BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

R.W. MILLER & SONS

and

TEAMSTERS LOCAL UNION NO. 43

Case 4
No. 60977
A-6002

Appearances:

For R. W. Miller & Sons, Inc., **Attorney Daniel D. Barker,** Melli, Walker, Pease & Ruhly, S.C., 10 East Doty Street, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664.

For Teamsters Local 43, **Attorney John J. Brennan,** Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212.

ARBITRATION AWARD

R. W. Miller & Sons, Inc., hereinafter referred to as "Employer" or "Company," and Teamsters Local 43, hereinafter referred to as "Union," are parties to a collective bargaining agreement covering an initial period from June 1, 1999 through May 31, 2003. That agreement provides for binding arbitration of grievances as therein defined that may arise between the parties. On March 1, 2002 the Union filed a request with the Wisconsin Employment Relations Commission for a 5-person panel of WERC commissioners/staff arbitrators from which the parties could select a person to hear and decide the grievance that had arisen between the parties. Commissioner A. Henry Hempe was selected by the parties from the panel provided and was subsequently appointed by said Commission to hear and decide said dispute. A hearing was held on May 23, 2002 and a transcript prepared of the testimony provided. On June 24, 2002, the Employer filed a Motion to Reopen the Record for the purpose of inserting an affidavit. Absent an objection by the Union the motion is granted and the affidavit received. The Employer filed an initial brief received on July 2, 2002 and a reply brief received on July 15, 2002; the Union filed an initial brief received on July 8, 2002 and filed no reply brief.

The grievance herein is companion to another grievance (Case 3, No. 60951, A-5999) filed by the Union on behalf of the same grievant. By agreement of the parties, the grievances were consolidated for hearing purposes. However, the respective awards for each case are made and discussed in separate decisions by the arbitrator that conducted the hearing.

STATEMENT OF THE ISSUE

The Union proposed the following Statement of the issue:

> Did the Company violate the labor agreement by failing to call the grievant to work for the welding job that occurred on January 16, 2002? If so, what is the appropriate remedy?

The Company proposed the following Statement of the issue:

> Did the Company violate the labor agreement when it did not recall the grievant from layoff to perform a small welding job? If so, what is the appropriate remedy?

I adopt the following Statement of the issue:

> Did the Company violate the Labor Agreement by failing to recall the grievant from layoff to perform a welding job on January 16, 2002? If so, what is the appropriate remedy?

FACTS OF THE CASE

The Employer, R. W. Miller & Sons, Inc., is a road contractor engaged in road construction that includes excavation, grading and asphalting. In winter months, the Company's business activities have included hauling snow for the City of Lake Geneva.

The grievant, John Laskowski, has been employed by the Company for almost six years. Mr. Laskowski is a crusher operator, but also performed some welding jobs from time to time (including welding on trucks). In addition, Mr. Laskowski works on the blacktop plant and the wash plant, and does whatever else is required to be done. He is sixth in seniority among Company employees. In the month of January 2002 Mr. Laskowski was on layoff for the entire month.

In mid-January 2002, the Employer engaged an independent welding contractor, d/b/a Tom's Welding, to weld a reinforcement plate on the cracked trunnion assembly of one of the Employer's dump trucks. The trunnion assembly attaches the axle to the truck frame. The idea of welding a reinforcement plate to the existing trunnion assembly instead of replacing the entire assembly came from a mechanic employed by the Company, who also serves as the Union's shop steward. The mechanic (who has also done welding for this employer in the past and is senior to the grievant) showed no reaction when Company President Jeff Miller told him that he was going to use Tom's Welding to carry out the proposed welding.

Previously, in his denial of the grievance on this matter, Mr. Miller had written that the welding work was for only three hours ". . . and utilizing Mr. Laskowski to perform the repair would have cost in excess of $1,000 in benefits alone." He added, " I made an economic decision as the total cost of their (Tom's Welding) invoice was just over $300."

At hearing CEO Miller did not deny that his decision was influenced by economics. But he also stated his belief that the welding work involved was not simple work and needed to be performed by an experienced welder. In addition, Mr. Miller also expressed safety and potential liability concerns if the work was not competently performed. He said that if the weld broke and the cracked trunnion assembly failed under the stress of a fully loaded truck bed, the rear axle could come off, possibly on the open road. Mr. Miller knew that Tom's Welding is a state-certified welding enterprise, that its proprietor teaches a welding certification course in Walworth County and also tests aspiring welders for certification purposes.

In 2001 the Employer had engaged Tom's Welding to build ductwork on the blacktop plant as well as an extra bin that feeds material into the blacktop and had been favorably impressed with the work Tom's Welding performed.

The grievant stated that six years before he had been a certified welder in structural steel, and that he believes welding certifications run from year to year. At times Mr. Laskowski has to do welding on the crusher he operates. At other times, he's been directed off the crusher to do other welding when there is no other welder available to do it. Mr. Laskowski estimates that in the normal course of his duties he does some welding at least once a month. Sometimes, Mr. Laskowski may work on welding projects for three or four days in a row; sometimes he might not weld for two, three, or four weeks at a time.

Mr. Laskowski's application for employment with the Employer dated 6/4/95 indicated that he had 10 years of welding experience. There is no record of any current welding certification of the grievant in the State of Wisconsin.

Mr. Laskowski acknowledged that he had never done any welding on a trunnion assembly, but has done some welding on truck frames. The grievant believes he was capable of repairing the cracked trunnion assembly. The grievant further stated that the mechanic that had suggested welding a reinforcement plate to the trunnion assembly had originally asked the grievant's opinion on an aspect of the proposed repair. The grievant said that on many occasions that mechanic had consulted him with respect to proper preparation for welding jobs.

In the past, the Employer has also subcontracted out other welding work that might have been performed by bargaining unit members, including repairs to dump trucks, and welding on a new asphalt silo. In some instances some bargaining unit members were on layoff while the welding was being performed. There is no record of any Union objection to that subcontracting.

The welding repair work on the cracked trunnion assembly took Tom's Welding four hours to complete.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3. RECOGNITION AND UNION SECURITY

. . .

Section 3. Work Assignments. The Employer hereby assigns all work involved in the operation of the Employer's truck equipment during the operation, loading and unloading thereof of the employees in the bargaining unit here involved. The Employer agrees to respect the jurisdictional rules of the Union and shall not direct or require their employees or persons other than the employees in the bargaining units here involved, to perform work which is recognized as the work of the employees in said units. This is not to interfere with bona fide contracts with bona fide Unions.

. . .

ARTICLE 21. HEALTH AND WELFARE BENEFITS

Section 1. Effective June 1, 1999, the Employer agrees to provide health and welfare insurance benefits as provided and offered as settlement of this Agreement. The Employer agrees to cover the cost of coverage up to a maximum monthly premium of $447.65 per aggregate employee. During the 2nd, 3rd, and 4th years of this agreement the maximum monthly premium amount will increase to $516.85, $586.05 and $655.25 respectively. . . .

(A) . . .

(B) When an employee is laid of due to lack of work, he shall receive benefits for the calendar month following his layoff. The Company will notify the insurance carriers upon termination of employment or layoff so that such employee may be billed directly.

(C) Regular employees returning from layoff will be eligible for coverage the first of the month following return to work.

ARTICLE 22. PENSIONS

Section 1. Effective June 1, 1999, the Employer shall continue to contribute to the Central States, Southeast and Southwest Areas Pension und the sum of eighty-five dollars ($85.00) per week for each employee covered by this Agreement, who has been on the payroll thirty (30) calendar days or more.

. . .

Section 5. Contributions to the Pension Fund must be made for each week on each regular or extra employee, even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other pension fund or health and welfare fund. Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this Section.

. . .

ARTICLE 31. GRIEVANCE PROCEDURE

Section 1. . . .

Section 2. . . .

Section 3. . . . In the event that the Employer's representatives and the Union's representatives are unable to reach a decision resolving the dispute, either party may, within five (5) days inform the co-chairman of the Joint Grievance Committee in writing requesting arbitration in accordance with this Article.

Section 4. The parties agree an arbitrator shall be selected on application to the Wisconsin Employment Relations Commission. If the Commission finds it necessary to appoint an arbitrator not a member of the Commission, the losing party shall bear the full cost of the arbitrator. No employee shall have the right to require arbitration, that right being reserved to the Union or Employer exclusively.

> **Article 5**. . . . The decision of the impartial arbitrator on any matter submitted to it shall be final and binding on all parties. . . .

POSITIONS OF THE PARTIES

Union

The Union argues that Mr. Laskowski had been a certified welder and had done welding on truck frames for the Employer in the past. The Union contends that Mr. Laskowski's welding experience and knowledge were widely known – indeed, even the mechanic had consulted him about welding duties sometimes assigned to the mechanic. In fact, says the Union, the mechanic even consulted Mr. Laskowski about the very project that was farmed out to Tom's Welding.

The Union believes that Company President Miller's decision to subcontract the welding repair of the cracked trunnion assembly was motivated by Mr. Miller's desire to avoid paying a month's worth of health benefits to the grievant under Article 21 of the Labor Agreement, and points to the CEO's written denial of the grievance prior to the hearing. The Union does not give credence to Mr. Miller's testimony at hearing that his primary concerns were safety and company liability. Nor is the Union impressed by the Employer's contentions that Mr. Laskowski lacked sufficient skills to perform the welding task involved.

The Union believes that the grievant should be made whole for the four hours of welding work of which he was deprived on January 16 and advocates a "make-whole" remedy that includes wages, health benefits, and a pension contribution in accordance with the Labor Agreement.

Employer

The Employer contends that the grievance should be dismissed because the Union failed to prove that the welding work in question was within the Union's exclusive jurisdiction. Furthermore, according to the Employer, the Union bears the burden of proof on work assignment cases.

The Employer cites arbitral precedent to the effect that a union has not established exclusive jurisdiction of the work if it has not proved that only bargaining unit members have performed the disputed work in the past.

In this matter, says the Employer, Mr. Laskowski never testified that only bargaining unit employees perform shop welding. But, the Employer continues, the testimony of Company CEO Jeff Miller establishes that the Employer often used welders that were independent contractors outside the bargaining unit for various shop projects.

The Employer additionally argues that the Union offered no testimonial evidence establishing that welding work is recognized as unit work only. Welding work is only incidental to the Employer's main business as a road builder, the Employer points out. Thus, urges the Employer, if it had negotiated away the right to send repair work to outside shops then the Labor Agreement would expressly say so.

The Employer believes that a holding that the Union has exclusive jurisdiction over all specialty work would hamstring the Employer to the point where it could never use a specialty contractor if a unit member wanted to try his hand.

Moreover, says the Employer, there were good reasons for out-sourcing the welding work, reasons based on safety and potential liability concerns. In this regard, the Employer notes that there is no record of the grievant's current certification as a welder and finds the grievant's testimony as to his own welding capabilities to be self-serving. The Employer asserts that it should not have to rely on such claims when safety is at issue.

Finally, the Employer argues that even if the welding done on January 16 was bargaining unit work, the grievant failed to prove that it would have been *his* work. The Employer points out that if the Employer had not out-sourced the welding work it is very likely that the mechanic – who was not on layoff, was senior to the grievant and had done welding in the past - would have received the welding assignment.

The Employer urges that the grievance be dismissed.

Employer's Reply to the Union's Brief

The Employer points out that at no time does the Union claim it had exclusive jurisdiction over welding work. Instead, says the Employer, the Union relies solely on the argument that it was improper for the Company CEO to deny the grievance based on the CEO's view that it was more economical to use an independent contractor. The Employer contends that the Union completely ignores the fact that Company President Miller's denial expressly states that the Company had used Tom's Welding in the past for small welding jobs, to the economic advantage of the Company.

DISCUSSION

In this case the Union contends that the grievant was improperly deprived of work that is recognized as work of bargaining unit employees. In summary, the Union argues that 1) the grievant is a competent welder, 2) that some welding is performed by bargaining unit

members, 3) that the grievant has performed welding work for the Employer in the past, 4) that the grievant had the requisite skill to handle the welding work the Employer out-sourced on January 16, and 5) that the welding work is bargaining unit work because it is recognized as work of bargaining unit employees.

The Employer correctly notes that in order to prevail the Union must show that the welding work in question is within the exclusive jurisdiction of the Union. See CONSOLIDATION COAL CO., 111 LA 587, 591 (Jenks, 1998). If the work is sometimes performed by bargaining unit employees and sometimes performed by independent contractors engaged by the Employer it cannot be considered bargaining unit work. See SLOAN VALVE COMPANY, 68 LA 479, 480 (Cohen, 1977).

The facts in this case indicate a mixed practice as to assignment of welding work. Assuming, *arguendo*, that the grievant is a qualified welder, and further assuming that the Employer has assigned welding work to bargaining unit members in the past, it remains indisputable that the Employer has also engaged independent welding contractors, such as Tom's Welding, to perform welding services for the Employer on more than one occasion.

Under this set of circumstances, it is immaterial that the Employer's decision to out-source the welding services provided on January 16 may have been influenced primarily by economic considerations. Certainly, the Employer was aware that the grievant had welding skills or it would not have given the grievant welding assignments in the past. The Employer may or may not have been aware of the extent of those skills.

But since the Employer had a mixed practice that included obtaining welding services from both bargaining unit persons and non-bargaining unit persons outside the company, the welding work cannot be said to be within the exclusive jurisdiction of the Union. Put another way, although welding is sometimes assigned to members of the bargaining unit, because it is also at times out-sourced without Union objection to persons outside the Company, it cannot be said to be the work of bargaining unit members within the meaning of that phrase in Article 3.

AWARD

The grievance is dismissed.

Dated at Madison, Wisconsin, this 25th day of September, 2002.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator

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