BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OFFICE & PROFESSIONAL EMPLOYEES INTERNAIONAL UNION LOCAL NO. 9, AFL-CIO-CLC

and

IRON WORKERS UNION, LOCAL NO. 8 APPRENTICESHIP AND TRAINING FUND

Case 2
No. 63012
A-6094

Appearances:

Dawn Martin, Business Manager, and **Gary Nuber**, International Representative, Office & Professional Employees International Union, Local No. 9, AFL-CIO-CLC, appearing on behalf of the Union.

Matthew Robbins, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., appearing on behalf of the Employer Training Fund.

ARBITRATION AWARD

The Union and Employer (Training Fund) named above are parties to a collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear the grievance of Theresa Kowalski. The undersigned was appointed as arbitrator and held a hearing on February 24, 2004, in Milwaukee, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by April 22, 2004.

ISSUE

The parties did not stipulate to the framing of the issue. The Arbitrator finds that the issue is:

> Did the Employer, the Iron Workers Training Fund, violate the collective bargaining agreement by subcontracting clerical and bookkeeping work to Iron Workers, Local No. 8? If so, what is the appropriate remedy?

BACKGROUND

The Iron Workers Union, Local No. 8 Apprenticeship and Training Fund (called the Training Fund in this Award) is the Employer. It is an employee welfare benefit plan within the meaning of the Employment Retirement Income Security Act (ERISA) and is made up of union and contractor trustees. Through collective bargaining agreements, contractors contribute negotiated cents per hour contributions for employees who are working in order to provide for training programs through the Training Fund. Iron Workers Union, Local No. 8, is a separate entity, a labor organization. The training center is located next to the Union's hall, and the clerical employee is in the same building as Iron Workers Local 8. The Training Fund employed the Grievant for 35 hours a week in a clerical and bookkeeping position from September of 1998 to January 5, 2004. At that time, the position was reduced to 20 hours a week and subcontracted by the Training Fund to the Iron Workers Union, Local No. 8. The OPEIU represents both the Grievant in a collective bargaining agreement with the Training Fund and clerical employees working for Local No. 8. There are separate bargaining agreements between the OPEIU and the Training Fund and OPEIU and Local No. 8. The Grievant was offered the 20-hour position with Local No. 8 but refused to take that position and filed a grievance.

The Training Fund passed a resolution on October 9, 2003, that it would contract with the Iron Workers Local No. 8 for clerical services for 20 hours a week. The Grievant took medical leave during September and October of 2003 for surgery. She came back to work from medical leave on October 28th. She continued to work 35 hours a week. The Grievant found out about the change in her position while she was on a physician approved medical leave, and she believed that the change took place in retaliation for her use of medical leave. The Training Fund's Apprenticeship Coordinator, Gil Toslek, was aware of her medical problems.

The new position of 20 hours has mostly bookkeeping duties, and the new job description eliminated several of the duties that the Grievant had done. The Grievant understood that Toslek would be doing some of those duties. He did some of those duties while the Grievant was on medical leave.

The Grievant declined to take the position because of the loss of wages and benefits. She was also concerned that the Training Fund's resolution stated that either party could eliminate the position after a 30-day notice. The Grievant did not know what the work hours would be if she took the 20-hour position. Her location and desk would remain the same. Her supervision would also remain the same. The Grievant was given repeated extensions to decide to take the job. She notified the Training Fund that she did not agree to voluntarily reduce her hours to 20 per week, and that she was not resigning nor agreeing to the change in terms of employment. She was notified to vacate her office by the end of business on January 2, 2004. She notified James Jorgensen, Business Manager of Iron Workers Union, Local No. 8, that she was not going to vacate her office or resign her position with the Training Fund.

Jorgensen, in addition to being the Business Manager of Iron Workers Local 8, is also the Financial Secretary and a trustee of the Training Fund. Jorgensen noted that in 1995, the Training Fund was discussing the clerical hours. The minutes of a meeting in January of 1995, the trustees discussed having a part-time rather than a full-time position but took no action on it. Similarly, in May of 1995, the trustees discussed reducing the clerical hours to 25 hours a week but again took no action.

The number of hours for which employers made contributions declined each of the last four years. The hours in the year 2000 shows 1,676,892 hours. In the year 2001, the hours were 1,596,325. In the year 2002, the contribution hours were 1,411,541. In the year 2003, the contribution hours were 1,295,158. Jorgensen reviewed the number of apprentices and trainees, which declined since the Miller Park project in 2000. The number of apprentices in 2000 was 151, and only 55 in 2003. The number of trainees in 2000 was 52 and 20 in 2003. The trustees of the Training Fund reduced costs by having fewer instructors and reducing the Director's hours from 45 to 40. For the apprentice program, there were eight instructors with almost 18 students per class in 1999 and only five instructors by 2003 with 11 students per class.

Jorgensen has the overall responsibility for clerical employees. He noted that the Iron Workers Health Fund also subcontracts clerical work to a third party provider, although it had been done in house at one time. Jorgensen was part of the discussions about subcontracting the clerical work from the Training Fund to the Iron Workers Local 8. He testified that the reasons were based on several economic factors, such as the bad stock market with the money they had invested, the lack of man hours affecting the contributions coming into the fund, and the implementation of a new computer system which should reduce the Training Fund's work. In June of 2003, there was a discussion at a trustee meeting regarding the situation between Toslek and his secretarial support staff. Someone made a suggestion to eliminate the secretarial position due to the workplace environment between Toslek and the Grievant. The trustees voted at that time to eliminate the position with written input from legal counsel. In another meeting of trustees on October 6, 2003, a discussion took place regarding reducing the secretary's position to 20 hours a week. The trustees were advised to have a unanimous vote from the management side but not enough management trustees were present so a decision was made to have a special management meeting.

The Grievant was the only person in the bargaining unit between OPEIU and the Training Fund. The Training Fund had clerical staff for more than 30 years, during which the number of apprentices varied over the same period of time. When Jorgensen sought to fill the position, he contacted the Business Manager of OPEIU, Dawn Martin, to help find a person for the job.

THE PARTIES' POSITIONS

The Union

The Union states that the bargaining agreement has been silent on the issue of subcontracting for the last 30 years and neither party recollects any proposals about subcontracting. However, even when the Union has sought and failed to get language prohibiting subcontracting in negotiations, arbitrators have usually not inferred that the Employer is suddenly granted an unlimited right to subcontract. In the absence of subcontracting language, the Employer's right to subcontract is not unfettered but is balanced against the interests of the Union, its membership, and the integrity of the bargaining unit.

The balancing test considers 11 elements: (1) past practice; (2) justification; (3) effect on the union or bargaining unit; (4) effect on unit employees; (5) type of work involved; (6) availability of properly qualified employees; (7) availability of equipment and facilities; (8) regularity of subcontracting; (9) duration of subcontracted work; (10) unusual circumstances involved; (11) history of negotiations on the right to subcontract. Another possible standard for disapproving subcontracting is the fact of performance of the work on the company's premises.

Since the Employer offered only an economic rationale in its defense, it in not necessary to explore all the factors of the balancing test. However, the Union points out that there was no past practice allowing subcontracting, and the effect upon the bargaining unit was its total elimination. The work was normally done by the unit employee, she had the skills to perform the work, the equipment and facilities were available, and the work was done in the same office and at the same desk. Arbitrators have noted that the company must act reasonably and in good faith.

The Union asserts that the Employer's economic argument for subcontracting is a pretext. The Employer introduced documents that it had a 19 percent decline in the contributing hours received by the Fund, that there was a substantial decline in the number of apprentices and trainees in the program, and that the number of instructors and class sizes had been reduced. However, it neglected to introduce any documentation that it was suffering financially from those recent events. It did not show it was operating at some deficit level that threatened the future of the Fund. The Fund was implementing a modification to its rate for contributing hours that would increase its income. The Employer indicated that the subcontracting rate of $29.00/hour paid to Local 8 was the equivalent of its total cost to employ the Secretary/Bookkeeper. So where are the savings to the Employer which supposedly mandated the economic/business necessity?

The real reason was shown by the Board meeting minutes of June 2, 2003 (Union Ex. 23), which indicated that the Board acted to subcontract the Secretary/Bookkeeper position because of the workplace environment between Toslek and his secretarial support staff. Toslek

had threatened to quit unless Kowalski's position was eliminated. Subcontracting should not be allowed to be used as a weapon or as a substitute for good management. The Union submits that the Employer lied about its reason or rationale to subcontract the one and only position in the bargaining unit. Jorgenson lied when he stated that the reason for the subcontracting was economic. The Employer lied when it raised an objection to the Union's attempt to introduce evidence about the relationship between Toslek and Kowalski. The Employer knew of the problems with an unhealthy and conflict ridden work environment at the Fund, because it offered conflict management training to Toslek and Kowalski. It knew that Toslek refused to attend such training and threatened to quit if his Secretary/Bookkeeper was not somehow discharged. The meeting minutes indicated that the Board knew this.

The Union asks that the grievance be sustained and the Employer be ordered to reinstate the Grievant to her position at 35 hours per week and otherwise make her whole in every way.

The Employer

The Training Fund trustees have a fiduciary duty to use the assets of the Fund for the exclusive purpose of providing benefits to participants and they may pay only reasonable expenses. They may not use the assets to perpetuate a make-work position. The issue as a matter of law must be: did the Trustees act in a manner consistent with their fiduciary responsibilities? The answer is that clearly they did. The trustees had been considering whether there was any need for a full-time clerical employee for a number of years. Between 2000 and 2003, contributions to the Fund declined by almost 20 percent, which required the trustees to evaluate every aspect of the Fund. They looked at the declining number of apprentices being trained by the Fund. Further, Local 8 was upgrading the computer system, including the purchase of a new server which would fully integrate the Training Fund with Local 8. That would reduce the amount of work and it would be more efficient to have clerical work performed for the Fund by Local 8. The Employer argues that since the Fund contracted to have Local 8 perform the clerical functions, those functions have been done by a part-time employee on a 20-hour per week basis. That demonstrates that either the Grievant was unable to perform in an efficient way or there was not enough work for her to remain occupied.

The Employer notes that where a contract is silent on subcontracting, it is generally held that the right to subcontract is an adherent management right. The Union relied on Article XVIII in its grievance, and that article provides for notice and bargaining and severance pay in the event of a merger if jobs are eliminated. Article XIX provides that in the event of a merger, the successor entity would be bound by the agreement. Both of those articles show that the parties knew how to negotiate where there would be a change in the operations of the Employer that would effect employment. The merger article specifically contemplates that there will be circumstances where the jobs of employees will be eliminated. And while they knew how to negotiate with regard to such restructuring, they did not provide

for a notice of bargaining or severance pay with regard to subcontracting. The Employer argues that given that they knew how to negotiate restrictions on other forms of restructuring and did not do so with respect to subcontracting, the logical implication is that the parties did not intend to restrict the subcontracting. Therefore, Local 9 seeks to gain through arbitration what it did not gain through negotiations.

If the Arbitrator were to imply a restriction or add to the contract, that decision was made in good faith and was reasonable. The Fund's decision was without anti-union animus. The work was subcontracted to Local 8, which not only has a union contract covering its clerical employees, but a union contract with the same local union, OPEIU Local No. 9. In what other case has the arbitrator seen that the work was subcontracted to an employer with a contract with the same union? The conduct of the Fund was exemplary. Local 8 offered the Grievant a position covered by its Union contract. It may not have been for the wages and benefits she wanted, but there was no longer a need for a full-time position. At the request of Local 9, the Fund gave repeated extensions of time to let the Grievant reconsider her decision to not take the position – which went over three months.

While the Union implied that the decision was motivated by the Grievant's health problems, she had health problems for the entire period of her employment with the Fund. Local 8 wanted to have the Grievant as an employee. The Fund paid to the Grievant every benefit requested by Local 9. All of those facts show good faith and absence of anti-union animus of the Fund in this matter. By any standard, the decision here was reasonable.

DISCUSSION

As both parties recognize, in the absence of contract language restricting the right of the Employer to subcontract, arbitrators look at the decision to subcontract in terms of good faith, reasonableness and the justification for it. The Union correctly notes that there are commonly 11 factors to consider under a balancing test, although not every factor applies in every case. The factors that apply here are justification, effect on the union or bargaining unit, the effect on unit employees, and unusual circumstances. Woven into the balancing tests of these factors will be the reasonableness and good faith of the actions taken.

The Training Fund has offered an economic justification for its actions. It has demonstrated its economic decline and concerns about economy, due to declining contribution hours and fewer apprentices and trainees. Local 9 questions how it saved money by paying the $29.00/hour total costs to Local 8 for clerical work. Obviously, the reduction in hours provided the savings. And that is what the Grievant is really complaining about. Local 9 also believes that there is another motive – that it wanted to get rid of the Grievant. There is a bit of a smoking gun in Union Exhibit 23, where a resolution to the conflict between Toslek and the Grievant was considered at a trustee meeting in June of 2003, and one resolution was to eliminate the secretarial position. There are other trustee meetings showing that a reduction in the Grievant's work hours had been contemplated for several years. At best, Local 9 shows that there could have been a mixed motive. It is Local 9's burden here to show bad faith, and

it has not done so. On the other hand, the Training Fund has demonstrated that it exercised good faith in dealing with its economic problems. Under the balancing test, this factor weighs slightly in favor of the Employer Training Fund.

Regarding the effect on the union or bargaining unit, this is a very unusual case, because while one might claim that the whole bargaining unit of one person was wiped out by this action, thereby depriving the Union the benefit of the bargain. But the position subcontracted went right back to the **same union** – and to the **same employee.** Therefore, there is no intent to discriminate against the Union, Local 9, and no intent to displace a bargaining unit employee. The Grievant was offered the job and given every opportunity to take it. She decided not to take the job, presumably because of its reduction in hours and resulting loss of benefits. Thus, this factor weighs in favor of the Employer Training Fund.

As to the effect on the unit employee, the hours were cut from 35 to 20, affecting one person – the Grievant. The effect on her is more through the loss of benefits. This factor weighs in favor of the Union in the balancing test.

There are other unusual circumstances. The Grievant attempted to claim that her job was cut in hours and moved to Local 8 because of her use of medical benefits, but there is no proof on the record to show that. The Union also attempted to claim that the Grievant's work was subcontracted to Local 8 because she and her supervisor, Toslek, did not get along. While there appears to be some truth to that, even after the work was moved to Local 8, the Grievant was offered the position and the supervisor was still there. Jorgensen's letter of October 23, 2003, stated that if he intended to get rid of the Grievant, he would not have offered her a job with Local 8. The case is unusual in itself because the work was subcontracted to the same Union bringing the grievance.

The fact that the Grievant lost some of her regular hours does not in itself shift enough weight in a balancing test to overturn the decision to subcontract. On balance, the fact that the work went to the same union, the work was offered to the Grievant, and there is some justification for the action, convinces me that the subcontracting was reasonable, justified and done in good faith.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this 12th day of July, 2004.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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