BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ROBERTS CONCRETE PRODUCTS CO.

and

TEAMSTERS GENERAL UNION, LOCAL 662

Case 2
No. 64714
A-6161

Appearances:

Ms. Andrea Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman Goldberg, S.C., 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, on behalf of the Union.

Mr. J. Dennis O'Brien, Littler Mendelson, 33 South Sixth Street, Suite 3110, Minneapolis, MN 55402, on behalf of the Company.

ARBITRATION AWARD

According to the terms of the 2004-07 labor agreement between the Company and the Union, the parties jointly selected Arbitrator Sharon A. Gallagher (pursuant to the procedures of the WERC and FMCS) to hear and resolve a dispute between them regarding whether the Company's decision to cease employing two full-time unit truck drivers and to subcontract all of its trucking operations violated the labor agreement. A hearing was held by agreement of the parties on July 11, 2005, at Mendota Heights, Minnesota. A stenographic transcript of the proceedings was made and received by the Arbitrator on July 20, 2005. The parties agreed to submit written briefs in the matter directly to each other with a copy to the Arbitrator and they agreed to waive reply briefs. The Arbitrator received the parties' briefs by August 22, 2005, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the issues to be determined herein. However, they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument in the case as well as their suggested issues. The Union suggested the following issues:

1. Is Roberts Concrete violating the collective bargaining agreement by subcontracting all of its trucking work?

2. If so, what is the appropriate remedy?

The Company suggested the following issues for determination:

1. Does the collective bargaining agreement authorize the Company to close down or cease its trucking operation?

2. If not, what is the appropriate remedy?

Based upon the relevant evidence and argument herein as well as the parties' suggested issues, the Arbitrator finds that the following combined issues reasonably state the dispute between the parties and they shall be determined herein:

1. Does the collective bargaining agreement between the parties authorize the Company to cease its trucking operations and would the Company violate the agreement by subcontracting all of its trucking work?

2. If a contract violation will occur, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 13

SUBCONTRACTING

During the regular work week, all employees in a classification covered by this Agreement must be called back to work, or be offered overtime, provided the employee is in the yard or at the plant and is first offered

the work before any sub contractor or other non unit personnel can be called to perform work in a classification covered by this Agreement. The provision for "in the yard" shall not apply if the Employer has sufficient notice of the work and can reasonably schedule the work for unit employees.

During non regular work days, all employees in a classification covered by this Agreement shall first be offered overtime work before any sub contractor or other non unit personnel can be used to perform work in a classification covered by this Agreement.

The parties mutually agree that the following represents additional clarification language to the existing contract provisions: The Employer agrees that it will not use contract haulers when a trick [sic] driver is on layoff, is not actively driving but has sufficient DOT hours to perform the available work, or is actively driving or on duty and additional work can be reasonably provided. This does not permit the Company to utilize contract haulers in place of filling truck driver positions open by reason of attrition.[1]

Additionally, the Company will not use temporary laborers when a plant production employee is on layoff, or so as to deprive such regular employees of available overtime opportunities. This permits the Employer to work temporary employees up to an equivalent number of hours as regular employees are concurrently scheduled.

. . .

ARTICLE 15

SENIORITY

Section 1. Seniority is a period of continuous employment of employees by the Employer in the bargaining unit, commencing with the first hour and date of work and including time for vacations, authorized leave of absence, layoff due to lack of work, military service as prescribed by law, illness or accident. When layoffs are necessary, those employees with the least seniority shall be laid off first, provided those employees retained are qualified to carry on the Employer's operations. Recall from layoff shall be in reverse order from layoff, provided recalled

[1] The shaded areas indicate language changed/added during negotiations over the 2004-07 labor agreement.

employees, together with those already on the job are qualified to carry on the Employer's operations.

. . .

ARTICLE 18

MANAGEMENT RIGHTS

Section 1. The conduct of its business and control and supervision of all operations, the size, character and direction of all working forces, including the right to hire and to determine the requirements of each job, shall remain with and be vested exclusively in the Employer and its decisions relative to these matters shall be final except as modified by this Agreement.

Section 2. The Employer specifically reserves the exclusive right in accordance with its judgement to reprimand, suspend, discharge or otherwise discipline employees for just cause, promote, lay off and recall employees to work; determine the starting and quitting time and the number of hours and shifts to be worked; close down the facility, or any part hereof, or create, expand, reduce, alter, combine, transfer, assign or cease any job, or service; control and regulate the use of machinery, equipment and other property of the Employer; determine schedules of production, make or change reasonable rules, policies and practices; introduce new or improved research, development, productions, maintenance, service and distribution methods, materials, machinery and equipment; and otherwise generally manage the facility, direct the work force, and establish terms and conditions of employment.

Section 3. The rights vested exclusively with the Employer include promulgation of reasonable rules and regulations which govern employment behavior and which recognize the principles of progressive discipline provided such rules and regulations do not violate the provisions of this contract or applicable law. The parties recognize that the Employer has reasonable work rules in effect on October 1, 2001.

Section 4. The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the standards in effect at the time of the signing of this Agreement.

. . .

ARTICLE 31

HOURS OF WORK – OVERTIME

Section 1. There shall be no guarantee of hours of work.

Section 2. The work week shall be Monday through Saturday. The Employer shall have the right to change the work week upon mutual agreement with the Union.

Section 3. All employees are required to be at their work stations and begin work at the designated starting times for the beginning of their shifts and at the conclusion of scheduled rest and lunch periods. Employees should not begin work prior to the beginning of the shift without approval from the Employer. An employee who punches in for work and is sent home, due to lack of work, will be paid for a minimum of two (2) hours.

Section 4. All regular employees are allowed an unpaid thirty (30) minute lunch period midway through the shift. All employees are allowed a ten (10) minute rest break midway between the beginning of the shift and the lunch period and a ten (10) minute rest break between the lunch period and the end of the shift.

Section 5. The Employer reserves the right to require the performance of overtime by any bargaining unit employee. Overtime shall be offered on a voluntary basis to employees in order of their seniority with the Company, subject to such employees possessing the necessary qualifications to perform the available overtime work. If the number of volunteers is insufficient to cover the overtime need, mandatory overtime shall be assigned to employees inversely (from the bottom up) according to seniority. Saturday overtime must be posted by 10:00 am the Thursday prior.

Truck drivers shall not be eligible for plant production overtime if such overtime can be practically predicted to adversely effect subsequent driving availability pursuant to DOT regulations. Should the Company's exercise of this provision in any instance prove to be in error, the parties agree to meet within a reasonable period thereafter to discuss appropriate remedies.

Section 6. Time and one-half the regular rate will be paid for all hours worked in excess of forty (40) in a week and for work on Saturday. Double times shall be paid for Sunday work. There shall be no split-shift. Only hours actually worked shall be included in calculating entitlement to overtime pay.

Section 7. There shall be no pyramiding of overtime or other premium pay.

. . .

ARTICLE 35
TRANSFER OF COMPANY TITLE OR INTEREST

The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, etc. of the operation covered by this Agreement or any part thereof. Such notice shall be in writing with a copy for the Local Union. The parties hereto shall not use any leasing device to a third party to evade this Agreement.

Prior to final execution of any sale, transfer or lease of the operation, in whole or in part, the Employer agrees to negotiate with the Union concerning the impact and effects on the bargaining unit.

. . .

BACKGROUND

The Company produces various types of concrete mix, masonry products and some straight sand, which it dries, bags and sells mostly to "big box" stores such as Menard's and Home Depot, and to commercial masonry contractors. The Company therefore employs up to 15 production workers during its high season, (Spring to Summer), who assist in drying, bagging and loading the Company's sand and concrete mixes.

It is undisputed that for many years before they were organized by the Union, Roberts Concrete had regularly employed 2 full-time, year-round truck drivers to deliver products to customers using Company-owned tractor/flatbed trailers. During high season, the Company also traditionally contracted with two trucking companies, K&D and Garth Trucking, to deliver its products to customers. During high season, there can be up to 11 subcontracted drivers delivering Roberts products. These subcontracted drivers have always been employees of K & D or Garth, not Roberts employees.

In 2001, when the Teamsters and Laborers Unions jointly organized Roberts employees, the Teamsters sought only to represent the 2 full-time, year-round truck drivers, leaving the Company free to continue to use subcontracted drivers during high season to deliver its product, so long as the two full-time Roberts drivers remained fully employed.

Union Representative Steve Novacek[2] stated that although he was not in charge, he attended bargaining between the Teamsters and the Company over the 2001-04 contract. At bargaining regarding Article 13 the Union took the position that it wanted to preserve the driving work for the 2 full-time truck-drivers but that it fully understood that the Company would continue to subcontract for deliveries during high season as it had done for many years before the advent of the Union. During those negotiations, the Company did not indicate they intended to expand their subcontracting nor did Company representatives explain under what circumstances the Company had previously subcontracted driving work.

The initial labor agreement covering 2001-04 was between the Company and Teamsters 662 as well as Laborers Union 317 representing unit employees contained the following language relevant to this dispute:

. . .

ARTICLE 2
RECOGNITION

Section 1. The Employer recognizes the Union as the sole and exclusive collective bargaining representative for employees in the following classifications certified as follows by the National Labor Relations Board in Case No.: 18-RC-16772: "All full-time and regular part-time Truck Drivers, Production Employees, General Laborers, Maintenance Employees and Assistant Managers employed at the Employer's Roberts, Wisconsin facility."

Section 2. The Employer agrees not to enter into any Agreement or contract, individually or collectively which any way conflicts with the terms and provisions of this Agreement.

ARTICLE 13
SUBCONTRACTING

During the regular work week, all employees in a classification covered by this agreement must be called back to work, or be offered overtime, provided the employee is in the yard or at the plant and is first offered the work before any sub contractor or other non unit personnel can be called to perform work in a classification covered by this agreement. The provision for "in the yard" shall not apply if the Employer has

[2] Novacek was the only Union witness on the question of bargaining history.

sufficient notice of the work and can reasonably schedule the work for unit employees.

During non regular work days, all employees in a classification covered by this agreement shall first be offered overtime work before any sub contractor or other non unit personnel can be used to perform work in a classification covered by this agreement.

ARTICLE 15
SENIORITY

Section 1. Seniority is a period of continuous employment of employees by the Employer in the bargaining unit, commencing with the first hour and date of work and including time for vacations, authorized leave of absence, layoff due to lack of work, military service as prescribed by law, illness or accident. When layoffs are necessary, those employees with the least seniority shall be laid off first. Recall from layoff shall be in reverse order from layoff.

Section 2. Seniority shall be lost for the following reasons:

1. Discharge for just cause.
2. Voluntary quit.
3. Layoff for more than eighteen (18) consecutive months.
4. Failure to respond to notice of recall as set forth in Section 3 of this Article.
5. Inability to work after a period of five (5) years of absence.

. . .

ARTICLE 18
MANAGEMENT RIGHTS

Section 1. The conduct of its business and control and supervision of all operations, the size, character and direction of all working forces, including the right to hire and to determine the requirements of each job, shall remain with and be vested exclusively in the Employer and its decisions relative to these maters [sic] shall be final except as modified by this Agreement.

Section 2. The Employer specifically reserves the exclusive right in accordance with its judgment to reprimand, suspend, discharge or

otherwise discipline employees for just cause, promote, lay off and recall employees to work; determine the starting and quitting time and the number of hours and shifts to be worked; close down the facility, or any part hereof, or create, expand, reduce, alter, combine, transfer, assign or cease any job, or service; control and regulate the use of machinery, equipment and other property of the Employer; determine schedules of production, make or change reasonable rules, policies and practices; introduce new or improved research, development, production, maintenance, service and distribution methods, materials, machinery and equipment; and otherwise generally manage the facility, direct the work force, and establish terms and conditions of employment.

Section 3. The rights vested exclusively with the Employer include promulgation of reasonable rules and regulations which govern employment behavior and which recognize the principles of progressive discipline provided such rules and regulations do not violate the provisions of this contract or applicable law. The parties recognize that the Employer has reasonable work rules in effect on October 1, 2001.

Section 4. The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the standards in effect at the time of the signing of this Agreement.

FACTS

In early July, 2002, the Teamsters attempted to settle their overall unit contract with the Company and at this time Union representative Alexander sent the Company a "One-time offer for settlement" of all open issues between the contracting parties. This offer contained the following proposal regarding Article 13:

1.- ARTICLE 13, SUBCONTRACTING

The parties mutually agree that the following represents additional clarification language to the existing contract provisions: "The Company agrees that it will not use contract haulers when a truck driver is on layoff, is not actively driving but has sufficient DOT hours to perform the available work, or is actively driving or on duty and additional work can be reasonably provided. This does not permit the Company to utilize contract haulers in place of filling open truck driver positions.

> Additionally, the Company will not use temporary Laborers when a plant production employee is on layoff, or so as to deprive employees of overtime."

At the end of August, 2002, Teamsters Local 662 took over representation of all Roberts unit employees who had previously been represented by the General Laborers' Union, Local 317. The Union entered into an MOU with the Company to this effect dated August 29, 2002, which read as follows:

. . .

> The Company, Roberts Concrete Products, hereby agrees to formally recognize and accept Teamsters General Union, Local 662 as the exclusive representative for the Roberts Concrete bargaining unit as certified under the NLRB Case No. 18-RC-16772. The Company's recognition and acceptance hereof constitutes the unequivocal and irrevocable waiver of any rights to challenge the exclusive representation by Teamsters General Union, Local 662 of this bargaining unit now or in the future for the facility located at Roberts, Wisconsin.
>
> As a consequence of this Agreement, all references to the General Laborers Local 317 Union contained in the existing August 1, 2001 through August 31, 2004 contract shall be deemed amended or expunged as appropriate to conform to the exclusive representation of this bargaining unit by Teamsters General Union, Local 662.
>
> The Company further acknowledges that it has received a contemporaneous submission with this Letter of Understanding attesting to the majority status of Teamsters General Union, Local 662 within the Roberts Concrete Products bargaining unit.

. . .

After August 29, 2002, Company Vice President Hoffner and Company Owner Beckon spoke to Union Representatives Alexander and Newell in a telephone conversation about the meaning and intent of "amended Article 13."[3] Beckon asked Hoffner whether the language

[3] Tom Beckon, Dan Alexander and Jim Newell did not testify herein. Therefore, Hoffner's testimony stands uncontradicted on this point.

proposed by the Union on Article 13 would prohibit the Company from ceasing trucking operations if it so chose. Hoffner stated that Newell agreed that Article 18 protected the Company, and that the Company could cease trucking operations under the amended language, stating "you have the right; you always had that right and you will continue to have that right. We just want to make sure you don't do it [cease trucking operations] by attrition." Hoffner stated that in line with their discussion the last sentence of the third paragraph of Article 13 was changed to read as follows:

. . .

> This does not permit the Company to utilize contract haulers in place of filling truck driver positions open by reason of attrition.

. . .

Hoffner stated that he made notes in the margin of his copy of the Union's one-time offer stating that the "Company agrees to offer drivers positions in the plant" "economic reasons" "due to attrition" in reference to the last sentence of the quoted paragraph of Article 13.

On February 23, 2005, Hoffner sent Union Representative Mike Schmidt the following letter:

. . .

> This is to advise you that the Company has made a business decision to get out of the trucking business at Roberts. Our motivation is economic. Our plan is to sell the trucks and allow the drivers to work in the plant if they wish.
>
> Our plan, as to the drivers, reflects a series of conversations that Tom Becken and I had with Jim Newell in the summer of 2002. In those conversations, Jim Newell, on behalf of your Union, told the Company representatives that the Union would have no objection to subcontracting the driving work as long as the Company was not doing so by attrition, or piece meal, and the drivers were offered jobs in the plan [sic]. This is exactly what we propose to do.
>
> If you would like to bargain with us over the effects of this decision on the bargaining unit, please let us know.

. . .

On March 1, 2005, the Union filed the instant grievance, stating that the Company's decision to get out of the trucking business is a violation of the labor agreement and past practice and seeking that the Company withdraw its decision and continue trucking. In April, 2005, the parties attempted mediation of this dispute using the services of the Minnesota Bureau of Mediation Services. Mediation failed but as a result of the mediation the Company delayed implementation of its decision to contract out all trucking operations. It is undisputed that during mediation, the Company asserted it could save at least $1.50 per hour by contracting out its trucking operations.[4]

POSITIONS OF THE PARTIES

The Union

The Union urged that the clear language of Article 13 forbids subcontracting of truck driving if a regular driver is on layoff. The Union noted that it is undisputed that the two Union truck drivers will be laid off if the Company subcontracts all of its product delivery work. The Union further contended that the Company would nonetheless violate Article 13 even if the Company placed its two regular drivers into plant production positions as the drivers would continue to be "available to drive." Also, the Union noted that as the Company has had no openings in plant production even during its most recent busy season, no jobs exist which the Company's laid off drivers could accept.

In addition, the maintenance of standards clause contained in Article 18, Section 4 further protects the drivers' jobs. The Union argued that Article 18, Section 4 guarantees that benefits, past-practices, and working conditions will be maintained at pre-contract levels for the term of the effective agreement. As the elimination of two driver positions would eliminate the drivers' benefits, it would also violate Article 18, Section 4.

The Union asserted that evidence of bargaining history proffered by the Company does not supersede the clear contract language. Here, the Company claimed that undocumented statements made to Company official Hoffner by former Union Representative, Jim Newell in 2002, that the Company was free to eliminate the full-time driver positions and subcontract their work unless the drivers quit voluntarily. In the Union's view the proffered evidence was not only irrelevant and inadmissible to

[4] Evidence was submitted by the Company showing the projected savings it would experience after subcontracting the truck driving operations. The Union objected to this evidence on grounds of relevance. As the contract does not list permissible reasons for subcontracting, this Arbitrator does not find the evidence proffered by the Company relevant.

vary the clear contract language; it was also "nonsensical." The Union contended that it would be "ridiculous" for a Union Representative to give an employer *carte blanche* to eliminate the jobs of existing members but insist on total protection when the members left of their own choice. The Union asserted that such a representation would be "so unusual and counter-intuitive that an employer would want to confirm the conversation in writing or at least make a contemporaneous note of the conversation" (U. Br. at p. 6). The Union noted that Company Vice President Hoffner took neither action, choosing to use the purported conversation for the first time on February 23, 2005 to justify the Company's plans to subcontract all driving work. To the extent that Newell commented on the Company's right to lay off drivers, it amounted to his interpretation of the contract language which was never codified into contract language. In any event, Newell's comments could have been regarding the Company's NLRA-protected right to cease all operations (Tr. 36).

Finally, the Company's proffer of evidence of business necessity cannot excuse the Company's contract violation here. The Union noted that the Company did not claim it could not afford to replace its tractors. As the contract does not recognize business excuse/judgment or efficiency as a defense to a grievance protesting subcontracting, even if true, this would not excuse a contract violation.

Also, the fact that the Company would save money or be more efficient by subcontracting the driving work (even if proved) is an insufficient reason under Article 13 to allow the Company to subcontract the driving work with impunity. The Company's argument that subcontracting was a sensible financial decision was neither relevant nor well-supported by the evidence. In this regard, the Union noted that Union Witness, Durand testified without contradiction that he had observed Roberts trucks being used by Cemstone and Twin City Concrete and that Twin City and Roberts are affiliates of Cemstone, and the instant hearing was held in the Cemstone building. As the Company failed to submit any evidence to dispute Durand's testimony and it failed to show it could not afford to rent tractors for its two regular drivers to use, this defense must also fail.

The Union therefore sought an award sustaining the grievance and an order that the Company abandon its plans to subcontract the work of the two Company drivers.

The Company

The Company argued that the Arbitrator must dismiss the instant grievance because; 1) the Union failed to meet its burden to prove that the parties' labor agreement prohibits the Company from eliminating its trucking operations; 2) evidence of bargaining history in 2002 supports the Company's interpretation of Articles 13 and 18 and evidence of past practice shows no binding practice existed; 3) an application of the rules of contract construction supports the Company's position; and 4) a ruling in

favor of the Union would intrude upon the Company's contractually reserved right to get out of the trucking business. The Company noted that the Union must prove its case by a preponderance of the evidence. If the Arbitrator finds the evidence is unclear, or that neither party has provided sufficient evidence upon which the Arbitrator can make an informed ruling, or that the Company has proven its defense, the Arbitrator must dismiss the grievance.

In this case the language of Article 18 is clear and unambiguous, expressly allowing the Company to "close down the facility or any part hereof…" and to "cease any job or service." In addition, Article 13 prohibits subcontracting only in the specific and limited circumstance where drivers are laid off and available or a driver opening by attrition exists. As Article 13 assumes the existence of Company driver positions or an open (by attrition) driver position, the Company urged that Article 13 simply does not apply to this case. Rather, this case is disposed of by application of the clear language of Article 18 allowing the Company to "cease any job or service."

But even if the Arbitrator finds the relevant contract provisions ambiguous, the Company's proffer of bargaining history and evidence proves the parties' intent was to allow the Company to subcontract all of its delivery work so long as it did not do so by attrition. In this regard, the Company noted that less than one year after the parties' first contract was ratified, disputes arose regarding Article 13 which demonstrated that the language was unworkable and grievances thereon did not lead to mutually satisfactory resolutions. Hoffner's testimony herein concerning Newell's statements and the Union's offer to clarify the language of Article 13 showed that both parties thereby agreed to prohibit only the contracting out of driver positions by attrition.

Hoffner's handwritten notes regarding the parties' agreement further support the Company's interpretation of (clarified) Article 13. The Company observed that Hoffner's evidence remained unchallenged by the Union requiring a conclusion that Hoffner was credible. The Arbitrator must not permit the Union to gain through arbitration what it could not gain in negotiations.

The Company anticipated that the Union would argue that the Company's pre-union practice of employing two Company drivers while contracting out most of the seasonal delivery work constituted the *status quo*, or that a binding past practice arose indicating that the Company had surrendered "its right to exercise business judgment and get out of the trucking business" (E. Br. p. 19). The Company noted that the fact that it had not heretofore exercised its right to go out of the delivery business does not mean it ever relinquished that right. The Union's failure to present evidence of a binding past practice or a clearly manifested intent to prohibit the Company from discontinuing its trucking operation requires an Award denying the grievance.

The Arbitrator must also interpret the contract language here so as to

give effect to all provisions of the agreement. In this case, the Union's interpretation of Article 13 would eviscerate the clear language of Article 18. The Company argued as follows:

. . .

> It is clear from the text of Article 18, and the Union cannot dispute, that the Current Agreement's Management Rights provisions contemplate a situation where Roberts closes or ceases a "part," i.e., the delivery, maintenance, or production "part," of its operation. It is also plainly evident that, in order for the part of the concrete products business Roberts chooses to continue operating, some other party must participate in the operation of those other parts. That is, if Roberts chooses to retain its production services, some other participant must come forward and provide a means of transporting the product to the customer, just as Roberts would need to rely on some other participant to produce concrete products for its drivers to haul if Roberts chose to cease its production service.
>
> Under the Union's argument, Roberts does not have the ability choose to cease a business function, i.e. production or delivery, pursuant to Article 18 and still lawfully remain operative in the other phases of its concrete products business due to the subcontracting limitations in Article 13. Put another way, the union would have this Arbitrator believe that Roberts can somehow close or cease one of its business functions and remain operative without subsequently establishing or maintaining a relationship with a third party to provide a service to Roberts. As established above by way of example, this argument is baseless
>
> The Union's proposed interpretation of Article 18 and Article 13 creates a relationship between those two Articles that their language cannot maintain. If the arbitrator were to adopt the Union's far-too-broad interpretation of the subcontracting restrictions in Article 13, portions of Article 18's reserved management rights would be rendered meaningless or invalid. (ER Br. P 21-22).

. . .

In contrast, the Company urged that its interpretation of Articles 18 and 13 would give full meaning to both provisions of the contract by reading them separately and allow each provision to be effective in distinctly different situations. Indeed, the statement of the sole reason for the prohibition of subcontracting (attrition) in Article 13 requires a conclusion that the parties intended that all other reasons would be allowed under the *exclusio unius* maxim.

Finally, the Company contended that its decision to eliminate its delivery service was supported by a good faith assessment of operational/financial considerations and was not intended to weaken or subvert the bargaining unit. In this regard the Company noted that its research had shown that it would save more than $1.50 per hour by subcontracting its delivery work and that it had offered the two Company drivers positions in the plant if they wished to work there. The Union's insistence that the subcontracting language of the labor agreement prohibits the Company from closing individual facets of its business and requires it to go out of the concrete production business constitutes an absurd result, which the Arbitrator should avoid.

The Company therefore sought denial or dismissal of the grievance in its entirety.

DISCUSSION

In this case, a close analysis of the 2001-04 agreement and its context is necessary in order to properly analyze the disputed portions of the 2004-07 labor agreement. It is undisputed that for many years prior to the advent of the Union, the Company had employed two regular full-time drivers on a year-round basis, and that the Company had used contract haulers to otherwise augment its delivery force in high season. The Union chose not to disturb this approach when it became the full-time truck driver employees' exclusive bargaining representative. This explains the complete absence of any reference to subcontracting in Article 18, *Management Rights* contained in the initial labor agreement between the parties. Thus, Article 13 stands as the only reference to subcontracting in the parties' initial agreement. The language of Article 13 as it existed in the parties' initial labor agreement states that unit employees "must be called back to work,[5] or be offered overtime" if the employee is "in the yard or at the plant and is first offered work…" By this language, the parties were attempting to describe the rights of the two regular full-time drivers and its production employees to work overtime in the entire context of the agreement.

Although the 2001-04 contract listed no actual hours of work and Article 31 specifically stated that "there shall be no guarantee of hours of work," Article 13 required the Company to employ available ("in the yard…") Company drivers for regular and non-regular work and overtime before any work or overtime could be offered to "any subcontractor or other non-unit personnel." In addition, regarding work during the regular work week, even if a unit employee was not "in the yard…" if the Company had "sufficient notice of the work and [could] reasonably schedule the

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4. The use of the phrase "called back to work" strongly implies that the employee was on lay off but the language does not otherwise make this clear.

work for unit employees," it had to offer same to unit employees. This language left no room for the use of non-unit employees to perform unit work if unit employees could be "called back to work," were available or could reasonably be scheduled to work any available hours.

The question arises what was the meaning and intent of the parties' addition of certain portions of Article 18 to their initial labor agreement.[6] Reading Articles 13 and 18 together and giving full effect to all language involved as must be done in these cases, the requirements of Article 13 as they must be applied on a day-to-day basis actually left the Company very little flexibility to subcontract. This is so because there is absolutely no reference in Article 18 (or elsewhere in the contract) to a Company right to subcontract except as described in Article 13.

Hence, without the express reservation of a general subcontracting right in Article 18 (or elsewhere), the Company's rights to "close down the facility or any part hereof…or cease any job, or service," must mean just that and nothing more. In the entire context of the 2001-04 labor agreement, Article 18 does allow the Company to subcontract the underlying work but only if the Company specifically decides to close down the facility or any part thereof or to cease any job or service. This Arbitrator rejects the Company's argument that the use of the terms "close down" and "cease" necessarily implies that the Company has the right to subcontract the underlying work. No such express right was placed in the contract, and given the limiting language of Article 13, none can fairly be implied. Also, the use of the terms "close down" and "cease" support the above conclusion as the ordinary meaning of these terms is that activities or operations stop, come to an end, are terminated or eliminated.

The next question to be determined is what effect the parties' agreed-upon changes to Article 13 made in the 2004-07 agreement and the evidence of bargaining history have upon the above analysis. The first two paragraphs of Article 13 were left unchanged in the 2004-7 agreement. However, the parties added two new paragraphs specifically denominated as "additional *clarification* language to the *existing* contract provisions" (emphasis supplied). As such, the language of these two paragraphs simply appears to restate the concepts listed in paragraphs 1 and 2 in more intelligible terms. Thus, sentence 1 of paragraph 3 makes clear that the reference to being "called back to work" meant that the employee had been laid off and was being recalled; and the other two categories (not actively driving and actively driving) were more clearly explained

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5. This Arbitrator notes that no specific evidence of bargaining history was proffered concerning Article 18.

without reference to the concept of being "in the yard or at the plant."[7] It is the second sentence of paragraph 3 (and the bargaining history surrounding it) that the Company has argued gives it the right to use contract haulers in every situation *except* when a driver position is open by attrition. However, the language of Article 13 does not make such a broad, affirmative statement. Rather, it states only what the Company cannot do.

In addition, the bargaining history described by Vice President Hoffner does not clearly state that the Company can subcontract all trucking operations. On direct examination, Hoffner described the August 15, 2002 conference call between himself, Company owner Becken, and Union Representatives Newell and Alexander as follows:

> (By Mr. O'Brien:)
>
> Q. During that conversation, was there a discussion involving driving?
>
> A. Yes, there was.
>
> Q. Would you tell the arbitrator about that discussion.
>
> A. When it got down to – as you can see by this document, we were negotiating quite a few things, and we got down to the last thing that needed to be settled was Article 13 subcontracting language. That was the stickler.
> And the stickler was Tom Becken, the owner, wanted to make sure that everybody was clear that this language didn't prohibit the company from ceasing operations. We received assurances from Jim Newell that that would be the case, that Article 18, I guess it is, does protect us, gives us that right to cease operations. Their concern was that we wouldn't do it piecemeal, like somebody quit so we don't replace him. Thus, the –
>
> Q. They didn't want you doing it piecemeal?
>
> A. They did not, thus the language that was added there that we can't use contracts. So language was added to speak to attrition.
>
> Q. Okay.

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6. Sentence 1 of paragraph 4 is not relevant here as this paragraph applies only to laborer employees. However, this paragraph demonstrates that its intent was to clarify unit laborer's rights and it also demonstrates that the parties could affirmatively state the Company's rights when they chose to do so.

A. Once it was agreed by all parties, then Tom agreed to the offer.

Q. What was agreed to? Tell the arbitrator what was agreed to.

A. All parties were in agreeance [sic] that this did not prohibit the company from ceasing trucking operations.

Q. Was there a specific discussion about ceasing trucking operations?

A. Yes, there was.

Q. What do you recall of that conversation?

A. Conversation with Tom Becken asking if this language as it was proposed at the time around the conference call would prohibit the company from ceasing operations. Jim Newell said, "No, you have the right. You always had that right, and you will continue to have that right."

Q. Okay.

A. "We just want to make sure that you don't do it through attrition." (Tr. 35-37)

On cross-examination on this point Hoffner testified as follows:

(By Ms. Hoeschen)

Q. Yes, this tentative agreement, (ER Exh. 2) this was signed after the telephone conversation that you had with Dan Alexander and Jim Newell?

A. Correct.

Q. And I take it there's no documentation of that telephone conversation that you're aware of?

A. Recording? No recording of it.

Q. And no written documentation of the conversation as far as you're aware?

A. No written documentation other than the notation in my day planner to call them.

Q. Okay. I want to make sure I understand what it is that you're saying Jim Newell told you. Jim Newell took the position in this telephone call that you could eliminate the drivers' jobs so long as you did it all at once but you couldn't just subcontract if they quit or retired?

A. What he indicated to us was that we always under the management rights' clause, we had the ability to cease the trucking operation. But what he did not want to us to do was to do it through reason of attrition, and that actually got incorporated in here, the attrition piece.

Q. Did he explain to you why he would find it less problematic for you to eliminate two jobs instantaneously than to simply wait for the employees to quit or retire?

A. I'm not sure what his thought was other than what he had indicated to me was we always had that right to cease operations, so there wasn't much he could do about that but he could try to protect the drivers through attrition.

Q. So what he was giving you was his interpretation of the contract language, basically?

A. I would say that's true. (Tr. 40-41)

Hoffner's testimony clearly shows that Becken only asked Newell and Alexander if the Company could "cease" its trucking operation as stated in Article 18. No questions were ever asked of the Union Representatives whether they believed if the Company "ceased" trucking it could then subcontract all trucking work to a third party. Newell's response as quoted by Hoffner on cross-examination does not go as far as the Company has argued herein. And given this Arbitrator's analysis of the language of Article 13 across the 2001-04 and 2004-07 agreements, it cannot be concluded that the language of amended Article 13 when read in conjunction with the unchanged language of Article 18 gives the Company the affirmative right to contract out all work it has closed down or ceased doing at its facility.

Furthermore, Hoffner's handwritten notes (ER Exh. 1) do not require a different conclusion. In this regard Hoffner's notes regarding "economic reasons" and "Company agrees to offer drivers positions in plant" did not become part of the 2004 07 labor agreement. In addition, the Union's point is well-taken that the Company should have confirmed in writing Hoffner's understanding of his and Becken's August 15, 2002 conversation with Newell and Alexander. Yet the Company did not do so. It was not until two years later when the Company had already decided to subcontract all trucking work that it first mentioned the

August 15, 2002 conversation it had with Newell. It is significant that Hoffner's testimony herein demonstrated that the term "subcontracting" was never used during the August 15, 2002, conversation, making Hoffner's description of his February 23, 2005 description of his conversation with Newell suspect.

Finally, this Arbitrator notes that Article 18, Section 4 is a "maintenance of standards" clause which guarantees that "wages, hours of work, overtime differentials and general working conditions" must be maintained "at not less than the standards in effect at the signing of the Agreement." This provision further supports the Union's arguments herein. In addition, Article 35 contains a further promise that "any leasing device to a third party shall not be used to evade this agreement."

In all of these circumstances, this Arbitrator finds that the Company's plans to subcontract trucking work at the Roberts, Wisconsin plant would violate the 2004-07 collective bargaining agreement and she therefore issues the following

AWARD[8]

Although the collective bargaining agreement between the parties authorizes the Company to close down or cease its trucking operations entirely, the Company would violate Article 13 of the agreement and past practice by subcontracting all of its trucking work after making such a decision. The Company is therefore ordered to continue to employ the two Company drivers pursuant to Article 13 and past practice for the term of the 2004-07 agreement.

Dated at Oshkosh, Wisconsin, this 10th day of November, 2005.

Sharon A. Gallagher
Sharon A. Gallagher
Arbitrator

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[8] I shall retain jurisdiction of the remedy only for 60 days after the date of this Award.