

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LABOR ASSOCIATION OF WISCONSIN AND
WISCONSIN INDIANHEAD TECHNICAL COLLEGE CUSTODIAL &
MAINTENANCE EMPLOYEE'S ASSOCIATION, LOCAL 722**

and

WISCONSIN INDIANHEAD TECHNICAL COLLEGE

Case 76
No. 63966
MA-12763

Appearances:

Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the Association.

Victoria L. Seltun, Attorney at Law, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin 54702, appearing on behalf of the Employer.

ARBITRATION AWARD

Wisconsin Indianhead Technical College, hereafter WITC or Employer, and Labor Association of Wisconsin and Wisconsin Indianhead Technical College Custodial & Maintenance Employee's Association, Local 722, hereafter Association, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Upon the request of the Association and WITC, the Commission appointed Coleen A. Burns, a member of its staff as arbitrator to hear and decide the instant grievance. Hearing was held in Rice Lake, Wisconsin on March 30, 2005. The hearing was transcribed and the record was closed on June 8, 2005, following the submission of written briefs.

ISSUES

The parties have stipulated to the following statement of the issues:

Did the Employer violate the terms and conditions of the collective bargaining agreement when the Employer subcontracted mowing operations in the New Richmond campus to non-bargaining unit employees?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

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Section 3. The Board agrees that the work normally performed by the custodial employees will not be assigned to any other employees, unless mutually agreed to by both parties.

...

ARTICLE XII – WORK WEEK

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Section 5. In an emergency as determined by the Supervisor, overtime will be assigned by classification according to seniority. However, the Employer reserves the right to hire temporary help for absence of existing employees or for excessive work beyond the normal needs of the institution. This help is exempt from seniority rights and union dues obligations. Employment of temporary help cannot exceed twenty-five (25) consecutive workdays. Employment of temporary help beyond twenty-five (25) consecutive days will be allowed based upon “the mutual consent” of both parties.

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BACKGROUND

WITC has four campuses located in New Richmond, Rice Lake, Superior and Ashland, Wisconsin. Each campus employs members of the Association’s collective bargaining unit and all members of the Association’s collective bargaining unit are covered by the same labor agreement.

At the New Richmond campus, which is the work location that generated this grievance, there are six custodians; five (5) full-time and one (1) part-time. Each of these custodians is a member of the Association’s collective bargaining unit.

Association Steward Jerry Smith has been employed as a Custodian I at the New Richmond campus for approximately ten years. On or about May 10, 2004, Smith contacted New Richmond Facilities Maintenance Supervisor Steve Stocker to question him about New Richmond’s contracting out of mowing services. Stocker responded with the following email:

Thanks for the question.

This is a matter of assigning work. We have more important work which requires our time and efforts. Our jobs are constantly changing as our world changes and we need to change along with it. In this case, no jobs are lost. . . Our focus is shifted to other opportunities. We will still have an abundance of tasks. There are many previous instances where this had occurred. Our snowplowing is contracted. Mowing is contracted at other locations. . . Now it is here as well.

If you (or anyone for that matter) has any question about this or any other matter, see me anytime.

Thanks for your help.

In May of 2004, Smith contacted another Association Steward, Robert Zimmerman, who is employed as a Custodian I at the Superior campus, to discuss the fact that New Richmond was contracting out mowing operations. Zimmerman responded with the following email:

This is against the union contract and I would file a grievance right away. Ask the union to come to campus and help you file. That is what I would do, and I would do it now. This came up at our campus and I told them that I would file right away and that was the end of it. But I am sure it will come up again. This is what the union is supposed to do and they have always helped me when I needed it. Ashland does contract out but that is what they wanted. That happened before I was steward or I would have tried to stop that. If you have trouble getting help tell me and I will try to get something done up here. If you don't fight it it (sic) will come to other campuses. Let me know.

On or about May 12, 2004, a grievance was filed alleging that, on May 5, 2004, the Employer violated Article XII-Work Week, Section 5, because:

The Employer is subcontracting bargaining unit work by allowing non-bargaining unit personnel to mow the yard area.

This grievance requests the following remedy: "That the Employer offer the mowing operations to qualified bargaining unit employees and discontinue the current violation of the contract."

In a letter dated August 10, 2004, Perry Palin, WITC's Vice-President of Human Resources, responded to this grievance as follows:

On Wednesday August 4 we discussed a grievance filed on behalf of Jerry Smith, custodian at the WITC-New Richmond campus. The grievance argues

that the mowing of the lawn areas on the campus is “work normally performed by the custodial employees,” and that this work must be assigned to a bargaining unit member.

The collective bargaining agreement covers workers at four locations. At the Ashland location, an outside contractor has performed the mowing of the lawn areas for some years. At the New Richmond location, contracting for an outside lawn mowing service began in July, 2003, about ten months before the grievance was filed. There is no clear indication that this seasonal outside work must be viewed as bargaining unit work.

When the decision was made to outsource the mowing of the lawn areas at New Richmond, no bargaining unit workers lost their jobs, and none of them had their hours reduced as a result of this decision. With the equipment and procedures that the contractor employs, the contractor completes this task in about six hours, much less time than one of our employees on our equipment could perform the job. The cost of bringing in a contractor for this task is much less than assigning one of our own employees to turn away from inside custodial work. Facility Maintenance Supervisor Steve Stocker made an appropriate decision in applying the resources of the college to the tasks that need to be accomplished.

Thereafter, the grievance was submitted to arbitration. The parties have stipulated that the grievance is properly before the Arbitrator.

POSITIONS OF THE PARTIES

Association

The job description of the Custodian I classification establishes that these employees mowed the grounds of the New Richmond campus as part of their regular grounds keeping duties; as does the testimony of Facility Maintenance Supervisor Steve Stocker. Union Steward Jerry Smith, a 10-year Custodian I employee with WITC-New Richmond, testified that, from the date of his hire in 1992, through May 5, 2004, bargaining unit employees have performed mowing operations at New Richmond; except for July of 2003.

In July of 2003, Custodian Andrew Blomberg was on sick leave due to injuries sustained in an automobile accident; Stocker approached bargaining unit employees during lunch break and asked if they had any objection to hiring out mowing operations due to Blomberg’s absence; and Smith stated that the bargaining unit did not object. Bargaining unit employees continued to perform mowing and other grounds keeping operations. WITC purchased a new mower for such operations.

When Smith contacted Robert Zimmerman, Union Steward at WITC-Superior, regarding New Richmond's May, 2004 subcontracting of mowing operations, Zimmerman advised Smith to file a grievance. At that time, Zimmerman stated that WITC-Superior campus had attempted to subcontract out mowing operations; that Zimmerman had threatened to file a grievance; and, thereafter, the Employer did not proceed with its plans to subcontract.

It is well established that, in the absence of a written agreement, a past practice is binding on both parties, if the practice is (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The Association has established such a past practice.

In Article I, Section 3, the parties have agreed that work normally performed by the custodial employees will not be assigned to any other employees, unless mutually agreed to by both parties. Stocker acknowledged that he never discussed subcontracting out of mowing operations prior to implementing the subcontracting of that work. The Employer failed to negotiate the outsourcing of the mowing operations with the employees' bargaining representative, *i.e.*, the Association, as required by Article 1, Section 3.

The Employer's decision to outsource the mowing operations is a mandatory subject of bargaining. The Employer should have negotiated this decision, as well as any impact of this decision, with the Association.

The Employer argues that there was an excessive amount of work so that the Employer had no recourse but to outsource the mowing operations. This argument is inconsistent with Article XII, Section 5, of the collective bargaining agreement which permits the Employer to utilize on-call non-bargaining unit employees in an emergency.

The Employer violated the parties' collective bargaining agreement when it outsourced the mowing operations at WITC-New Richmond. The grievance reasonably requests, as a remedy, that the Employer offer the mowing operations to qualified bargaining unit employees and discontinue the current violation of the contract.

WITC

Although the job descriptions relied upon by the Association list one the responsibilities as "mow lawn," the practice at all WITC campuses is to regularly subcontract this and other listed responsibilities. The mowing operations in dispute are not exclusively bargaining unit work.

In the instant case, the contract specifically provides for the hiring of temporary help for absence of existing employees or for excessive work beyond the normal needs of the institution. As New Richmond Facilities Maintenance Supervisor Stocker testified, the need for subcontracting arose in June of 2003 for two reasons: the absence of a bargaining unit member due to a medical leave and campus expansion that created additional work for the

existing bargaining unit members. Work demands at New Richmond, as well as other campuses, has exceeded the capacity of the existing custodial staff.

Arbitrators have generally recognized that, absent specific contractual restrictions, management has an inherent right to subcontract work, if that right is exercised in good faith. During the summer months, WITC has difficulty staffing custodial and maintenance work due to the coordinating of vacations, summer remodeling and general building maintenance. As a result, for more than six years, other campuses have utilized call staff or outside contractors to perform mowing operations. New Richmond does not have call staff.

The decision to contract out mowing operations at New Richmond was motivated by business efficiencies. WITC saved money because the contractor could perform the work at less cost and custodial and maintenance employees were available to perform other necessary tasks.

The contracting out of mowing operations has not reduced the hours of bargaining unit employees; nor has it weakened the bargaining unit in any fashion. The decision to contract out mowing operations is not arbitrary or capricious, or made in bad faith.

The decision to contract out mowing operations is consistent with management's inherent and reserved rights. The grievance is without merit and should be dismissed.

DISCUSSION

Relying upon Article I, Section 3, the Association argues that the New Richmond mowing operations are work normally performed by bargaining unit employees and, as such, may not be subcontracted unless mutually agreed to by both parties. Arguing that, prior to May, 2004, when the grievance was filed, non-bargaining unit personnel have performed mowing operations at New Richmond, as well as at other campuses, the Employer denies that mowing operations are exclusively bargaining unit work. Additionally, the Employer asserts that, under the provisions of Article XII, Section 5, as well as reserved management's rights, the Employer has the right to subcontract mowing operations.

Article 1, Section 3, protects "work normally performed by" the Association's bargaining unit members. Thus, the initial question to be determined is whether or not the New Richmond mowing operations are "work normally performed by" the Association's bargaining unit members.

It is undisputed that, prior to the summer of 2003, the New Richmond mowing operations were normally performed by the Association's bargaining unit employees. In the summer of 2003, Maintenance Custodian Andy Bloomberg was on extended leave due to an accident. At that time, New Richmond Facilities Maintenance Supervisor Steve Stocker had a conversation with Union Steward Jerry Smith regarding subcontracting the mowing operations at New Richmond. The substance of this conversation is in dispute.

According to Smith, Stocker asked Smith, while he was in the lunch room, if it would be “ok” to subcontract the mowing operations for the rest of the year. Stocker recalls having a discussion at lunch, but denies that he asked permission to subcontract the mowing operations. Following this conversation, mowing operations were subcontracted. The then union did not file a grievance over this subcontracting.

Smith credibly testified that he understood that Stocker had sought union permission to subcontract the mowing operations for the rest of 2003. Stocker credibly testified that he did not seek such permission. The evidence of the 2003 mowing operations at New Richmond does not establish that the parties had any mutual understanding with respect to the issue of whether or not mowing operations are “work normally performed by” the Association’s bargaining unit members.

As the Employer argues, the custodians at New Richmond are covered by the same collective bargaining agreement as the custodians at the other WITC campuses. Thus, as the Employer further argues, the evidence of practices at these other campuses is relevant to the determination of whether or not mowing operations are “work normally performed by” the Association’s bargaining unit members.

In his testimony, Smith states that, at the Ashland campus, mowing operations are subcontracted. In his email of May 10, 2004, Robert Zimmerman, a Union Steward at Superior, states that “Ashland does contract out but that is what they wanted.” Zimmerman further states that this subcontracting occurred prior to the time that he was a Union Steward. It would not be reasonable to conclude that Zimmerman has direct knowledge of the reasons why mowing operations were initially subcontracted at Ashland.

During the processing of this grievance, WITC’s Vice-President of Human Resources sent an email to the supervisors at the other campuses requesting information on who performed mowing at the other campuses. The email response from Kevin Rowe, the Ashland Facilities Maintenance Supervisor, states that he relied upon “notes I’ve found and visits with Willis Hagstrom (the previous facility supervisor who initiated the move to outsourcing lawn service).” Rowe’s email states that Ashland has been subcontracting mowing operations since June of 1996. As with Zimmerman, it would not be reasonable to conclude that Rowe has direct knowledge of the reasons why mowing operations were initially subcontracted at Ashland.

The email responses from Dean King, the Facilities Maintenance Supervisor at Rice Lake, and Peter Gamache, the Facilities Maintenance Supervisor at Superior, each indicate that mowing is shared by bargaining unit employees and on call staff. King’s email states that this has been the practice at Rice Lake for “six or more years.” The testimony of Perry Palin, WITC’s Vice-President of Human Resources, establishes that on call staff are not bargaining unit employees.

In his email, Zimmerman states: “This came up at our campus and I told them that I would file right away and that was the end of it.” These statements do not establish that the parties had any mutual understanding with respect to the issue of whether or not mowing operations are “work normally performed by” the Association’s bargaining unit members.

The language of Article XII, Section 5, does not, as the Association argues, limit the use of temporary help to “emergencies.” Rather, it permits the use of temporary help “for the absence of existing employees or for excessive work beyond the normal needs of the institution.” Construing the language of Article I, Section 3, and Article XII, Section 5, as a whole, reasonably leads to the conclusion that Article XII, Section 5, governs the assignment of bargaining unit work, *i.e.*, the “work normally performed by” the custodial employees represented by the Association. Accordingly, if mowing operations are not “work normally performed by” the custodial employee represented by the Association, then the Employer’s right to assign such work is not conditioned upon either the “absence of existing employees” or “excessive work beyond the normal needs of the institution.”

The Association argues that the outsourcing of mowing operations is a mandatory subject of bargaining and, thus, the Employer has a duty to bargain the outsourcing decision, as well as the impact of this decision with the Association. These arguments are based upon statutory, rather than contractual, claims; the merits of which are for the WERC, and not this grievance arbitrator, to decide.

Conclusion

As the Association argues, the Custodian job description lists, as a job responsibility, “mow lawn.” It is evident, however, that, at three of the four campuses, mowing operations have been performed on a regular basis by non-bargaining personnel, *i.e.*, on call staff at Rice Lake and Superior and subcontractors at Ashland.

The record does not establish that the Ashland mowing operations were subcontracted because it was “mutually agreed to by both parties,” pursuant to Article 1, Section 3. Nor does the record establish that Rice Lake and Superior on call staff have only performed mowing operations in “the absence of existing employees or for excessive work beyond the normal needs of the institution.”

The most reasonable conclusion to be drawn from the record evidence is that mowing operations are not “work normally performed by” the Association’s bargaining unit members. Thus, by subcontracting the New Richmond mowing operations, the Employer has not violated Article I, Section 3, or Article XII, Section 5, of the parties collective bargaining agreement.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate the terms and conditions of the collective bargaining agreement when the Employer subcontracted mowing operations in the New Richmond campus to non-bargaining unit employees.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 26th day of August, 2005.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

