BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHEQUAMEGON UNITED TEACHERS

and

SOUTH SHORE SCHOOL DISTRICT

Case 40
No. 60430
MA-11613

(Frank Ray Grievance)

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ - West, P.O. Box 988, Hayward, Wisconsin 54843, appearing on behalf of the Union.

Mr. Henry Lamkin, District Administrator, South Shore School District, P.O. Box 40, Port Wing, Wisconsin 54865-0040, appearing on behalf of the District.

ARBITRATION AWARD

At all times pertinent hereto, Chequamegon United Teachers (herein the Union) and South Shore School District (herein the District) were parties to a collective bargaining agreement covering the period July 1, 2001, to June 30, 2003, and providing for binding arbitration of certain disputes between the parties. On October 5, 2001, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding the layoff of Frank Ray (herein the Grievant) from his bus driver position and requested the appointment of a WERC staff member to arbitrate the issue. The undersigned was subsequently appointed to hear the dispute and a hearing was conducted on February 7, 2002. The proceedings were not transcribed. The District and Union filed their initial briefs on February 21, 2002, and February 22, 2002, respectively. The Union filed a reply brief on March 13, 2002. The District filed a reply brief on April 15, 2002, and the Union filed a letter reply on April 19, 2002, whereupon the record was closed.

ISSUES

The parties stipulated to the framing of the following issues:

Did the District violate Article XII, Section C, of the collective bargaining agreement when it laid off Frank Ray?

If so, what is the appropriate remedy?

Additionally, the District proposed the following issue, to which the Union did not agree:

Is the grievance timely under the provisions of Article XV, Section B, Step 1, of the collective bargaining agreement?

As the issue of timeliness raises a procedural question potentially affecting the arbitrability of the merits of the case, the Arbitrator will address it.

PERTINENT CONTRACT PROVISIONS

II. MANAGEMENT RIGHTS

A. The Board possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this Agreement. The Board shall have the sole and exclusive right to determine the number of employees to be employed, to determine the duties of each of these employees, the nature and place of their work, and all other matters pertaining to the management and operation of the District, including the hiring, transferring, demoting. suspending, or discharging of any employee. This shall include the right to assign and direct employees, to schedule work, and to pass upon the efficiency and capabilities of the employees, and the District may establish and enforce reasonable work rules and regulations.

The Board shall also have the right to designate the District as a job site for students participating in the JTPA program or other school-to-work and related programs, provided the placement of students in such programs does not displace any bargaining unit employees, and does not violate Article XVI and such program does not result in future lay-offs caused by such program. No bargaining unit member will have to supervise more than one student at a time and there will be no more than three students allowed per department during any one semester or summer.

XII. JOB SECURITY

. . .

C. The District will not subcontract any work previously done by the bargaining unit employees when such subcontracting would result in lay-offs or reduction in the length of the regular work week of an employee.

. . .

XV. GRIEVANCE PROCEDURE

A. ***Definitions:***

1. A grievance shall be defined as any problem involving an employee's wages, hours or conditions of employment or the interpretation, meaning or application of the provisions of this Agreement or Board policies affecting wages, hours and working conditions.

2. The term "day" when used in this Article shall, except where otherwise indicated, mean scheduled employee working day; thus weekend or vacation days are excluded.

3. The term "grievant" is defined as the employee, a group of employees with a common complaint, or the CUT. The grievant is entitled to have a CUT representative.

B. ***Initiation and Processing:***

1. ***Step 1***

   a. The employee or the Union shall, within fifteen (15) days after the grievant knew or should have known of the occurrence giving rise to the grievance, submit a written grievance to the superintendent.

   b. The superintendent shall give a written answer to the complaint within five (5) days of the conference.

2. ***Step 2***

   If the complaint is not resolved within ten (10) days after receipt of the superintendent's written response, the recommendations of both parties

shall be presented to the Board in writing and both parties shall be present at a Board meeting scheduled at a mutual agreeable time (within ten days after receipt of the superintendent's response), for further explanation of their positions on the subject.

If it is not possible for both parties to be present at a mutually agreeable time within ten (10) days after receipt of the superintendent's response, the Board shall act upon the grievance at their next scheduled meeting and make a decision based upon the written recommendations supplied by the grievant and the superintendent. The Board within ten (10) days of the meeting shall render a written decision to both parties.

3. ***Step 3***

If the Board's decision is considered to be unsatisfactory, the Association shall, within ten (10) days of receipt of the Board's decision, submit the grievance to binding arbitration. The arbitrator shall be a staff member of the Wisconsin Employment Relations Commission selected by the Commission. The cost of the arbitrator and the transcript (if one is needed by the arbitrator) shall be borne equally by the parties.

Either party may make arrangements for a transcript and supply a copy to the arbitrator at their own cost. If in doing so, the other party wishes a copy of the transcript, a copy will be provided, provided such requesting party pays for one-half of the cost of having the transcript produced and copies made.

4. ***Step 4***

Unless specified time limits are extended by mutual consent any grievance not processed within such limits shall be considered resolved in accordance with the previous disposition. Failure to file a grievance in a similar. past situation shall not be considered a bar to a grievance filed upon subsequent recurrence of such conduct or situation.

BACKGROUND

According to Article XII, Section C, of the parties' collective bargaining agreement, the District is prohibited from subcontracting bargaining unit work when such subcontracting would result in a layoff or reduction in hours for a bargaining unit member. In 1977, at the time the bargaining unit was created, the unit contained six bus drivers. Over the years, however, as bargaining unit drivers have retired or resigned, the District has gradually subcontracted bus driving work. Since 1995, the District has contracted with local vendors to provide bus driving services not being done by bargaining unit members.

The Grievant was utilized by the District as a substitute bus driver beginning with the 1991-92 school year. In the Fall of 1999, the Grievant was awarded a regular bus route. Later that year, the District acquired a specially designed handicapped-accessible bus, which was assigned to the Grievant. The District had one student requiring special assistance due to disability and the Grievant was then assigned a route which included this student, along with others. At the time, the District had two other regular bargaining unit drivers, Ed Burhans and Eunice Laakso, in addition to the Grievant, while employing three subcontracted drivers under a contract with Jim's Auto, Inc. In the Fall of 2000, Eunice Laakso resigned as a bus driver at the request of the District Administrator in order to become a full-time aide. At the same time, the District entered into a three-year contract with Jim's Auto, Inc., guaranteeing at least four subcontracted bus routes for the 2000-2001, 2001-2002 and 2002-2003 school years. Thus, for the 2000-2001 school year, the Grievant and Burhans were the only bargaining unit drivers. At the end of the school year, the handicapped student graduated, eliminating the need for a handicapped-accessible bus route. On July 26, 2001, the School Board voted to layoff the Grievant due to budgetary restrictions, which the Grievant grieved on July 30. The Board then issued a written notice of layoff on August 3, which the Grievant acknowledged on August 16. For the 2001-2002 school year, the District redistributed the students on the bus routes and continued to employ Burhans and the four subcontracted drivers. The grievance proceeded according to the parties' contractual procedure, resulting in the instant arbitration. Additional facts will be referenced, as needed, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Union

Timeliness

At the arbitration hearing, the District first raised the issue of timeliness. Step 1 of the grievance procedure requires filing a written grievance within 15 days of the date the Grievant knew or should have known of the occurrence giving rise to the grievance. The District has been subcontracting bus driving work for many years without violating the collective bargaining agreement. The District argues that the Grievant should have filed the grievance when the District added a fourth subcontracted route in Fall, 2000, but it did not layoff the Grievant then, or inform him that it intended to do so. The School Board voted to layoff the Grievant on July 26, 2001, and the grievance was filed four days later, well within the contractual timelines.

The case of SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE, WERC CASE 30, NO. 56266, MA-10441 (GRECO, 8/30/99) is directly on point. The District had a subcontract agreement with CESA #8 to provide special education aides. Ten years after entering this agreement, the District laid off bargaining unit aides, while retaining the subcontracted aides, resulting in a grievance. The grievance was not filed until after the aides were laid off and was held timely.

Merits

The current subcontracting language was added to the contract in the 1979-82 collective bargaining agreement. Until the 1990s, the District only had one subcontracted bus route and up to nine bargaining unit drivers. In the 2000-2001 school year, the District had four subcontracted routes and two routes assigned to bargaining unit drivers, one being the Grievant. In 2001-2002, the District continued the four subcontracted routes, but laid off the Grievant and then had only one bargaining unit route.

The subcontracting language gave the District the ability to subcontract certain work without complaint from the Union, but is not unlimited in scope. It protects bargaining unit members by assuring that they will not be laid off or have their hours reduced due to subcontracting. Numerous arbitral precedents hold that job security is inherent in collective bargaining agreements and that contractual limitations on subcontracting exist for the purpose of protecting bargaining unit employees from having their jobs eliminated by subcontracting. [Cf.; NEW BRITAIN MACHINE CO., 8 LA 720 (WALLEN, 1947); AMERICAN SUGAR REFINING CO., 36 LA 409 (CRAWFORD, 1960); SAUK COUNTY, CASE A/P M-98-293 (HONEYMAN, 2/6/99); SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE, SUPRA]. As was made clear by Arbitrator Greco in DISTRICT OF BEECHER-DUNBAR-PEMBINE, critical question is whether, but for the subcontracting, the employee would have been laid off. Here, as there, the answer is no. The Grievant deserves to be made whole and to be restored to his position.

The District

Timeliness

The District had three subcontracted bus routes and two regular bargaining unit routes and a handicapped route in the 1999-2000 school year. The District subcontracted four regular bus routes on August 25, 2000, and had only one regular bargaining unit route and a handicapped route in 2000-2001. The District was aware of this, but did not grieve the loss of the bargaining unit route until July 30, 2001. The Union should have grieved the loss of the route at the time it was subcontracted when Eunice Laakso resigned her position to take a lower paying position as an aide. It did not do so and thereby failed to meet the timeline required by the contract.

Merits

The District's action did not violate the contract. Article XII, Section C, does not preclude the District from subcontracting bargaining unit work. It only prohibits subcontracting when it results in a reduction of hours or layoff to a bargaining unit employee. The District entered into a multi-year bus driving subcontract in August, 2000, with no resulting layoffs. It has done so for years without objection from the Union.

In this case, the Grievant was hired in 1999 specifically to drive a handicapped bus route to meet the needs of one handicapped student and to transport a small number of other students living nearby, which was known and admitted by all the Union witnesses. The handicapped student graduated in 2001, eliminating the need for the route. The route was eliminated, not subcontracted, and the bus has been transferred to another district. Had the District subcontracted the handicapped route, the Union would have a valid complaint, but such is not the case. The Grievant was hired for a specific purpose, which no longer exists, and the route, the bus and the driver are no longer needed by the District. This does not justify a grievance and the case should be dismissed.

The Union in Reply

Timeliness

The District's argument that the grievance is untimely is without merit. The bus driving position eliminated in the 2000-2001 school year had previously belonged to Eunice Laakso. Laakso had previously worked as a bus driver and an aide, with the two positions adding up to eight hours of work. In 2000, the Superintendent asked her to work full-time as an aide, to which she agreed, resulting in her voluntarily cutting back her driving to one athletic run of about one-hour per day. She continued as a full-time aide in the 2001-2002 school year. The reduction of her hours, therefore, was voluntary, and not the result of subcontracting. Since neither Laakso, nor the Grievant, had experienced a layoff or reduction due to subcontracting in 2000, therefore, there was no basis for a grievance at that time. Once the Grievant was laid off in July, 2001, and the District continued to subcontract bus driving work, the grievance was filed within 15 days and is, therefore, timely.

Merits

The District's past multi-year subcontracting agreements did not result in layoffs or reductions for bargaining unit members and so were not grieved. The question here is whether the Grievant would have been laid off but for the subcontracted work and the answer is no.

The District tried to draw a distinction by arguing that the Grievant was only hired to drive the handicapped route and that when the need for the route disappeared so did the position. The fact is that the Grievant was driving in the 1999-2000 school year before the handicapped student was assigned to him. Further, of the twelve students assigned to the Grievant, nine were transferred to the route of a subcontracted driver after the Grievant was laid off. Thus, the route continued to exist after the Grievant was laid off. The District's distinction does not have merit. Bus driving is bus driving and one route is the same as another. Arbitral precedents support the view that if positions are eliminated bargaining units members are entitled to positions held by subcontractors for which they are qualified.

Contrary to the District's position, a finding for the Grievant would not prevent the District from subcontracting in the future. The District has subcontracted in the past without objection from the Union and may do so in the future. Only it may not subcontract when to do so will result in a layoff or reduction of hours to a bargaining unit member. That is what it did here and the grievance should be sustained.

The District in Reply

Merits

SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE can be distinguished from the instant case. There, the District acknowledged that the work was not eliminated, but redistributed. Here, the position ceased to exist. Once the handicapped student graduated, the need for the route disappeared. Further, the BEECHER-DUNBAR-PEMBINE award does not address the fact that it was the elimination of the need, not the subcontracting, that "resulted" in the layoff here. The contracted routes were larger bus routes. The Grievant had a limited term small bus route made necessary by the needs of one student and made superfluous by the graduation of that student. The number of subcontracted routes was the same in 2001-2002 as it had been in 2000-2001.

According to Elkouri and Elkouri, How Arbitration Works, 5th Edition, 1997, the word "result" should be given its usual and ordinary meaning. Doing so leads to the conclusion that the Grievant's layoff did not result from subcontracting, but from loss of the need for his position. To interpret it otherwise would lead to a harsh, absurd, or nonsensical result, because the District would be unable to enter into multi-year contracts unless it could somehow read the future and determine in advance whether the need for a position might end. Were that to occur, the District would have to break its contract with the vendor rather than layoff a bargaining unit employee and incur substantial cost in equipment and operations. The arbitrator must also apply the rule of reason to arrive at an equitable result which gives neither party an unfair advantage. It is unreasonable to interpret the contract in such a way that the District must break a multi-year contract with a private vendor in order to preserve a position for an employee who was hired specifically to fill a limited need for a limited term once the need ends. To do so would mean that in the future the District cannot hire bargaining unit employees to fill limited term bus driving positions because they would then be able to require the District to give them a previously subcontracted position once the need for which they were hired disappeared. Thus, to protect itself, the District would always be required to subcontract short term work in the future rather than offer it to bargaining unit employees. For the foregoing reasons the grievance should be dismissed.

The Union in Rebuttal

The District raises new arguments in its reply brief and cites facts which are not in the record. The District claims that the Grievant was hired to fill a specific need for a limited

term, but there is no evidence to support this. The evidence is that the Grievant was hired to drive a bus, nothing more. The fact that he was assigned a handicapped route is irrelevant. The District also contends that the Grievant was hired after the District entered into a multi-year subcontract guaranteeing four routes to a private vendor. In fact, the Grievant was hired on November 15, 1999, whereas the subcontract agreement wasn't entered into until August 25, 2000.

DISCUSSION

Timeliness

Step 1 of the grievance procedure states, in subparagraph a:

> a. The employee or the Union shall, within fifteen (15) days after the grievant knew or should have known of the occurrence giving rise to the grievance, submit a written grievance to the superintendent.
>
> . . .

The grievance was filed on July 30, 2001. In arguing that the grievance is untimely, the District identifies the initiation of the subcontracting agreement on August 25, 2000, as the "occurrence" giving rise to the grievance, thereby requiring the grievance to have been filed by September 9, 2000, in order to be timely. The Union, on the other hand, maintains that the "occurrence" was the School Board's decision on July 26, 2001, to lay off the Grievant, which would set the grievance deadline at August 10, 2001.

If subcontracting, *per se*, were the issue, the District would have a stronger argument, but it is not. As the contract language and the actions of the parties over many years establish, there is nothing intrinsically wrong with subcontracting so long as it does not result in the layoff or reduction in hours of bargaining unit employees. Thus, although the contract was entered into in August, 2000, there was nothing to grieve until the Grievant was laid off in July, 2001. From the District's perspective, a grievance filed in August, 2000, over action it might take in the future regarding the Grievant due to the subcontracting agreement might have seemed premature at the time. Accordingly, the occurrence giving rise to the grievance is that point at which the District's action affects the Grievant. In this case, that is when the School Board determined to lay the Grievant off. The grievance is timely.

Merits

The pertinent contract language is contained in Article XII, Section C:

> C. The District will not subcontract any work previously done by bargaining unit employees when such subcontracting would result in lay-offs or reduction in the length of the regular work week of an employee. (Emphasis added.)

As the Union points out, this language serves the interests of both parties. From the District's perspective, it establishes the right of the District to subcontract services from private vendors without objection from the Union, so long as bargaining unit members are not negatively impacted. For the Union members, it protects their jobs from being eliminated or reduced in order to contract out the work privately. With respect to this last point, it is notable that Article containing this provision is entitled "Job Security."

The District maintains, in effect, that the Grievant was not laid off as a "result" of the 2000 subcontract agreement. In this regard, it argues that the Grievant was hired for the limited purpose of driving a specific handicapped bus route and it was the elimination of that route when the handicapped student graduated, not the subcontracting of other bus routes, that caused the Grievant's layoff. For a number of reasons, I cannot agree.

First, there is nothing in the record that supports the District's underlying premise that the Grievant was hired for a limited term or a limited purpose. The Grievant's uncontested testimony was to the effect that he was hired to drive a regular bus route at the beginning of the 1999-2000 school year, but that the need for the handicapped route, which was eventually assigned to him, did not arise until later in the year. There is no testimony that the Grievant was hired as anything other than a regular bus driver, nor do the School Board minutes noting the offer a contract to the Grievant (Joint Ex #26) make any such distinction. It may be that the District viewed the Grievant as a limited term employee not protected by the language of Article XII, Section C, but, if so, it was incumbent upon it to make this clear to the Union and the Grievant at the time of his hire and it did not do so. Thus, while the District may argue for the drawing of such a distinction, it is not supported by the evidence and I can only conclude from the record that the Grievant was hired as a regular bus driver.

The District argues, in the alternative, that the Grievant was covered by the language of Article XII, Section C, but only with respect to the handicapped bus route. Thus, if the District laid off the Grievant and then subcontracted the handicapped route, the District concedes the grievance would have merit, but since the handicapped route was eliminated and only regular routes were subcontracted, the grievance must fall. Here again, however, there is no evidence of a meaningful distinction between bus routes. The recognition clause in Article I refers only to "bus drivers," without distinction. Further, Appendix A sets the wage rates for bus drivers and, again, makes no distinction with regard to a handicapped route. In fact, it categorizes the rates according to "regular runs," "athletic runs" and "extra runs." It is established in the testimony that the Grievant's route was a "regular run" and he was paid accordingly. Thus, to the extent it supports either position, the contract language must lead to the conclusion that the Grievant was a regular bus driver with the same contractual rights and protections as any other. Finally, the seniority list (Joint Ex. #7) lists the Grievant as a "bus driver," not a handicapped bus driver, and ranks his seniority vis a vis other bus drivers,

without regard to which routes they drive. Thus, I conclude that the handicapped route did not constitute a distinct category, but was merely one of number of regular routes distinguished only by the fact that the driver used a smaller, specially equipped bus, which was only capable of accommodating a small number of students.

The District further contends that the Grievant's layoff was not occasioned by the subcontract because his position continued for nearly a year after the subcontract agreement was made and the precipitating event was, in fact, the graduation of the handicapped student, thus eliminating the need for the position. In this regard, the District also argues that the use of the word "result" in the contract language compels the conclusion that the subcontract and layoff must be cause and effect to constitute a contract violation and they were not. I find this situation analogous to that addressed in SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE, WERC CASE 30, NO. 56266, MA-10441 (GRECO, 8/30/99), cited by the Union. In that case, with similar contract language, the employer laid off two teacher aides while retaining two subcontracted aides. The employer argued, as here, that the subcontract preceded the layoffs by a long period of time, in that case ten years, and was not, therefore, the cause of the layoffs. Arbitrator Greco, however, focused, instead, on the fact that subcontracting, by its very nature, often results in work which bargaining unit employees are qualified to do being done by contract employees. In this regard, he noted

> . . . unless expressly stated otherwise, a subcontracting proviso by its very nature is meant to protect bargaining unit employes from being laid off or having their hours reduced <u>if any bargaining unit work for which they are qualified to perform is being performed by non-bargaining unit employes.</u> (Emphasis added.)

There is no dispute that the Grievant is qualified to drive any bus route currently served by the subcontractor, thus the crux of the case is whether the Grievant's layoff would have occurred but for the subcontracting of bus driving work to a private vendor. Put another way, would the Grievant have been laid off if the subcontract did not exist? The evidence leads to the inescapable conclusion that he would not have been laid off.

The District attempts to distinguish BEECHER-DUNBAR-PEMBINE in that there the aides' work was not eliminated, but redistributed, whereas here the handicapped route, and thus the Grievant's work, ceased to exist. I do not find this a meaningful distinction. Nine of the twelve students on the Grievant's route remained in the 2001-2002 school year and were reassigned to different routes. Thus, the work didn't cease to exist, as the District suggests, it was merely redistributed, unless one accepts the premise that transporting a handicapped student was a discrete position within the bargaining unit, which, as previously stated, I do not.

The District also raises arguments with respect to methods of contract interpretation, arguing that sustaining the grievance would lead to an unreasonable result, in that it would hinder the District's long range planning and preclude the District from entering into multi-year subcontracts unless it could foresee no need for the reduction of positions during the term

of the agreement. The District's alternative is to subcontract all limited term work to prevent a limited term bargaining unit employee from demanding a previously subcontracted position once his term of employment ends. That is not what occurred here. As previously noted, the Grievant was not a limited term employee. Had the District chosen to define his employment in those terms it could have done so and bargained with the Union over the implications once the job ended, but it did not. Further, the Grievant was employed when the contract was entered. Presumably, the District knew at the time that the handicapped student would graduate the next spring, eliminating the need for a handicapped bus route. Nonetheless, it added a fourth route to the subcontract knowing full well that the Grievant, a bargaining unit member, would be available to drive a regular route in 2001-2002. Thus, the District was not "sandbagged" by the Union, but was victimized by poor planning. It is unquestionably inconvenient for the District to have to renegotiate its subcontract in order to comply with the collective bargaining agreement, but it is a problem of the District's creation and it cannot solve it at the expense of the Grievant.

For the foregoing reasons and based upon the record as a whole, I hereby enter the following

AWARD

The grievance was filed within fifteen days of the notice of layoff as required by Article XV, Section B, of the collective bargaining agreement and is timely.

The District violated Article XII, Section C, of the collective bargaining agreement when it laid off Frank Ray.

The District shall forthwith award Frank Ray a regular bus route and an athletic bus route and credit him with seniority accrued during the period of his layoff. The District shall further make Mr. Ray whole by paying him backpay and any other benefits to which he is contractually entitled from the first day of the 2001-2002 school year, less any monies earned from other employment during the layoff, which would not have been earned but for the layoff.

The Arbitrator will retain jurisdiction of this award for a period of sixty (60) days to resolve any questions regarding implementation of this Award.

Dated at Madison, Wisconsin this 7th day of November, 2002.

John R. Emery /s/
John R. Emery, Arbitrator

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