BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OCONOMOWOC CITY EMPLOYEES UNION
LOCAL 1747, AFSCME, AFL-CIO

and

CITY OF OCONOMOWOC

Case 75
No. 63416
MA-12581

Appearances:

Mr. Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 727, Thiensville, Wisconsin 53092, appearing on behalf of the Union.

Mr. Ronald S. Stadler, Stadler & Centofanti, S.C., Attorneys at Law, 1025 Glen Oaks Lane, Suite 108, Mequon, Wisconsin 53092-0727, appearing on behalf of the Employer.

ARBITRATION AWARD

Oconomowoc City Employees Union, Local 1747, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Oconomowoc, hereinafter referred to as the Employer, are parties to a collective bargaining agreement, effective January 1, 2003 through December 31, 2005, that provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over subcontracting. Hearing on the matter was held in Oconomowoc, Wisconsin on June 7th, 2004. Post-hearing arguments and reply briefs were received by the Arbitrator by August 2nd, 2004. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties where unable to agree on the framing of the issue and agreed to leave framing of the issue to the Arbitrator. The Arbitrator frames the issue as follows:

"Did the Employer violate Article II, subsection h, when it subcontracted the removal of a tree and stump at Roosevelt Park?"

"If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

. . .

ARTICLE II – MANAGEMENT RIGHTS

2.01 – Rights. The Union recognizes that, except as hereinafter provided, the City has the right to manage and direct the work force. Such rights include, but are not limited to, the following:

. . .

h. To subcontract work, provided that jobs historically performed by members of the bargaining unit shall not be subcontracted, and further provided that no present employees laid off or suffer a reduction of hours as a result of such subcontracting.

. . .

ARTICLE XXII – GRIEVANCE PROCEDURE

. . .

22.02 – Arbitration. . . .In rendering his decision, the Arbitrator shall have no authority to add to, subtract from, or modify the provisions of this Agreement.

. . .

APPENDIX A

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JOB CLASSIFICATION	**2002**	**2003**	**2004**	**2005**
	1 Year	**1 Year**	**1 Year**	**1 Year**
Tree Trimmer	$19.53	$20.12	$20.73	$21.35
Laborer (Group 1-A)	$19.17	$19.76	$20.37	$20.99

BACKGROUND

During the course of the hearing in the instant matter the parties agreed to the following stipulations:

1) The grievance is timely.
2) Article II, subsection h, came into effect with the 1974-1975 collective bargaining agreement.
3) Article II, subsection h is a mandatory subject of bargaining.
4) The Arbitrator is to frame the issue.
5) The Employer has made contractual proposals to modify or delete Article II, subsection h, for the past twenty years.

The instant matter arose when the Union became aware the Employer was using a contractor to remove a tree and its stump at the Employer's Roosevelt Park. The contractor was hired to develop a trail head at the park. This included the installation of trails and a park shelter. In order to complete the project a tree had to be felled. The felling of trees is normally performed by bargaining unit members and when the Union became aware a contractor had performed this function the instant grievance was filed. A Tree Trimming job classification has been within the bargaining unit commencing with the first collective bargaining agreement in 1966. The Tree Trimming classification includes the duties of planting, removing, and trimming trees and ground foliage and requires the position's incumbent to be able to use a stump grinder. The classification is currently held by Jim Houk who testified at the hearing that tree trimming and stump removal are key functions of the position and are performed on a regular basis.

On January 12th, 1999, in resolving a grievance filed on September 10, 1998, the parties entered into the following agreement:

AGREEMENT

BETWEEN
CITY OF OCONOMOWOC AND
OCONOMOWOC CITY EMPLOYEES,
A.F.S.C.M.E. LOCAL 1747

In resolution of the grievance filed by Local 1747 on September 10, 1998 which addressed the City's subcontracting of tree trimming and tree removal, the parties admit the following:

1) The City violated the labor agreement when it hired Bark River Tree Service of Dousman to prune trees on September 16, 1997 and February 4, 1998. It also violated the labor agreement when it hired Miller Tree Care of Oconomowoc to remove trees in July and August of 1998.

2) The City and the Union agree that the pruning of trees and removal of trees both constitute work which has historically been performed by members of Local 1747.

3) The City will cease and desist from violating the labor agreement as it relates to bargaining unit work. Future instances of such violations shall include compensation to bargaining unit members who are impacted by such actions.

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For the City	For the Union
1-12-99	1-12-99
Date	Date

On July 7th, 2000, in resolving a grievance filed on May 4, 2000 over tree and stump removal, the parties entered the following agreement:

AGREEMENT
between
CITY OF OCONOMOWOC
and
OCONOMOWOC CITY EMPLOYEES
LOCAL 1747, AFSCME, AFL-CIO

In resolution of the grievance filed by Local 1747 on May 4, 2000 which addressed the City's subcontracting of stump grinding, the City and Union agree as follows:

1. The library parking lot project was included in the 2000 Streets Project approved by the City Council on May 2, 2000. The $26,000 project did not include costs related to tree removal, stump grinding and/or removal performed by Rocky's Tree Service on May 3, 2000 was an adjustment and correction to the original project proposal.

2. The grinding and/or removal of stumps both constitutes work which has historically been performed by members of Local 1747 where such work is related to operational needs (i.e. removal,, replacement, safety). Should the City violate the Labor Agreement as it relates to bargaining unit work, such violations shall include compensation to bargaining unit members who are harmed by such actions.

3. This Agreement shall be non-precedential as it may relate to the subcontracting of stump grinding and/or removal where it is included as part of a total project bid. In such case(s), each party reserves, without waiver or prejudice, all rights it may possess under law or Agreement.

FOR THE CITY		FOR THE UNION	
---------	7-5-00	----------	7-7-00
City Administrator	Date	President	Date
		----------	7-7-00
		Secretary	Date

The record demonstrates that on at least three occasions (Jt. Ex. 10, 11 and 12) the parties have entered into agreements that allowed the Employer to utilize bargaining unit members to perform non-traditional work and not create a work assignment that became work traditionally performed by the bargaining unit. The record also demonstrates that in certain large scale projects such as the Employer's Annual Sidewalk Project, even though there are certain assignments bargaining unit members can perform, a contractor performs all of the project's assignments.

During the past several years the Employer has hired contractors to perform major projects, including a Utility Headquarters Expansion (Employer Ex. 1) and a Fowler Park Shoreline Restoration (Employer Ex. 2). These projects included tree felling and stump removal performed by the contractor. Public Works Director George Langohn testified that a Dam project in calendar year 2001 included tree felling and stump removal by the contractor and a house razing project where two (2) trees were felled and removed by bargaining unit employees and two were felled and removed by the contractor. No grievances were filed by the Union concerning these subcontracted projects and the work the contractor performed.

UNION'S POSITION

The Union contends the language of Article II, subsection h, is clear and unambiguous. The Union argues the language is clear and straightforward. The Union acknowledges that there can be exceptions such as in cases in emergencies, when bargaining unit members could not perform the work or when there has been a mutual agreement between the parties. The Union avers this is not the situation in the instant matter. The Union argues the Employer is attempting to modify the unambiguous language by asserting there is a caveat that the language does not pertain to situations where the work is part of a larger project. The Union contends the parties have never made such an agreement and argues to amend the language to include such an exception would open the door to extensive subcontracting.

The Union asserts the work in question meets the definition of "historically performed." The Union acknowledges it has the burden to demonstrate the work in question meets the standard set forth in Article II, subsection h. The Union also acknowledges that there is no specific list, which identifies the jobs that have been historically performed by bargaining unit members. However, the Union argues the Employer is aware of the wide latitude of the language and has been careful not to expand functions that could fall under this broad definition. The Union point's out this is evidenced by the waivers signed by the Union concerning certain work (Jt. Ex. 10, 11 and 12). The Union also points out no waiver exists concerning the work of tree felling and stump removal.

The Union argues the job classification listed in the collective bargaining agreement, Tree Trimmer, the positions job description (Jt. Ex. 5), grievance resolutions (Jt. Ex. 7 and 13) and Houk's testimony unequivocally support a conclusion that the work of tree felling and stump removal are jobs historically performed by members of the bargaining unit. The Union stresses what stronger evidence can there be than two agreements signed by both parties clarifying that this specific work meets the criteria of Article II, subsection h.

The Union also argues there is no provision in the collective bargaining agreement to exclude work that is part of a larger project. The Union contends the instant matter is attempt on the part of the Employer to diminish the language of the collective bargaining agreement. The Union also asserts that the exception claimed by the Employer has never been agreed to by the Union. The Union also contends the Employer is attempting to circumvent the clear contract language. The Union argues the Employer may not like the language and this has been demonstrated by the Employer's repeated attempts to negotiate different terms. The Union asserts the Employer cannot unilaterally redefine what the understanding of the parties has been. The Union also point's out the Employer and the Employer alone determines what projects to contract out. The Union contends allowing the Employer the exception it seeks would open the door to add any work that has been historically performed by bargaining unit members.

The Union also argues the Arbitrator should not grant to the Employer what it could not obtain in bargaining. The Union point's out the Employer has for twenty (20) years been attempting to change the language since it lost the ruling declaring it a mandatory subject of bargaining.

The Union also contends there is no established practice that modifies this language. The Union argues evidence must demonstrate such a practice exists and the burden is on the seeker of the alleged practice to demonstrate there is an existing binding past practice. The Union argues that there has been no consistent practice. The Union contends there has been no mutuality. The Union also points out that all the projects where trees were felled and stumps removed there is no direct evidence the Union was aware that these tasks were being performed by the contractor. The Union avers no one from the Union knew contractors were performing work historically performed by bargaining unit members. The Union does acknowledge that the Annual Sidewalk Project involves task that can be performed by bargaining unit members but points out the Union has never viewed the annual repair of sidewalks as work historically performed by the bargaining unit. The Union also point's out the Employer and the Union did not have any discussions concerning any of the projects the Employer presented as evidence that contractors on large scale projects performed all of the work.

The Union also contends that the failure to grieve does not waive clear contract language. The Union argues the failure to grieve or to protest a past violation of clear contract language does not waive the right to grieve and protest future violations. The Union also argues that it was not aware of most or all of the incidents the Employer cited. The Union asserts that when it has become aware of violations it has grieved them and point's to the two (2) grievances over tree felling and stump removal to support its position.

The Union also contends there was no practical reason why the bargaining unit could not perform the work. The Union acknowledges there are instances when it is impractical for bargaining unit members to perform work, such as in emergencies or when employees work side by side with the contractor. The Union points out in the instant matter bargaining unit members could of felled the tree and removed the stump prior to the contractor's arrival to perform the remainder of the project.

The Union would have the Arbitrator sustain the grievance and direct the Employer to pay Houk and the qualified Park Laborer next in line for overtime three (3) hours overtime and direct the Employer to cease and desist from having subcontractors do work that has been historically performed by members of the bargaining unit.

EMPLOYER'S POSITION

The Employer contends that the fundamental issue herein is whether the Employer must analyze every large-scale project to determine whether any aspect of the project has been historically performed by members of the bargaining unit. The Employer contends it has not done so in the past and when it did not do so for the Roosevelt Park project it did not violate the collective bargaining agreement when the contractor felled a tree. The Employer does not dispute that the contractor felled the tree. The Employer does not dispute that, generally, the felling of trees is ordinarily work that has historically been performed by the bargaining unit. The Employer also does not dispute that the bargaining unit was capable of felling the tree. The Employer argues that were the felling of a tree was within the scope of a large-scale project the parties have not treated that work as bargaining unit work.

In support of its position the Employer points to the Fowler Lake Dam project, City Utilities project, a library project and a Utilities pump station project. The Employer also argues that this is not limited to the felling of trees. The Employer argues that a contractor is responsible for all aspects of the project, regardless of whether they included job tasks that the bargaining unit members have historically performed in the past. The Employer points out Union witnesses did not dispute that contractors have planted trees, graded soils, prepared soils for planting of flowers and grass, planted flowers, planted shrubs, laid sod, and mulched flower beds. The Employer notes these are all tasks that have historically been performed by bargaining unit members and the Union has never grieved these matters.

The Employer contends that because the parties have a long-standing past practice of not separating bargaining unit work out of large-scale projects there has been no violation of the contract. The Employer asserts the Union has failed to demonstrate that Employer violated the collective bargaining agreement when the Employer allowed the contractor to fell a tree at the Roosevelt Park project. The Employer does not dispute the collective bargaining agreement is unambiguous in addressing the issue of whether the Employer can use contractors to replace bargaining unit members on day to day activities, however, the Employer argues the collective bargaining agreement does not address situations where the Employer has decided to use a contractor to manage and complete a large-scale project. The Employer argues the Arbitrator can rely on past practice to give meaning to the parties' complete agreement.

The Employer asserts that when a practice has been unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time there is a binding practice. The Employer asserts in the instant matter the Union and the Employer have always engaged in a practice of allowing a contractor to perform all of the work on the project, regardless of whether some individual tasks have been historically performed by bargaining unit members. The Employer also argues the Union's witnesses who testified they were unaware the contractors were felling trees does not negate the past practice. The witnesses were aware that contractors

performed other tasks that were historically performed by bargaining unit members. The Employer argues the Union can not claim it was unaware of these tasks and argue it should not be extended to tree felling. The Employer concludes the parties practice concerning large-scale projects is broad enough to encompass all activities within the scope of a large-scale project including tree felling.

The Employer also asserts that although union members disclaimed knowledge of felling trees on large-scale projects the Arbitrator should presume they had knowledge of it. The Employer points to Director of Public Works George Langohr's testimony that a library parking lot project included the felling of several trees by the contractor. The Employer point's out the Union did not grieve the felling of the trees but did grieve the grinding of the stumps. The contract for the library parking lot project did not include stump grinding and another contractor was brought in to perform the task. The Union did grieve the fact another contractor was used to grind the stumps but it did not grieve the felling of the trees. The Employer asserts that if the Union knew of the stumps it knew of the felling of the trees. The Employer also asserts the Union claim it was unaware of other trees being felled on other projects ignores the fact the work was clearly visible. The Employer also points to the testimony of Waste Water Operations Manager Tom Steinbach that during the Northside Interceptor project a contractor felled dozens of trees throughout the City of Oconomowoc. The Employer argues it would be impossible for bargaining unit members not to notice this work was done.

The Employer would have the Arbitrator deny the grievance.

UNION'S REPLY BRIEF

The Union contends the Employer assertion that the unambiguous language of Article II, subsection h, is only for one kind of subcontracting is without merit. The Union argues to accept the Employer's position would render the language meaningless. The Union reasserts the Employer has attempted to negotiate changes in the subcontracting language and has failed to obtain them. The Union also argues that there are no gaps in the language that need to be filled. The Union point's out the Employer has conceded that the work in question is historically performed by bargaining unit members.

The Union also contends the Employer has failed to demonstrate that a past practice existed. The Union argues that at most a mixed practice concerning the work of contractors was demonstrated by the Employer. The Union also argues there was no agreement by the parties to modify the unambiguous language. The Union points out that the settlement of the library parking lot grievance (Jt. Ex. 13) demonstrates that the Union did not agree that work performed by a contractor as a part of a large scale project was a practice accepted by the Union. The Union also points out the Union President Tony Kluz testified that bargaining unit members cut down the trees on the Library project and Director of Public Works Langohr acknowledged under cross examination bargaining unit members could have cut down the trees.

The Union also asserts the Employer presented no evidence that would question the credibility of the Union's witnesses that they had no knowledge of trees being removed in various projects. The Union argues the Employer did not attempt to impeach their testimony but now claims that the Union was obviously aware of tree removal on various projects. The Union points out the tree removal occurred in locations were bargaining unit members were not working and there is no evidence tree removal occurred in the presence of bargaining unit members. The Union argues that if no bargaining unit member saw the tree removed, and, once removed, people may not even realize that the tree was removed.

The Union concludes that there is no consistent practice where subcontractors exclusively work on large scale projects.

EMPLOYER'S REPLY BRIEF

The Employer argues the Union cannot simply ignore the parties' long-standing practice of not separating bargaining unit work out of large scale projects. The Employer contends it is appropriate to look to the parties' past practice to give meaning to the collective bargaining agreement. The Employer acknowledges that the general rule in interpretation of contract language that past practice should not be considered in the face of clear and unambiguous language. However, the Employer asserts the instant matter concerns a specific type of situation that the collective bargaining agreement does not address. The Employer contends in such cases it is appropriate to look at the parties' past practice.

The Employer asserts that the parties' have a past practice that contractors can perform any job within a large scale project, regardless of whether the bargaining unit has performed those jobs for operational needs. The Employer points out the Union acknowledged bargaining unit members have worked side by side with contractors on large scale projects and has not grieved those matters. The Employer avers that it does not contend contractors' work exclusively on large scale projects. The Employer asserts that its position has always been contractors can perform any task on a large scale project.

The Employer also asserts the Union acknowledgement that bargaining unit members have worked side by side with contractors is significant. The Employer further asserts the Union acknowledgement that the annual sidewalk repair projects are exclusively performed by the contractor is also significant. The Employer contends these acknowledgements demonstrate an admission to the existence of the practice that the Employer has used contractors to do bargaining unit work on large scale projects. The Employer argues that the Union cannot claim that in one instance the language is clear and unambiguous and past practice conflicts with it and in another instance allow the practice to stand.

The Employer also argues that it would have been impossible for the Union to be unaware that tree felling occurred at the Fowler Lake Dam, the Utilities expansion, the pump station upgrade or the Northside Interceptor projects. The Employer reasserts it has never analyzed large scale projects to determine whether tasks could be performed by bargaining unit members. The Employer points out the felling of trees is but one task and the fact the Employer has never been required to break out other bargaining unit work demonstrates that it is not required to do so for the felling of a tree on a large scale project.

The Employer also argues that the two grievance settlements do not support the Union's position. The Employer argues that the first dealt with a tree that was part of operational needs and the second was a tree that not was a not part of the original large scale project. The Employer argues the settlement of the May 4, 2000 grievance (Jt. Ex. 13) demonstrates the parties have long distinguished between daily operational activities and large scale projects.

The Employer also argues the bargaining history argument raised by the Union does not alter the Employer's argument that the Employer is merely maintaining the long-standing practice the parties have created over the years. The Employer also argues it would not be practical to look at each large scale project and remove those tasks traditionally performed by bargaining unit members.

DISCUSSION

A careful review of Article II, subsection h, demonstrates that the Employer is barred from subcontracting work that is historically performed by bargaining unit members. This language is clear and unambiguous. Work historically performed by bargaining unit members cannot be subcontracted. Herein there is no dispute that tree felling and stump removal are work that has been historically performed by bargaining unit members. The record also demonstrates that when the Employer desires to have members of the bargaining unit perform work and the Employer does not want the work to become apart of work historically performed by the bargaining unit members it has entered into agreements with the Union not to make such work assignments a precedent. The record demonstrates three (3) such agreements entered into by the parties. There is no evidence in the record of what occurs when the Employer desires such a waiver and the Union refuses to enter into such an agreement.

The Employer, in acknowledging that it can not subcontract work historically performed by bargaining unit members, argues this language only applies to general operations and that when it contracts for large scale projects the contractor has performed all the tasks of the project, even those tasks historically performed by bargaining unit members. The Employer has claimed that this has created a past practice that is unequivocal, has been clearly enunciated and acted upon, and is readily ascertainable over a reasonable period of time. However, the record also demonstrates that the instant matter is not the first instance where the Union has grieved the

Employer's use of contractors. The Union grieved a similar matter on September 10, 1998 and again on May 4, 2000. In both instances the Employer had contracted out work historically performed by the Tree Trimmer. In both instances the matter was resolved voluntarily. In both instances the Employer acknowledged it had violated the collective bargaining agreements prohibition on subcontracting of work historically performed by bargaining unit members. In the first the Employer acknowledged the pruning and removal of trees constituted work historically performed by bargaining unit members. In the second the Employer acknowledged the grinding and removal of stumps constituted work historically performed by bargaining unit members. However, the May 4, 2000 grievance settlement specifically states there is no agreement between the parties on whether the Employer has the right to subcontract stump grinding and/or removal when such a task is included in a contracted large scale project.

The two grievances establish there is not an unequivocal practice concerning the removal of trees and stump grinding by subcontractors contracted to perform large scale projects. While the Employer has argued there have been several large scale projects that involved tree and stump removal that the Union must have been aware of, the May 4, 2000 grievance settlement clearly demonstrates there was no meeting of the minds on whether the Employer had the right to subcontract to contractors performing large scale projects the tasks of tree removal or stump grinding. It is also evident that unlike instances where the Employer entered into agreements with the Union to prevent work from becoming work historically performed by bargaining unit members, the Employer did not inform the Union of what work the contractors would be performing and, in particular, whether that work was historically performed by bargaining unit members. The Employer in effect unilaterally acted. The fact the Union did not grieve tree or stump removal does not automatically lead to a conclusion the Union was aware a tree or stump was being removed and acquiesced. There is no evidence the Union knew what work the contractor was to perform or what work the contractor actually performed. Had the Employer informed the Union of what work it was subcontracting and the Union failed to grieve the matter a different result would occur. Thus the Arbitrator finds no merit in the Employer's claim that there is a binding past practice that excludes large scale projects from the Article II, subsection h prohibition of subcontracting the work of tree and stump removal.

The Employer has also argued it would be unrealistic to require the Employer to scrutinize every large scale project it subcontracts to determine what, if any, work was historically performed by bargaining unit members. The undersigned emphasizes the instant matter is limited to tree and stump removal. In the instant matter one tree and stump was removed by the contractor. The Employer has acknowledged this is work historically performed by bargaining unit members. The fact that the Union may have acquiesced when contractors performed other work historically performed by members of the bargaining unit does not lead to a conclusion the Union has acquiesced on all work historically performed by members of the bargaining unit. Herein, the Union has grieved in the past when it was aware a contractor performed tree and stump removal. The question of whether all work performed by a contractor

of a large scale project that may have been work historically performed bargaining unit members violated the collective bargaining agreement is not before the undersigned. As noted above, the instant matter is limited to tree and stump removal.

Based upon the above and foregoing and the testimony, evidence and arguments presented, the undersigned finds the Employer violated the collective bargaining agreement when it subcontracted a tree and stump removal. The Employer did not dispute the Union's contention that such work requires two (2) employees, the Tree Trimmer and a Park Laborer, nor that it would amount to three (3) hours of work. While the Union requested the remedy be paid at time and one half rates, there is nothing in the record that would lead to a conclusion that the work would have been performed outside normal working hours. Therefore the Employer is directed to pay both the Tree Trimmer and the most senior Park Laborer three (3) hours of pay at straight time rates.

AWARD

The Employer violated Article II, subsection h, when it subcontracted the removal of a tree and stump at Roosevelt Park. The Employer is directed to cease and desist from subcontracting tree and stump removal. The Employer is directed to pay both the Tree Trimmer and the most senior Park Laborer three (3) hours of pay at straight time rates.

Dated at Madison, Wisconsin, this 16th day of November, 2004.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

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