is no dispute that Hallmark entered into a principal contract with Design and that it did not actually enter into a subcontract with Midwest, or any other entity. The evidence is uncontroverted that Hallmark sublet to no one. Hallmark had a contract with Design, and that contract was amended with change orders agreed to by Hallmark and Design, and motivated by the unusual circumstances associated with the project. Design entered into a separate contract with Midwest. These facts are uncontroverted in the record. It is axiomatic that if Hallmark did not sublet to any subcontractor, the grievance alleging that Hallmark sublet the work to a non-union contractor must be dismissed.

Hallmark also denies that it engaged in any scheme to circumvent the labor agreement. The Union has argued that Hallmark engaged in a "subterfuge" to "circumvent" the labor agreement. There are two possible arguments that evolve from this assertion:

i. Hallmark engaged in sham, whereby Hallmark actually accomplished a sublet to a non-union contractor without entering into a direct subcontract; or

ii. Hallmark was prohibited from entering into a change order to give up a portion of its work under its original contract with Design Builders, and was instead required to either perform all of the work itself, or was required to subcontract a portion of the work to a union contractor.

The first argument fails because the material components of a sublet situation do not exist, and Hallmark has no financial risks or rewards associated with Midwest's work performance. The circumstances under which Hallmark gave up the work are also significant. Hallmark did not enter into its contract with Design with the intent to engage in a sham to avoid the subcontracting language in the labor agreement. Unusual circumstances developed whereby Hallmark gave up a portion of the work for legitimate business reasons. As a result of financial problems, the general contractor did not pay its subcontractors, including Hallmark, and the project was shut down for two to three months. Hallmark had undertaken the contract with the expectation that the work would be performed at a time when its regular crew was available. Due to the project's delays, Hallmark's regular crew became unavailable as Hallmark was committed to a significant number of other jobs, each with their own crew requirements and business risks. Thus, Hallmark needed to give up some of the work on the Hawthorn project, and that was a business judgment that Hallmark was entitled to make.

Regarding the second argument, i.e., that Hallmark is not entitled to give up a portion of the work, such an argument is an unfair attempt to revise the language of the Agreement and impose business risks on Hallmark. Hallmark has the right to make business judgments regarding the bidding, execution, and amendment of contracts, including amendments to

change the amount of work to be performed. Under the circumstances in this case, Hallmark's business judgment to give up some of the originally-contracted work is warranted, and is not a subterfuge. While the Union may disagree with that business judgment, that judgment is for Hallmark to make, as it bears all risks associated with its business judgment. In this case, Hallmark made the judgment it should give up a portion of the work rather than perform it under strict time pressures with untested potential referrals from the Union. There is nothing in the labor agreement to require Hallmark to perform work with the referrals or to subcontract to any entity against its better business judgment. If the Union desires such contractual rights they must negotiate them, as such language does not currently exist in the Agreement.

Hallmark concludes that the Union's real dispute is with Midwest and that those issues are for another time and place.

In its reply brief, Hallmark asserts that while the amendment to the purchase order does contain an extension of time to finish the project, testimony revealed that there were countering circumstances and practical considerations that made it unreasonable for Hallmark to rely on such language. Grosse testified that he was unaware the provision had been included in the amendment by his attorneys. More significantly, the project's originally scheduled date of completion was being respected as the completion deadline in order to accommodate the planned usage of the hotel. Under the circumstances, Hallmark and Design were in agreement that the project needed to be completed by the originally-scheduled date, and further agreed to change the contract to permit Design to retain another contractor. These are business decisions and judgments which Hallmark and the general contractor are entitled to make, and were certainly justified under the circumstances.

While the Union states that the labor agreement requires Hallmark to obtain referrals from the Union, Sefcik admitted that was not true in his testimony. The agreement sets forth procedure for obtaining referrals, but does not require Hallmark to use referrals and give up its right to decide what work it will or will not contract to perform.

Hallmark also disputes the assertion that the parties were involved in an "identical grievance in 1995." The Union provided no facts, circumstances or details regarding that grievance or the motivations for settlement. The previous grievance in fact was much different. If the facts and circumstances were identical, the Union would have provided them. As presented, the 1995 grievance is irrelevant to the issues in this case.

Hallmark also disputes the claim that it provided all the tools for the work to be performed by Midwest. While it did supply the materials, testimony revealed that the materials for the project were special-ordered due to their size and had already been ordered by Hallmark. Under the circumstances, Hallmark's supplying the drywall material was justified.

The Union's statements that employees were bussed in by a "coyote" and were "presumably" paid in cash are additional examples of the Union's willingness to presume facts not in evidence and are not relevant to any actions of Hallmark.

Hallmark does not disagree with the Union's assertion that labor agreements have an implied covenant of good faith and fair dealing. However, the cases cited by the Union deal primarily with the issue of subcontracting away all bargaining unit work, and thereby "subverting" the entire agreement. That situation does not exist here, as the bargaining unit employees of Hallmark have not lost any work or opportunities. Hallmark was unable to properly man the project because its employees were needed on other projects. The suggestion that it engaged in bad faith by depriving bargaining unit members of employment opportunities is disingenuous. Further, the Union's discussions of the principles of good faith and fair dealing acknowledge that management actions may have justification which conforms to those standards. The facts and circumstances in this case provide such justification for Hallmark's business judgments and actions in light of the unusual circumstances.

Hallmark asserts the Union is basically alleging that Hallmark planned an arrangement to perform its work using lower-cost (non-union) labor, implying that Hallmark's profits increased because of the lower-cost labor. The fact is that Hallmark did not benefit from lower-cost labor performing the work, as its contract with Design was amended and it was no longer responsible for the work removed from its contract. Hallmark lost all profit associated with that work. Under the unusual circumstances in this case, Hallmark no longer wanted to perform the work, however, it needed to protect its ability to get paid for the work it had already performed, and therefore remained under contract with Design. Hallmark and Design then entered into an agreement whereby a logical portion of the work would be removed from Hallmark's contract, and performed by others. While Hallmark referred possible names, it made it clear it could not be otherwise involved with non-union contractors. The general contractor, Design, took over from there and eventually hired Midwest. Hallmark concludes that its actions under the circumstances cannot constitute bad faith and that it made legitimate business judgments that it was entitled to make, and requests that the grievance be denied.

DISCUSSION

The issue in this case is whether Hallmark violated the labor agreement by agreeing to give up the interior drywall work, which was to then be performed by Midwest, with the amount Midwest agreed to charge for the work to be deducted from the amount Hallmark was to be paid for the work it had originally agreed to do for Design on the Hawthorn Suites project. The provisions of the agreement alleged in the original grievance to have been violated are Article VIII, Sec. 7.1, Minimum Hourly Wage Rates; Article VIII, Sec. 8.1., Contributions (fringe benefits); and Article XIV, Subcontracting, Sec. 1(a) and (b). To find violations of those provisions in this case would require a finding that Hallmark had effectively

sublet the work to Midwest – a non-union drywall contractor. The record does not support such a finding. As Hallmark notes, there is no privity of contract between itself and Midwest. Midwest's contract is with Design, the general contractor. Hallmark did not provide any supervision, and was not responsible for the quality or the timeliness of the work performed by Midwest. There is no evidence of any type of agreement, verbal or written, between Hallmark and Midwest. The only agreements in the record are the initial contract between Hallmark and Design, the December 15, 2000 amendment to that contract, the January 31, 2001 contract with GLC, and the change orders to Hallmark's contract with Design eliminating certain drywall work from that contract and specifying the work would be completed by Midwest for a specified amount (which amount was deducted from the original contract amount to be paid Hallmark), and the contract between Design and Midwest for the drywall work with the appropriate change orders when more drywall work was given up by Hallmark and added to Midwest's contract. Thus, the evidence in the record establishes that Hallmark's only contractual relationship was with Design and GLC and that it had no contractual relationship with Midwest. It follows then that Hallmark cannot be found to have entered into a sublet agreement with Midwest in violation of Section 14.1(a) and (b) of the labor agreement.

The Union also asserts that every labor agreement contains an implied covenant of good faith and fair dealing which Hallmark has violated in this case. Hallmark does not dispute such a covenant exists, but asserts that it did not violate that covenant.

In support of its position, the Union asserts that Hallmark provided the tools and materials for the work Midwest performed and that Midwest was only a "conduit", as demonstrated by the specific reference to Midwest in the change orders to Hallmark's contract with Design. The Union concludes that the arrangement was masterminded by Grosse as a way to reduce labor costs by circumventing the labor agreement.

The evidence is to the contrary regarding the assertion that Hallmark provided the tools used by Midwest's workers. Grosse testified that Hallmark provided the drywall materials Midwest used, but no tools or labor. The original contract between Hallmark and Design required Hallmark to provide "all labor, material and equipment necessary" to complete the work listed. Design's contract with Midwest required the latter to provide "all Labor and Equipment necessary. . ." for it to complete the listed work. Hallmark did provide the drywall material Midwest used, but that was pursuant to its original contract with Design, and does not necessarily infer an arrangement with Midwest.

There is also no evidence that Midwest was a "conduit" as relates to Hallmark. The assertion infers that Hallmark benefited monetarily from the arrangement. There is not sufficient evidence in the record to establish that is the case. There is no evidence of any monies being passed through Midwest to Hallmark. There is also no evidence in the record of any arrangement between Hallmark and Midwest as to the amount the latter agreed to charge

Design to perform the work. The most the Union has in this regard is Grosse's acknowledgement that Midwest's amount must have been close to the amount Hallmark originally bid on the project as far as the drywall work in question, or he would not have given up the work and agreed to the deduct, and that Hallmark's bid would have included both the cost and a profit on the work. That is not enough to establish that Hallmark benefited financially from Midwest performing the work.

Things get stickier when it comes to Grosse's involvement in Midwest getting the work Hallmark was agreeing to give up. It is clear in the record that Grosse played a part in getting Kieth together with Sandridge. He gave Sandridge Kieth's name, among others, as a possible subcontractor for the drywall work and contacted Kieth to tell him about the work and gave him Sandridge's name and telephone number. There is, however, no evidence that Grosse had any further involvement in Midwest's getting the work. Both Grosse and Sandridge testified they only had the one conversation concerning Kieth, and that he was one of a number of possible subcontractors Grosse mentioned. The testimony was also that Midwest is noted in the change order to Hallmark's contract because it was the subcontractor with whom Design contracted to do the work in question and its identity was already known at the time.

Hallmark was also able to give a credible explanation for giving up the work in question, rather than seeking referrals from the Union or subletting the work itself. Grosse testified Hallmark had 13 other projects going at the time he was negotiating with Sandridge to return to the Hawthorn project, and that he did not believe he could hire enough qualified workers to do the drywall work on that project, given the other projects Hallmark had going. He also testified that he did not consider looking for someone Hallmark could sublet the work to, given the 15% retainage (Hallmark would be responsible to the general contractor for finishing on time and the quality of the work) and the fact that Hallmark had only been paid 25% of what it was owed for work already done on the project. Those appear to be legitimate business reasons for deciding to give up the work, so as to rebut a claim that Hallmark was not acting in good faith in doing so.

The Union also asserts that this case is identical to a situation that occurred with Hallmark in 1995. Hallmark agreed to settle that grievance by paying the Union $5000.00. The parties dispute whether the facts of that grievance are the same or similar. The evidence in the record as to the prior grievance is the 1995 grievance and the settlement agreement, as well as Sefcik's testimony. Both documents reference subcontracting, albeit the grievance states, "you have subcontracted or sought to evade subcontracting provisions. . ." Sefcik testified he had investigated the matter and found there had been a verbal agreement between Hallmark and the subcontractor that the work would be taken out of Hallmark's contract and given to the subcontractor. There are no more details beyond that to make a comparison. The settlement agreement also references both Hallmark and "Planning Associates"; presumably

the latter was the general contractor or owner on that project. To the extent the settlement of a prior grievance might be relevant here, 1/ there is not sufficient information with which to

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1/ It is noted that the settlement of a prior grievance is not necessarily considered reliable evidence in discerning the meaning of a provision. **Fairweather's Practices and Procedures in Arbitration, 3rd Ed.**, *pp. 263-264.*

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compare the two situations as to the underlying facts and/or the motives for settling the prior grievance.

It is again noted that while Grosse played a part in getting Kieth and Sandridge together, there is no evidence that Hallmark benefited from the arrangement, other than getting rid of the work that it thought was a risk. Again, there is no evidence establishing that there was any kind of agreement or arrangement between Hallmark and Midwest, written or verbal. Thus, the 1995 grievance provides little or no guidance in this case.

In summary, to establish that Hallmark's actions violated such a covenant of good faith and fair dealing, the Union would have to show in this case that Hallmark's actions circumvented the agreement in that they permitted Hallmark to obtain the benefit (effectively subcontract), while at the same time denying the Union the benefit of its bargain (only permit subcontracting work to a union contractor). As concluded above, there was no contractual relationship or demonstration of some arrangement between Hallmark and Midwest and the Union has been unable to establish that Hallmark received any financial benefit from Midwest performing the work for Design.

For the foregoing reasons, it is concluded that Hallmark did not violate the parties' labor agreement by agreeing to give up the drywall work which was then performed by Midwest.

Based upon the above, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 6th day of December, 2001.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc
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