BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OPERATIVE PLASTERERS' & CEMENT MASON LOCAL #599, AREA 204

and

J.H. FINDORFF & SON, INC.

Case 6
No. 62962
A-6091

(Using Non-Union Plasterer)

Appearances:

Tim Costello, Krukowski and Costello, S.C., Attorneys at Law, 7111 West Edgerton Avenue, P.O. Box 28999, Milwaukee, Wisconsin 53220, on behalf of J.H. Findorff & Son, Inc.

Matthew R. Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of Operative Plasterers' & Cement Mason Local #599, Area 204.

ARBITRATION AWARD

On November 5, 2003 the Operative Plasterers' & Cement Mason Local #599 filed a request for grievance arbitration with the Wisconsin Employment Relations Commission seeking to have the Commission appoint a member of its staff to hear and decide a grievance pending between the Union and J.H. Findorff & Son. Following jurisdictional concurrence from the Company, the Commission appointed William C. Houlihan, a member of its staff to hear and decide the matter. A hearing was held on May 18, 2004, in Madison, Wisconsin. No record was made. The parties filed post-hearing briefs, which were submitted and exchanged by July 7, 2004. The Company submitted additional authority and argument, received January 5, 2005. The Union objected and responded on January 21, 2005.

This Award addresses whether or not the J.H. Findorff & Son Company was contractually obligated to use Union labor to do Plaster work on its Fourth Ward Condominium project in Madison, Wisconsin.

BACKGROUND AND FACTS

J.H. Findorff & Son is a general contractor that builds residential and commercial buildings. It has a collective bargaining agreement, negotiated through the Associated General Contractors of Wisconsin, with the Operative Plasterers' & Cement Mason Local #599 Area 204 covering cement mason work. The scope of that agreement forms the basis of this dispute. Findorff performs some work and contracts out other work. In the Fall of 2003 Findorff was working on a jobsite in Madison, Wisconsin constructing a condominium building called the Fourth Ward Condominium Project. Findorff did the Cement Mason work on the project, but contracted out the Plaster work to a company named Bollig, a company that had previously done work for Findorff. The Union has grieved Findorff's contracting with Bollig to perform the Plaster work.

Local #599 also has collective bargaining agreements specifically covering plasterers with various entities. Neither the AGC nor Findorff, has a separate contract applicable to plasterers with Local #599. Bollig is a former signatory to a plasterers agreement with Local #599. That agreement expired in the Summer of 2002, and in the Fall of 2003 Bollig had an ongoing dispute with Local #599 over their failure to reach a successor agreement.

The subcontracting language that is the subject of this dispute has existed between the parties since at least the mid-1980's. It was the testimony of a company witness that over the years Findorff has used non Union subcontractors to do plasterers work on 3-4 projects, including a $62,000 plaster sub-contract on a large public building in Madison.

ISSUE

The parties could not stipulate the issue.

The Company believes the issue to be:

Whether the Employer violated Article IV, Section 1(A) at page 6 of its 2002-2005 Cement Mason collective bargaining agreement with the Union when it subcontracted plasterer (EFIS) work, which is not covered by the Employer's current collective bargaining agreement with the Union, to a subcontractor, Bollig Lath & Plaster Co., who no longer was a Union signatory to the Union's separate and distinct Independent Plastering collective bargaining agreement?

If so, what is the appropriate remedy?

The Union regards the issue to be:

Did the Employer violate the collective bargaining agreement by subcontracting work in violation of Article 4, Section 1.

If so, what is the remedy?

I believe the issue to be:

Did the Company violate Article IV – Sub-Contracting, when it contracted Plaster work to Bollig, a non-union contractor?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

There are numerous provisions of the agreement that make reference to Cement Masons (i.e. not to Plasterers)

ARTICLE I – UNION SECURITY/ RECOGNITION

(A) The Employer recognizes the Union as the exclusive representative of all its employees performing work within the jurisdiction of the union for the purpose of collective bargaining in respect to rate of pay, wages, hours of employment and other conditions of employment.

. . .

ARTICLE IV – SUB-CONTRACTING CLAUSE

SECTION 1

(A) It is agreed that the Employer will not sublet any work in the jurisdiction of the O.P.& C.M.I.A. Area 204 which he has contracted or agree to do to any person, firm or corporation unless at the time of subletting such sub-contractor is bound by the applicable collective bargaining agreement of the trades involved to provide the wages, fringe benefits and working conditions provided in such collective bargaining agreement.

. . .

ARTICLE IX – OPERATIVE PLASTERERS' & CEMENT MASONS JURISDICTIONAL WORK

. . .

SECTION 3- CEMENT MASONS JURISDICTION

> All concrete construction, such as buildings, bridges, elevators, concrete stacks, all curb and gutter and sidewalk forms, all footing, and pad forms one board high, all metal mechanical screeds and all shut-off's notched or fitted of they are used to screed form. All sand blasting of concrete as well as all bush hammering, all grinding of exposed finished surfaces including floors. The cutting of nails and wall ties in preparation of patching, all concrete slabs and all flat surfaces of concrete. The curing of finished concrete wherever necessary whether by compounds chemical or otherwise. The rodding, darbying, floating, troweling by either hand or machine. The pointing and patching around all metal or steel window frames and steel door frames set in concrete. All dry packing, grouting, and finishing in connection of setting machinery, base plates and the leveling thereof in the erection of steel columns. All fabricating of pre-stressed beams, columns, floor slabs, joists and the setting of the same when fabricating is done on the construction site. (Pending meetings of committees on rewrite of jurisdictional claims). The spreading, finishing of all epoxy materials on floors and the six inch base shall come under the jurisdiction of the Cement Mason. Cement Masons claim the waterproofing of all work included in their jurisdiction such as Thoroseal, Ironite, Plasterweld and any similar materials regardless of the tools used or the method of application. All soft expansion materials, all screeds metal or wood, all metal keyways that are to remain in the concrete. All joint sawing on commercial work and city sidewalk.

. . .

POSITIONS OF THE PARTIES

It is the view of the Union that I should confine my decision to the interpretation of the contract, and not to an interpretation of the National Labor Relations Act. That said, the Union goes on the argue that the subcontracting clause does not violate the NLRA. The Union contends that the subcontracting clause is intended to apply solely to construction sites, and so is not overbroad.

The Union believes the Employer violated the subcontracting clause. The clause, by its specific language, is not limited to work covered by this agreement but to any work in the jurisdiction of the OPCMIA. The Union represents not only cement masons, but also plasterers. The clause refers to the collective bargaining agreement of the "trades" involved. The plural contemplates more than one trade.

The Union refers back to the 1984-87 agreement governing these parties where the language refers to work within the jurisdiction of the Madison Building and Construction Trades Council. That is a far broader scope than is found in this agreement, and confirms that the clause was never intended to be limited to work covered by this agreement. The Union also points to the subcontracting clauses in the agreements between the AGC and the Bricklayers, Laborers, and Carpenters, each of which limits subcontracting to "work covered by this agreement". The Union argues that had these parties intended that result, they knew how to write such language and would have done so.

The fact that the employer has utilized non union contractors in the past is of no consequence. The Union contends that the language is clear and unambiguous. The previous failure of the Union to enforce its rights does not constitute a waiver of those rights. The Union denies that there exists a past practice. The employer claim that it contracted on 2-3 jobs, with only one project specifically cited, does not rise to the level of a practice.

The Company contends that the Union bears the burden of proof that the subcontracting clause protects more than bargaining unit work. The Company contends that the normal purpose of a subcontracting clause is the protection of bargaining unit work. The Union is attempting to expand the meaning of the clause to an uncustomary purpose - the acquisition of work. The Company believes the Union has failed in this task.

The Company contends the subcontracting clause to be ambiguous. It does not define work within the jurisdiction of the OP&CMIA, nor does it define "applicable collective bargaining agreement", or the "trades involved". It is the view of the employer that other provisions of the agreement must be consulted in order to interpret this ambiguity and provide definition.

It is the view of the Company that the agreement read as a whole, and the history of the parties' relationship supports its interpretation of the subcontracting clause. In that context, the Company points to numerous references to "cement mason" and no references to "plasterer work". The Company notes that this is an agreement that is applicable to cement masons in all respects. It is in that context that the Union seeks to take a single clause, and expand it to cover a trade and work not otherwise covered by this agreement. Such a construction not only defies logic, but ignores the balance of the agreement.

The Company contends that its interpretation of the subcontracting clause is consistent with the purpose of such clauses, as work preservation and not as work acquisition. All cement mason work performed on the job was by Findorff employees covered by the contract. The Union contends that the sweep of the subcontracting clause is such that it protects work for Union members who perform non cement mason work for other employers.

The Company argues that the Union interpretation of the clause is inconsistent with the parties' prior behavior. The Company contends that it has routinely subcontracted plastering work to both Union and non-Union contractors for over a decade, including a large job in the

center of Madison. It has become an issue only since the Union failed to reach an agreement with Bollig over a Plasterer contract. It is in that context that the Union has "discovered" what Article VI, Section 1(A) of the cement mason contract means.

The Company contends that the Union's interpretation of the subcontracting clause produces an absurd result. The Company contends that it could have hired its own employees, paid them whatever it chose, and performed the work non-Union. It is only if the Company chose to sub-contract the work that it is held to the clause. The Company contends this makes no sense.

The Company contends that the Union's interpretation of the clause produces an unlawful result. The Company argues that what the Union seeks amounts to a hot cargo clause, under the NLRA.

DISCUSSION

I agree with the Union's assertion that my task is to interpret the collective bargaining agreement, and not to attempt to construe the National Labor Relations Act. If the Agreement offends some provision of the Act, there exist forums for that to be addressed.

The subcontracting clause is broadly worded, and has existed for many years. It is certainly expansive enough to be read as the Union reads it, but there is no evidence the parties have ever applied it that way. A company witness testified that the Company had used a non-Union Plastering contractor 3-4 times over the years without objection from the Union. The Union Business Agent testified that he was unaware of that fact. One of the projects was a recent public building (a jail) in Madison, home of the Union office, involving a $62,000 Plastering contract, twice the size of the Fourth Ward job.

I agree with the Union's contention that 3-4 incidents over a number of years do not rise to the level of a binding practice. However, I find it difficult to believe that such a project, involving Union and non-Union firms working side by side, could occur without the knowledge of the Union. If the Agreement means what the Union claims, it is hard to understand how a non-Union subcontractor could come onto that site without feedback to the Business Agent.

The Recognition clause sweeps as broadly as does the Subcontracting provision. The clause "recognizes the Union as the exclusive representative of all its employees performing work within the jurisdiction of the union...". The terms "all its employees" and "within the jurisdiction of the union" appear all inclusive. There is no distinction drawn between Masons and Plasterers. Both are the Unions "employees". Both fall within "the jurisdiction of the union". As noted by the Company, the contract is applicable to Cement Masons. It addresses the terms and conditions of Masons throughout, including a work jurisdiction provision. It does not address the conditions of employment of Plasterers. I believe the parties have used this broadly worded Recognition clause to refer to Masons, notwithstanding the presence of Plasterers in the Union.

As a practical matter, the Union negotiates a separate collective bargaining agreement applicable to Plasterers. That contract, also a part of this record has the same recognition clause, and goes on to comprehensively regulate the terms and conditions of employment of Plasterers.

Implicit in the words of the Recognition clause is the limitation that the employees described work within the Cement Masons trade. That is the sole trade covered by the various provisions of the contract that follow the Recognition clause. I believe the same to be true of the Subcontracting Clause. That clause is found in the context of an agreement that otherwise is applicable solely to Cement Masons. If it is read expansively, it is the sole provision applicable to Plasterers. It sweeps the Plasterers jurisdiction into the agreement without specific mention or definition. It does so in the context of parallel negotiations involving the Plasterers. It does so with the rather anomalous results described by the Company: i.e. that the Company could self perform the work non-union, but is regulated in sub-contracting it. This is a lot of meaning to pump into this provision, particularly given the application of the equally broad Recognition clause.

The parties have never applied the words this way. While I agree that the Company has not established a binding interpretive practice, I also believe that the Union was aware of at least one significant non-union subcontract, and did nothing. I think the Union's inaction relative to the jail project reflects its historic interpretation of the Agreement.

The Union points out that the subcontracting language had its origins years ago, and once restricted subcontracting that fell within the jurisdiction of the Madison Building and Construction Trades. The Union argues that the language has always been designed to be read expansively. The language has since been narrowed. The question before me is how narrow the limitation is. I find the factors referenced above more persuasive.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 24th day of February, 2005.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc
6796