BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO

and

KLUG & SMITH COMPANY

Case 3
No. 60019
A-5942

(Subcontracting Grievance)

Appearances:

Mr. Thomas Scrivner, Michael, Best & Friedrich, Attorneys at Law, Suite 3300, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appeared on behalf of the Company.

Mr. Brian C. Hlavin, Baum, Sigman, Auerbach, Pierson, Neuman & Katsaros, Ltd., 200 West Adams Street, Suite 2200, Chicago, Illinois 60606, appeared on behalf of the Union.

ARBITRATION AWARD

On June 6, 2001, Local 139, of the International Union of Operating Engineers, AFL-CIO and Klug & Smith filed a request with the Wisconsin Employment Relations Commission requesting the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. There was no evidentiary hearing conducted in this dispute. Rather, the parties submitted a narrative stipulation and joint exhibits received March 25, 2002. Post-hearing briefs were submitted and exchanged by May 2, 2002.

This dispute concerns whether or not Klug & Smith is bound to a collective bargaining agreement with Local 139 of the International Union of Operating Engineers, and if so, whether or not Klug & Smith violated the agreement by utilizing a non-signatory contractor to perform bargaining unit work.

BACKGROUND AND FACTS

The parties submitted the following joint narrative stipulation:

Pending Grievances. Klug & Smith is a general contractor based in Milwaukee, Wisconsin at 4425 W. Mitchell Street.

Klug & Smith was the general contractor on a Jones Island 2000-2001 project in Milwaukee. Klug & Smith was responsible for designing and building a cement plant (the Project). On several occasions, Fran Wewers observed that Klug & Smith subcontracted crane work on the project relating to the erection of two pre-engineered metal buildings to a non-signatory sub-contractor.

The Union has filed two grievances against Klug & Smith relating to this construction project on Jones Island in Milwaukee. The first grievance was filed on November 21, 2000 and the second grievance was filed on January 17, 2001. The grievances allege Klug & Smith violated contractual subcontracting obligations with respect to crane operations for the erection of two pre-engineered metal buildings on the Project.

Local 139 Business Agent Fran Wewers was aware of several other times on the project when subcontracted crane work was performed by a non-signatory contractor. Mr. Wewers learned that Klug & Smith subcontracted crane work to non-signatory contractors on other occasions by visiting the job site. Mr. Wewers learned that Klug & Smith claimed that it was no longer bound to any collective bargaining agreement. Accordingly, Local 139 did not file grievances every time it believed Klug & Smith violated the subcontracting clause. Local 139 decided to refrain from filing multiple grievances alleging essentially the same contract violation until it obtained a determination on Klug & Smith's contractual status.

The grievances allege violations of Sections 4.1 of the 2000-2003 Area I Master Building collective bargaining agreement. In addition to the Union, the parties to the collective bargaining agreement are the Allied Construction Employers Association, Inc. (ACEA) and the Associated General Contractors of Greater Milwaukee, Inc. (AGC).

The ACEA and the AGC are also parties to multi-employer contracts covering the Greater Milwaukee Area and involving five (5) additional construction unions: (1) Laborers Local Union Nos. 113 and 392 ("Laborers"); (2) Carpenters Southern District Council ("Carpenters")(Pile Drivers, Floor Covering, Millwright and General Carpenters); (3) Bricklayers Local Union No. 8 ("Bricklayers"); (4) Iron Workers Local Union No. 8; (5) Cement Finishers Local Union No. 599 ("Cement Finishers").

The Issue: Klug & Smith does not believe it is bound by the 2000-2003 collective bargaining agreement. Klug & Smith believes that all of the necessary notices to terminate the 1996-1999 collective bargaining were timely given and that the collective bargaining agreement is not binding upon it on a multi-employer basis, on an independent signatory basis or on any other basis.

The Union believes Klug & Smith is bound by the 2000-2003 collective bargaining agreement. The Union bases this belief on: (1) Klug & Smith being admittedly bound through association bargaining to prior Area I Master Agreements with Local 139, including the 1996-1999 agreement; (2) Klug & Smith's voluntary recognition of the Union as a Section 9(a) exclusive collective bargaining representative on or about November 1, 1989; and (3) the fact Klug & Smith submitted monthly fringe benefit contribution reports after the 1996-1999 collective bargaining agreement expired. No hours worked were reported and no contributions were made regarding the reports Klug & Smith submitted.

The fund reports are prepared for Klug & Smith by a clerical employee who receives the forms which the fund mails monthly to signatory employers. The Klug & Smith employee completes the form monthly and sends the completed monthly forms to the funds. Klug & Smith asserts that these reports were submitted without management review or approval. Klug & Smith further asserts that the person who submitted the reports is not involved in labor relations maters for Klug & Smith.

Local 139 had no knowledge that the reports allegedly were not approved or reviewed by management. It was Local 139's understanding that Klug & Smith was filing the reports in the normal course of its business. There were no markings or other indications on the reports to suggest that the person submitting the reports was not performing a function on behalf of Klug & Smith. Klug & Smith did not notify Local 139 that only certain individuals had authority to submit reports or that management review or approval was necessary.

Klug & Smith has not self-performed for several years any work with its employees in area described as Area I by the Local 139 Master Building Agreement. Area I is defined as the southeast region of Wisconsin covering the following six counties: Kenosha, Milwaukee, Ozaukee, Racine, Washington and Waukesha. Accordingly, Klug & Smith has had no Local 139 member working as an Operating Engineer in Area I since 1998. The last time Klug & Smith reported hours worked and made fringe benefit contributions on behalf of a Local 139 member was on or about October 12, 1998 (for work performed in September 1998).

Because of their differences on this threshold issue, the parties have agreed to a bifurcated proceeding. The parties have agreed that the first issue for the Arbitrator to decide is whether or not Klug & Smith is bound by the 2000-2003 collective bargaining agreement.

The Project: Klug & Smith was the successful bidder for the design/build of the cement plant on the Project. The owner of the Project is Minergy. Klug & Smith began work on the Project on or about September, 2000. Klug & Smith's work on the project is substantially completed in 2001.

In addition, Klug & Smith has union relationships for work on the Project with the Laborers, Carpenters (including Millwrights) and the Cement Finishers. Klug & Smith is self-performing with its employees approximately 50% of the direct construction labor work on the Project. In addition to standard subcontracts (i.e. painting, electrical, etc.), Klug & Smith subcontracted the following work on the Project: the erection of two pre-engineered buildings. The subcontracted work amounts to $265,000 of the Klug & Smith's contract for work on the Project. This aspect of the Project was subcontracted to Precision Structures (Germantown, WI). Precision Structures performed the subcontracted work which included crane rental, the crane operator and a crew of six or seven steel erectors and highlift operator(s). Precision Structures is not signatory to a collective bargaining agreement with Local 139.

Multi-Employer Collective Bargaining Historically. The ACEA and/or the AGC have negotiated collective bargaining agreements with the Union on a multi-employer basis since at least the 1960s. In each of these collective bargaining negotiations, the associations have received authorizations from contractors and constituent contractor associations. The authorizations make the associations the collective bargaining representative for the affiliated contractors for the upcoming negotiations and during the term of the collective bargaining agreement that is subsequently negotiated.

Upon receipt of authorizations, the AGC and the ACEA compile lists of contractors or constituent contractor associations from which each has received a collective bargaining authorization. The lists are then presented to the Union before collective bargaining negotiations begin. The list given to the Union by the associations in 1999 did not include Klug & Smith.

A labor contract negotiated by the associations and the Union is binding on the contractors and constituent contractor associations whose bargaining authority the AGC and the ACEA hold. Regarding contract matters arising during the contract term, the ACEA is the contractor representative for labor contract administration purposes.

This method for setting up the multi-employer collective bargaining relationship for each labor contract in the Greater Milwaukee area has been used for over 30 years. At least ten (10) rounds of collective bargaining with the Union have been set up and conducted on this basis in the Greater Milwaukee Area. Collective bargaining negotiations structured in this way have also been engaged in by the AGC and/or ACEA with the Laborers, the Carpenters, the Cement Finishers, the Bricklayers and the Iron Workers.

The contractors and constituent contractor associations whose bargaining authority the ACEA and the AGC hold sometimes change from one collective bargaining negotiations and labor agreement to another. New names are added to the list. Lists often have not included contractors for whom the associations previously held bargaining authority. The pending grievances are the first instance in which the Union has argued a contractor remains bound after bargaining authority was denied to the associations and a list was exchanged which omitted the name of the contractor in question.

Independent Signatory Contractors. Contractors can agree to be bound by the multi-employer collective bargaining agreement(s) that have been negotiated with the construction trades in the Greater Milwaukee Area. A contractor so bound is called an independent signatory contractor. Klug & Smith has never been an independent signatory to any of the Union's collective bargaining agreements for the Greater Milwaukee area, including the collective bargaining agreement.

Klug & Smith's Relationship With the Union. Klug & Smith has been bound by the Union's multi-employer collective bargaining agreement for the Greater Milwaukee Area through a succession of collective bargaining authorizations that it gave over the years. First Klug & Smith gave its

bargaining authorizations to the ACEA. Later, its bargaining authorizations were given to the AGC, including in 1996. Prior to 1989, Klug & Smith had a Section 8(f) pre-hire relationship with the Union. Following the voluntary recognition on November 1, 1989, the Union and Klug & Smith have had a Section 9(a) collective bargaining relationship.

The 1996 Bargaining Authorization. In 1996, Klug & Smith authorized the AGC to act on its behalf to negotiate the successor contract to the 1993-1996 collective bargaining agreement with the Union. The 1993-1996 collective bargaining agreement was to expire as of May 31, 1996. Early negotiations were conducted to roll that agreement over with certain agreed upon economic changes. The AGC and the ACEA received contractor authorizations prior to beginning the 1996 negotiations. With regard to the Union, Klug & Smith gave its bargaining authority to the AGC in early 1996. Therefore, Klug & Smith was governed by the multi-employer collective bargaining agreement that was negotiated in 1996.

The 1999 Contract Termination Notices. The 1996-1999 collective bargaining agreement between the associations and the Union had an expiration date of May 31, 1999. That collective bargaining agreement contained a notice of termination provision at Section 3.1 which required notice of at least ninety (90) days prior to contract expiration in order for the collective bargaining agreement to terminate rather than be renewed automatically at expiration.

The Union gave the following notice timely to the ACEA and the ACEA on or about February 19, 1999:

> Re: Reopener Notice – Master Building Agreement Area I
>
> Dear Mr. Hayden:
>
> This will advise you the International Union of Operating Engineers, Local No. 139 is reopening the above-referenced collective bargaining agreement with your Association on its anniversary date, May 31, 1999.
>
> The representatives of Local No. 139 would like to meet prior to the anniversary date for the purpose of negotiating a successor agreement.

> Please advise us of a date and place that will likely be convenient and mutually agreeable to meet.

The notice the Union gave was to the associations for the contractors and constituent contractor associations the ACEA and the AGC had represented in connection with the 1996-1999 collective bargaining agreement.

The ACEA and the AGC gave the following notice to the Union on February 22, 1999:

> Re: Notice Regarding the 1996-1999 Area I Building Collective Bargaining Agreement ("CBA")
>
> Dear Mr. Miller:
>
> This notice is being given on behalf of the Allied Construction Employers Association, Inc. and the Associated General Contractors of Greater Milwaukee, Inc. (collectively the Associations). This notice is being given by the Associations and on behalf of contractors or constituent groups whose bargaining authority the Associations held for the term of the 1996-1999 CBA.
>
> Notice is hereby given by the Associations of the intention for the CBA to terminate or be amended when it expires on May 31, 1999. This notice is given pursuant to the provisions of Section 3.1 of the CBA. Concurrent with this notice, the Associations are also giving the required statutory notice to the Federal Mediation and Conciliation Service and the Wisconsin Employment Relations Commission.
>
> We look forward to successful bargaining negotiations this spring. We will be in contact with you in the next few weeks to develop a schedule of meetings to begin the collective bargaining process.
>
> Very truly yours,
>
> Allied Construction Employers Association

No Bargaining Authorization in 1999. Klug & Smith was asked by the associations whether or not it would give its bargaining authorization to either of the associations for the 1999 collective bargaining negotiations with the Union. On January 20, 1999, Klug & Smith declined to give either association its bargaining authority for the 1999 collective bargaining negotiations with the Union. Klug & Smith has never independently given Local 139 notice of its intent to withdraw from the bargaining associations. Before collective bargaining negotiations began in 1999 Dick Platt, chair of the bargaining committee for the contractors, sent a letter to the Unions identifying the contractors who had given bargaining authority to the associations.

The 1999 Multi-Employer Collective Bargaining Negotiations. The multi-employer negotiations with the Union did not produce a successor labor agreement in 1999. The Union called a strike on or about around June 23, 1999; the strike lasted a couple of weeks and ended in July 1999. The collective bargaining negotiations were concluded around June or July of 2000. The agreed upon collective bargaining agreement has the term of June 1, 2000 through May 31, 2003.

At no time during the 1999-2000 multi-employer collective bargaining negotiations was the status of Klug & Smith discussed by the associations or the Union. The Union asked no questions of contractor representatives about the status of Klug & Smith. During negotiations, Mr. Platt confirmed the Union's receipt of the contractor list. The associations reiterated at the collective bargaining table that they were representing the contractors and constituent contractor associations named in Mr. Platt's letter.

Interim Agreements. In connection with the strike in June, 1999, the Union approached contractors who were currently performing work in Area I and asked them to sign Interim Agreements. The Union used two types of Interim Agreements in that time frame. One was for association-represented contractors. The other was for independent signatory contractors. Klug & Smith did not sign an Interim Agreement in 1999 and has not done so since that time. Klug & Smith never requested that Local 139 bargain a successor contract with Klug & Smith. Similarly, Local 139 has never requested that Klug & Smith bargain a successor contract with Local 139.

The Union has not approached Klug & Smith as an independent signatory seeking to bargain a labor contract with it in 1999, 2000 or 2001. After the multi-employer collective bargaining agreement was signed in the summer of 2000, the Union began contacting many independent signatory

contractors. The purpose of these contacts was to obtain the agreement of the independent signatory to be bound by the terms of the multi-employer collective bargaining agreement. No such contact was made with Klug & Smith. Local 139 was not aware of any work being performed by Klug & Smith in Area I at that time.

Local 139 maintains a book in the regular course of its business that lists all the signatory contractors that work in Area I. The book is updated frequently and used by Local 139 staff and business representatives to determine if a particular contractor is signatory with the Union. The report from September 15, 2000 lists Klug & Smith as a signatory contractor that performs work in Area I.

The Union's Website Contractor Listing. After the issue the first grievance addresses surfaced, the Executive Vice President of the ACEA went onto the Union's website to check the contractor listing contained there. This was done on November 2, 2000. . . .Klug & Smith does not appear in the alphabetical listing of contractors.

Cecil Argue, President of International Union of Operating Engineers, Local 139, maintains the website. According to Mr. Argue, the Union developed and maintains the site for three reasons. First, the website is intended to educate individuals and contractors about the benefits of trade unionism. Second, the website is intended to identify work opportunities, for members and signatory contractors, throughout the state of Wisconsin. Finally, the website lists the names and contact information of signatory contractors who wish to be included on the website. The Union offers to list the names and contact information of interested signatory contractors, in part, as a marketing tool for the contractors. Union members benefit when signatory contractors are awarded jobs; the Union offers signatory contractors an opportunity to be listed on the website as a means of helping signatory contractors secure more work.

The Union developed the web site in late 1999. The Union built its database of signatory contractors by sending out a four-page data form to all signatory contractors who had submitted remittance forms since 1991. Contractors who wanted to be listed on the "Contractor database" were instructed to complete the form and return it to the Union. The Union then inputted the information provided by the contractors onto the "Contractor database." The Union only inputted information provided by the contractor; the Union did not input any other information.

The Union mailed the first batch of data forms to contractors on or about October 19, 1999. The Union sent a data form to Klug & Smith. Klug & Smith did not return its data form to the Union after the first mailing. On or about January 6, 2001, the Union did a second mailing and sent data form to all contractors who did not respond to the first mailing. Since Klug & Smith did not respond to the first mailing, the Union sent Klug & Smith another form card in its second mailing. Klug & Smith did not respond to the second mailing. The Union did not list a contractor on its website unless the contractor submitted a completed form card evidencing its desire to be listed on the web site. Klug & Smith was not listed on the website because it never submitted a completed data form.

A majority of the signatory contractors in the state of Wisconsin are not listed on the website. There are roughly 1,800 contractors signatory to contracts with Local 139. There are currently approximately 300 contractors listed on the "Contractor database." Some of these larger signatory contractors not included on the "Contractor data base" include: Arby Construction, Gustafson, Hoffman Construction, Millestone Materials, Vulcan Materials, and Dawes Crane.

RELEVANT PROVISIONS OF THE 2000-2003 COLLECTIVE BARGAINING AGREEMENT

Article I – Master Building Agreement

This Master Agreement, made and entered into this 1st day of June, 2000, by and between the Allied Construction Employers Association, Inc. and the Associated General Contractors of Greater Milwaukee, Inc., hereinafter called the "Associations", for and on behalf of those persons, firms or corporations, who have authorized the Associations to negotiate and conclude a labor agreement on their behalf, herein called the "Contractor", and International Union of Operating Engineers, Local No. 139, hereinafter called the "Union".

. . .

Article III – Period of Agreement

Section 3.1. Period of Agreement: This Agreement shall continue in full force and effect until May 31, 2003, and thereafter, and shall be subject to amendment or termination only if either party notifies the other party in writing of its desire to amend or terminate the same, not more than one hundred and

twenty (120) days, but not less than ninety (90) days prior to May 31, 2003, or of the expiration date of any subsequent Agreement.

Article IV – Subcontracting

Section 4.1. Union Subcontractor: The contractor agrees that, when subletting or contracting out work covered by this Agreement which is to be performed within the geographical coverage of this Agreement, at the site of the construction, alteration, painting, or repair of a highway, building structure or other work, they will sublet or contract out such work only to a subcontractor who is signed to this Master Agreement.

. . .

RELEVANT PROVISIONS OF THE 1996-1999 COLLECTIVE BARGAINING AGREEMENT

AREA I
MASTER BUILDING AGREEMENT

THIS MASTER AGREEMENT, made and entered into this 1st day of June, 1996, by and between the Allied Construction Employers Associatoin, Inc., and the Associated General Contractors of Greater Milwaukee, Inc., hereinafter called the "Associations" for and on behalf of those persons, firms or corporations who have authorized the Associations to negotiate and conclude a Labor Agreement on their behalf, herein called the "Contractor", and International Union of Operating Engineers, Local No. 139, hereinafter called the "Union."

WITNESSETH:

That the parties hereto, for and in consideration of the mutual promises and obligations herein contained, agree to and with each other as follows:

. . .

Article III. Period of Agreement.

Section 3.1. Period of Agreement: This Agreement shall continue in full force and effect until May 31, 1999, and thereafter, and shall be subject to amendment or termination only if either party notifies the other party in writing

of its desire to amend or terminate the same not more than one hundred and twenty (120) days, but not less than ninety (90) days prior to May 31, 1999, or of the expiration date of any subsequent Agreement.

POSITIONS OF THE PARTIES

The Union contends that it is axiomatic that when clear and specific language in a labor agreement is at issue, the federal courts and arbitrators uniformly adhere to the strict interpretation of such language. The Union contends that Klug & Smith is bound to the parties' 2000-2003 collective bargaining agreement. On November 1, 1989, Local 139 and Klug & Smith executed 2 Section 9(a) recognition agreements, or what is commonly referred to as "short-form memoranda of agreements". That agreement extended recognition to the Union. By signing the recognition agreements, the Union contends that Klug & Smith acknowledged that Local 139 was the Section 9(a) representative of bargaining unit employees and further agreed to comply with the terms of Local 139's Area I Master Building Agreement. The Union contends that Klug & Smith did not terminate its contractual relationship with Local 139 in the manner specified in the parties' collective bargaining agreement, therefore the parties' 1996-1999 collective bargaining agreement "rolled over" by virtue of the so-called "evergreen clause". Second, regardless of whether Klug & Smith terminated its relationship with Local 150, Klug & Smith adopted the 2000-2003 collective bargaining agreement through its subsequent conduct.

The Union contends that Klug & Smith failed to properly terminate its contractual relationship with Local 139. The 1996-1999 Area I Master Agreement contained a so-called "evergreen clause". An automatic renewal or "evergreen clause" typically provides that if the parties to a collective bargaining contract fail to give written notice of their intent to terminate or renegotiate said contract to each other by a deadline, the contract will renew itself without change. Such clauses are to be strictly construed. Thus, a contract may only be terminated in the manner specified within that contract.

The termination/evergreen clause in the parties' 1996-1999 agreement provided:

> "This Agreement shall continue in full force and effect until May 31, 1999, and thereafter, and shall be subject to amendment or termination only if either party notifies the other party in writing of its desire to amend or terminate the same not more than one hundred and twenty (120) days, but not less than ninety (90) days prior to May 31, 1999, or of the expiration date of any subsequent agreement."

Here, the Area I Master Agreement sets forth simple, clear language for termination of the Area I Master Agreement, i.e., send written notice to the other party not more than one

hundred and twenty (120) days but not less than ninety (90) days prior to the expiration date to terminate the 1996-1999 Area I Master Agreement. However, it is undisputed that at no time did the Company do so.

There is no evidence in the record to suggest that Klug & Smith gave Local 139 timely written notice of its intent to terminate the collective bargaining agreement. Absent timely written notice to Local 139, Section 3.1 of the parties' collective agreement provided that the agreement would remain in full force and effect beyond May 31, 1999.

In this case, Klug & Smith signed the recognition agreement in its individual corporate capacity, without the aid of any multi-employer bargaining association, and never terminated the agreement in the manner specified by the Area I agreement. Thus, Klug & Smith's affiliation with ACEA has no bearing on issues of contract formation and termination in this case. In other words, Klug & Smith could not have terminated the parties' collective bargaining agreement by merely withdrawing from ACEA.

Moreover, ACEA's timely notice of termination of the Area I agreement is void with respect to Klug & Smith because Klug & Smith withdrew from ACEA prior to the date on which the multi-employer association provided Local 139 with timely notice of termination. On January 20, 1999, Klug & Smith withdrew from the multi-employer association. One month after Klug & Smith's withdrawal, on February 22, 1999, the ACEA gave its notice of termination to the Union. Thus, because Klug & Smith no longer belonged to ACEA as of February 22, 1999, ACEA's notice of termination did not act to terminate Klug & Smith's contract with Local 139. In short, the 1996-1999 Area I Master Agreement remains in full force and effect because Klug & Smith did not terminate the agreement in a proper fashion.

The Union contends that Klug & Smith adopted the 2000-2003 Area I Master Agreement by its subsequent conduct. On October 7, 1999, ten months after it withdrew from the Association, Jim J. Fuibs, Chief Financial Officer of Klug & Smith, signed and submitted a monthly remittance report which incorporated by reference the Area I Master Agreement. Thus, assuming it terminated the contract in January of 1999, Klug & Smith readopted the contract in October of 1999, when its Chief Financial Officer signed a monthly remittance report. The continuous submission of remittance reports to Local 139 through June of 2001, constituted acceptance of the Area I Agreement. The Union cites authority for the proposition that it is "elementary contract law that incorporation by reference of clauses which are in existence and properly identified has precisely the same legal effect as if the clauses were set forth explicitly in the body of the contract." In this case, the contribution form incorporated by reference the Area I Master Agreement. Specifically, the clause provided:

> "I (we) agree to be bound by all of the provisions (including making payments) relating to pension, health, vacation, and educational funds, as contained in the

> respective areas labor agreements covering employees in the trade for which this report is made, for our (my) employees in such trade, for the duration of such labor agreements, and, further, agree to be bound by the applicable trust agreements."

The Union contends that by repeatedly signing and resubmitting forms containing the above clause Klug & Smith adopted by reference the Area I Agreement. The Union contends that the two individuals who signed the monthly remittance reports, operating under principles of corporate law, had authority to bind Klug & Smith.

The Union contends that Klug & Smith adopted the Area I Agreement by merely submitting the monthly remittance reports. The Union contends that the NLRB has held that by paying fringe benefit contributions per the terms of the collective bargaining agreement, the Employer is bound to the agreement in its entirety. In order to comply with its obligations under the collective bargaining agreement and applicable trust agreements, Klug & Smith was required under those documents to submit monthly remittance reports through June 5, 2001, and indicate "inactive" on each report.

The Union contends that it has not waived its right to enforce the agreement with Klug & Smith. To establish that a union has waived its statutory right to have a collective bargaining agreement's terms fully honored, "there must be a conscious relinquishment by the Union clearly intended and expressed to give up the rights." The Union cites authority for the proposition that a waiver must be clear and unmistakable. The Union contends that waiver does not apply in the instant case because the Union had no knowledge of any employer's alleged violation. The evidence demonstrates that Local 139 at no time was aware of any alleged violations of the contract by Klug & Smith prior to the instant grievance. The Employer presented no evidence that it ever made Local 139 aware that the Employer claimed to no longer be bound to its agreement with Local 139, let alone that Local 139 "consciously relinquished" its right to enforce its contract with Local 139. Rather, once Local 139 became aware of the violation, it immediately filed a grievance to enforce the contract.

It is undisputed that Local 139 never requested that the Employer execute the non-association member interim agreement. Further, it is also clear that Local 139 was not aware of any work being performed by Klug & Smith in Area I at that time. Accordingly, the interim agreement has no effect on Local 139's relationship with this employer. Further, the Union had consistently kept Klug & Smith as an active contractor in its various internal records.

The Union's contact with Klug & Smith in October, 1999, again in January, 2001 soliciting Klug & Smith's permission to place them on their website is significant in that the Union continued to treat them as a signatory contractor from 1999 to the present.

It is the position of the Company that the grievances are not arbitrable. It could not be more clear that the 2000-2003 collective bargaining agreement contains no provision which addresses the formation, continuation, or disillusion of the Area I multi-employer bargaining group. No provision of the collective bargaining agreement says anything about the rules governing how and when contractors may join or leave the Area I multi-employer bargaining group. This complete contractual silence means the issue before the Arbitrator is not a substantively arbitrable dispute.

The Company argues that the Union ignores the contract termination notices that were given by the Union and the associations to each other. In addition, the Union's argument ignores the long-standing practice in Area I that a new multi-employer bargaining group is created for each round of collective bargaining with each of the six Area I construction unions. Each new multi-employer bargaining group consists only of those contractors whose names were given to a particular union by the associations as collective bargaining began.

The contract explicitly defines the specific type of disputes which the parties have agreed the contractual grievance procedure should resolve. Contractually-covered matters do not include the questions concerning multi-employer bargaining group formation, or contractor withdrawal.

In the view of the Company, where the grievance/arbitration language is limiting, the Arbitrator does not have substantive jurisdiction over issues not specifically committed to arbitration by the collective bargaining agreement. The complete silence in the contract as to Klug & Smith's participation in the Area I multi-employer relationship coupled with the narrow language in the collective bargaining agreement defining a grievance require the arbitrator to deny the grievances. The language in this collective bargaining agreement specifically limits the arbitrator's jurisdiction to interpreting or applying "provisions of the Agreement."

The Employer contends that Klug & Smith withdrew from the new multi-employer bargaining group. The Union erroneously argues that a contractor must itself withdraw from the multi-employer bargaining unit by giving written notice to the Union. Notwithstanding that a 40-year plus practice completely contradicts this contention, the contention also fails because established NLRB caselaw is to the contrary.

The Employer contends that the normal NLRB rule concerning the formation of a multi-employer bargaining unit is that a new bargaining unit would only include the contractors whose names were given to the Union before negotiations began. The pre-negotiations exchange of contractor names is viewed as defining which contractors intend to be a part of the new multi-employer bargaining group. When a contractor list is given to a union before negotiations have begun, it names only the contractors who are to be included in the new multi-employer bargaining group (RETAIL ASSOCIATES, 120 NLRB 388 (1958)).

The omission of the name of a Section 9(a) contractor from the list exchanged with the union is dispositive under additional NLRB caselaw. When the union is notified prior to the commencement of negotiations, as it undisputedly was here, the unnamed 9(a) contractor is considered excluded from the new multi-employer bargaining group. The omission of the name of the contractor is considered a timely and complete written withdrawal of that contractor from the multi-employer bargaining unit. (PLUMBERS LOCAL UNION NO. 699, 318 NLRB 347 (1995)). Mr. Platt's list of named contractors placed the Union on notice that the associations only represented the named contractors and that unnamed contractors were not to be a part of the new multi-employer group.

The Company contends that Area I past practice precludes what the Union seeks through the grievances. Why Area I rules for multi-employer group bargaining should be changed now is not answered by the Union. Klug & Smith withdrew from this bargaining group in the same way that many other contractors have withdrawn from relationships with this and other Area I construction unions for over 40 years. This method for group bargaining formation and contractor withdrawal has been used in Area I by the associations, with the Union going back to the 1960's. This history involves at least 10 rounds of Area I collective bargaining with the Union, and thus 10 different multi-employer bargaining groups. The Union knew from past experience and the information received in 1999 that unnamed contractors were not part of the new multi-employer group.

The Company argues that submitting fringe benefit reports does not bind Klug & Smith to the 2000-2003 collective bargaining agreement. The Employer contends that the wording in the fringe benefit reports contains no agreement for a contributing contractor to be bound by any particular collective bargaining agreement. The Employer contends that the language printed on the fringe benefit reports contains only a limited agreement to be a party to "all of the provisions of the collective bargaining agreement. . .relating to pension, health, vacation and education funds. . ." By its terms, this is not a contractor commitment to be bound to the collective bargaining agreement as a whole or for purposes other than fringe benefit contributions.

The Employer contends that Klug & Smith has never expressed any intention to be bound through group bargaining to the area labor contract that was negotiated with the Union in 1999 and 2000.

The Employer describes the submission of the reports as a benign act. A clerical representative of Klug & Smith who did not participate in labor policy matters submitted the reports. The person who completed the reports neither knew about, nor participated in ongoing labor relations matters. The person simply received the forms from the funds, and returned the signed and dated forms to the funds.

The filing of fringe benefits reports began when Klug & Smith had Union-represented employees actually working for it. The last report which contained actual hours worked and contribution payments, was filed in October, 1998. This was before the 1996-1999 contract had expired. In filing subsequent reports, Klug & Smith simply continued to do what it had been previously contractually obligated to do each month.

The content of the "inactive" reports makes it clear that Klug & Smith was agreeing to nothing regarding employment terms and conditions. At first, the reports contained the work and contribution information associated with active employment. However, the reports on which the Union relies – those filed after September, 1998 – contain no information about any active or ongoing relationship or any contractually-covered work having been performed.

As a contractor in a Section 9(a) relationship with the Union, it could be argued that Klug & Smith had to file fringe benefit fund reports even after the 1996-1999 collective bargaining agreement expired. Such filings would simply be the fulfillment of an obligation relating to a mandatory subject of bargaining which continued after contract expiration. Since there was no bargaining with the Union in 1999, 2000 or 2001, Klug & Smith might very well have violated its bargaining duties by not filing the contribution reports since there was no impasse in the collective bargaining negotiations with the Union.

The Company contends that reports that were filed before expiration of the 1996-1999 collective bargaining agreement obviously show no intention to be bound by a subsequent successor labor contract. Similarly, the reports that were filed between mid-1999 and mid-2000 when there was no contractual agreement cannot show an intention to be bound by a non-existent and later agreed-to, agreement.

The Employer contends that the 2000-2003 collective bargaining agreement is void as to Klug & Smith. The Employer notes that Klug & Smith has had no ongoing relationship with the Union since at least September, 1998. That is when the last Union-represented employee actually worked for Klug & Smith. Under established NLRB case law, a labor contract, otherwise binding, is considered void if the bargaining unit has had no employees or only one employee for a sustained period of time.

DISCUSSION

The Union contends that Klug & Smith is bound to the 2000-2003 collective bargaining agreement. The Union argues that on November 1, 1989, Klug & Smith executed two 9(a) recognition agreements. The effect of that recognition was to acknowledge Local 139 as the Section 9(a) representative of those employees and to commit the company to comply with the Local 139 Area I Master Agreement. Among the contractual obligations was to be bound by successor agreements.

The Union goes on to argue that Klug & Smith failed to properly terminate its contractual relationship with Local 139. The Union argues that the 1996-1999 collective bargaining agreement has an evergreen clause which automatically renews the terms of that contract absent proper notice. The Union then points to Section 3.1 of the Agreement which provides, ". . .shall be subject to amendment or termination only if either party notifies the other party in writing of its desire to amend or terminate the same. . ." The Union contends that Klug & Smith never provided proper notification and so the 1996-1999 collective bargaining agreement rolls over.

Section 3.1 requires notification by a "party". Implicit in the Union's argument is that Klug & Smith is a "party" as that term is used under Section 3.1 of the collective bargaining agreement. My reading of the contract is to the contrary. The signatories to this contract are the Allied Construction Employers Association, the Associated General Contractors of Greater Milwaukee, and the International Union of Operating Engineers, Local No. 139. The preamble to the contract refers to these entities as "the parties". The essence of this multi-employer associational bargain is that various contractors have authorized the Contractors Associations to bargain on their behalf. The notice provision in the contract is a bargaining obligation. Here, the Association did give notice, as did the Union. There is no indication that any individual contractors provided parallel notification. The Union treats the notice provided by the Association as effective to all 1996-1999 contractors, other than Klug & Smith.

I believe that the Contractor Associations (Allied Construction Employers Association, Inc. and Associated General Contractors of Greater Milwaukee, Inc.) are the "parties" referenced in Section 3.1 of the Agreement.

The Union contends that Klug & Smith originally signed an individual agreement with Local 139. The Union goes on to argue that that agreement was never terminated. According to the Union, Klug & Smith's withdrawal from the Area I agreement cannot satisfy its 9(a) obligation. This argument ignores the fact that Klug & Smith joined the Employer Association and transferred its bargaining rights to that association. The Area I Master Building Agreement succeeded the 9(a) agreement between the parties. While the Company's recognition of the Union survived the transition, the contractual relationship and obligations became those provided under the Area I Agreement.

Klug & Smith's withdrawal from the Association raises two questions. (1), its recognition of Local 139, and (2), what if any collective bargaining obligations it owed. There was no effort to sign Klug & Smith to a successor 9(a) agreement. The Union does not argue, and there is no record basis to find, that Klug & Smith was somehow bound to a 9(a) agreement that preceded the Area I agreement. Under the applicable NLRB law, Klug & Smith's withdrawal from the Association was effective. Following withdrawal, it was not a

member of the Association and not bound by the successor agreement negotiated by the Association.

Even if the recognition survived withdrawal, there was no collective bargaining agreement in place following the expiration of the 1996-1999 Area I Agreement.

The Union contends that since Klug & Smith withdrew from the ACEA prior to the ACEA's termination notice to the Union, that the termination notice was not effective as to Klug & Smith. I disagree. Klug & Smith declined to provide the associations with bargaining authority for the successor agreement to the 1996-1999 collective bargaining agreement. Klug & Smith was covered by the terms of the 1996-1999 agreement through its expiration. The notice explicitly provides that it is submitted "on behalf of contractors or constituent groups whose bargaining authority the associations held for the term of the 1996-1999 CBA." That group included Klug & Smith.

The Union contends that Klug & Smith adopted the 2000-2003 Area Agreement by its subsequent actions. Local 139 provides a monthly remittance report form for pension and health benefit contributions to signatory employers. The employer is required to fill out the form indicating the names, hours worked and contributions of employees covered by the various funds. The Union contends that by signing and subsequently submitting on a monthly basis these forms the Company incorporated the Area standards agreement by reference. The printed form contains the following provision just above the signature line:

> "I (we) agree to be bound by all of the provisions (including making payments) relating to pension, health, vacation and education funds as contained in the respective Area's labor agreements covering employees in the trade for which this report is made, for our (my) employees in such trade, for the duration of such labor agreements and, further, agree to be bound by the applicable trust agreements."

The last remittance report which actually included the name of an employee, hours worked, and wages subject to benefit contributions, is dated October 12, 1998. Subsequent reports have no employee listed, no hours worked, no contribution made, and a box marked "inactive". Those reports were submitted on a monthly basis.

I do not believe that the submission of the remittance forms operates to incorporate the collective bargaining agreement by reference. The background of the Union's claim is that Klug & Smith withdrew from the multi-employer bargaining association. Klug & Smith did not enter into a subsequent 9(a) agreement with the Union, nor did it employ bargaining unit members for a period of years following the expiration of the 1996-1999 collective bargaining agreement. The Union contends that by signing the remittance report, the Company intended

to sign on to the Area I Agreement, which it had previously rejected. I find more plausible the Company contention that the submission of the inactive reports was a clerical task, carried on without labor relations oversight.

I am reluctant to conclude that by signing a pre-printed form the Company entered into a comprehensive collective bargaining arrangement with Local 139. I do not believe the language contained on the form to compel such a result. That language does not, read literally, incorporate the collective bargaining agreement as a whole. The language makes reference to specific "pension, health, vacation and education funds". From October of 1999 and thereafter, there are no employees on whose behalf contributions were made. I am unwilling to imply the existence of a comprehensive collective bargaining relationship from the execution of these monthly remittance reports.

It is my conclusion that Local 139 and Klug & Smith were not signatories to any collective bargaining agreement during the relevant period of the grievances.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 21st day of January, 2003.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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