BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A.F. of L. - C.I.O., LOCAL UNION #2304

and

MADISON GAS AND ELECTRIC COMPANY

Case 72
No. 65461
A-6199

Appearances:

Kurt C. Kobelt, Lawton & Cates, S.C., Attorneys at Law, 10 East Doty Street, Suite 400, Madison, Wisconsin 53703-2694, appearing on behalf of International Brotherhood of Electrical Workers, A.F. of L. - C.I.O, Local Union #2304.

Peter L. Albrecht, La Follette Godfrey & Kahn, Attorneys at Law, One East Main Street, Suite 500, P.O. Box 2719, Madison, Wisconsin 53701-2719, appearing on behalf of Madison Gas and Electric Company.

ARBITRATION AWARD

International Brotherhood of Electrical Workers, A.F. of L. - C.I.O., Local Union #2304, hereafter Union, and Madison Gas and Electric Company, hereafter Employer, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested that the Wisconsin Employment Relations Commission appoint a WERC Commissioner or staff member as Arbitrator to hear and decide the instant dispute. The Commission appointed staff member Coleen A. Burns. Hearing on the matter was conducted on March 21, 2006 in Madison, Wisconsin. No transcript was made of the hearing. The parties filed briefs and reply briefs by June 8, 2006.

ISSUES

The parties did not stipulate the issues for decision. The Union proposes the following:

Did the Employer violate the collective bargaining agreement and a grievance settlement when it contracted out the night Janitor position at its Blount Street Plant?

If so, what is the appropriate remedy?

The Employer proposes the following:

Whether the Employer violated the collective bargaining agreement when it contracted out the night shift janitor work?

PERTINENT 2003-2006 CONTRACT PROVISIONS

ARTICLE I

. . .

Section 2

A. Union Shop and Departments Included. The Employer agrees to recognize the Union Shop and also that all employees of the Blount Generating Station, the Line and Pole Department, including Cable Splicers, the Garage, the Storeroom, the Meter and Connection Department, the Electric Meter Shop, the Gas Meter Shop, the Gas Distribution Department, Facilities Management Department, West Campus Cogen Department, the Viroqua Gas Company, Elroy Gas Company, and Crawford County, and all other employees directly connected with the mechanical performance of these departments, with the exception of the supervisory, clerical, and technical employees, shall be members of the Union.

Part-time employees may be hired but are limited to no more than 5 percent of the full-time labor force within the Union. Employees cannot be demoted or assigned part-time status. Part-time employees cannot be worked overtime until such overtime is first offered to full-time employees within the department where the work is available.

The Employer will inform the Business Manager, the Union Chief Steward, or the Department Steward of any work that is to be done by a contractor in cases where the work is ordinarily and customarily done by the Union.

The Employer agrees that it will not contract any departmental work which is ordinarily and customarily done by its regular employees if, as a result thereof, it would become necessary to layoff any such employees.

. . .

Section 4

. . .

N. Employer Determines Number of Employees.
The Employer shall have the right to determine how many employees it will employ or retain consistent with safety to men and equipment, together with the right to exercise full control and discipline in the interest of good service and proper conduct of its business. It is the Employer's objective to manage the size of its workforce through attrition, early retirements, and transfers.

. . .

T. Posting and Bidding for Jobs. When there is a vacancy in a position which is included in this bargaining unit, a job notice shall be posted on Employer bulletin boards for a period of ten calendar days under the following conditions:

a) When a new regular employee is to be added, or (b) When the Employer is proposing that an existing employee is transferred to fill a different line of progression in the same department.

Any regular employee of the Employer will be given opportunity to bid on posted job vacancies except that:

. . .

V. Part-Time Employees. The number of part-time employees shall be limited to no more than five percent (5%) of the full-time labor force in the IBEW bargaining unit. Current employees cannot be demoted or assigned part-time status. Full-time employees may volunteer for the part-time status if they so desire. Part-time employees cannot be worked overtime until such overtime is first offered to full-time employees in that department. Part-time positions will be posted in accordance with the provisions of the Labor Agreement.

BACKGROUND

In 1990, the Employer employed two janitors at the Blount Street plant, *i.e.*, a day shift and a night shift janitor. In 1990, while night shift janitor Wayne Boyle was on an extended medical leave of absence, work performed by this employee was contracted out by the Employer. Union Representative David Poklinkoski contacted Employer representative Garry

Hefty regarding this contracting out. Following discussions between Poklinkoski and Hefty, Hefty issued a memo dated October 12, 1990, notifying Poklinkoski of the following:

> Crest International will be performing some of the night janitorial work commencing Tuesday 11-12-90. Their services will be terminated at the plant once Wayne Boyle returns to work.

When Boyle returned to work, he moved into the vacated day shift janitor position. When the Employer did not terminate the Crest International contract, the Union, on or about March 15, 1991, filed a grievance stating, *inter alia:*

> **NATURE OF GRIEVANCE:**
>
> 1. Failure of Company to post job of janitor in the Electric Plant
> 2. Failure of Company to live up to MG& E memorandum of October 12, 1990 From Garry Hefty to David Poklinkoski
>
> **VIOLATION(S) OF CONTRACT:**
>
> Article I Section 1. Paragraph A. Union Recognized.
> Article I Section 2. Paragraph A. Union Shop and Departments Included.
> Article I Section 4. Paragraph N. Posting and Bidding for Jobs.
>
> **SETTLEMENT DESIRED:**
>
> 1. Post job for janitor in the Electric Plant.
> 2. Company terminate Crest International janitorial services per October 12, 1990 memorandum

In June, 1991, the Poklinkoski and Employer Representative David C. Mebane executed the following written document:

> Settlement of Electric Plant Janitor Subcontracting Grievance –
> Grievance #P91-2
>
> As full and complete settlement of the aforementioned grievance, a part-time permanent member of the bargaining unit, IBEW Local 2304, will be hired to fulfill the janitorial duties of the "night shift" janitor in the Blount Street Electric Plant subject to the following stipulations by and between IBEW Local 2304 and MGE.
>
> The part-time janitor position created by this settlement is an exception to the exception contained in Article I, Section 2, paragraph A of the Labor Agreement in this instant case alone.

For the purposes of benefit entitlement, this part-time employee position will be defined as an employee scheduled to work annually a maximum of 1,560 hours (30 hours per week) or a minimum of 1,040 (20 hours per week) hours per year. Employees who are scheduled to work in excess of 1,560 hours will be classified as full-time employees for benefit entitlement purposes.

Eligibility for participation in the MGE Health Benefit Plan would be three months of continuous employment (this is the same as for active employees). Benefit coverage would be identical to full-time employees. Employee contribution to premiums would be 30 percent of the full premium for single or family coverage.

Pension benefits shall be accrued on the basis of the actual hours worked (the same as full-time). The night janitor position will be scheduled by the employer as a four hour shift for any continuous four hours between the hours of 3:00 p.m. and 11:30 p.m.

Eligibility for other benefits for this position shall be provided in the attachment.

Any vacancy in the night janitor position will be subject to the Posting and Bidding for Jobs clause of the Labor Agreement.

The settlement of this grievance shall not be considered precedential. The sole purpose of this settlement is to resolve this particular grievance.

. . .

The referenced attachment states as follows:

PART-TIME EMPLOYEE BENEFITS

Progression/Layoff

Eligibility for bidding, progression, and priority in the event of layoff would be based on seniority. One year's seniority is earned for each 2,080 hours consecutively worked and would include holidays, vacation, and sick leave.

Life Insurance

Eligibility for life insurance would be three months of continuous employment. Life volume would be based on the employee's hourly rate of pay, exclusive of overtime pay, multiplied by 1,040 times one and one half and rounded to the next higher $1,000 increment. Premiums would be the same as for active employees.

Supplemental Worker's Compensation

Eligibility for supplemental worker's compensation for part-time employees would be the same as for full-time employees as outlined in Article IV, Supplement B, of the labor contract.

Calculation of the employee's regular weekly wage will be based on an average of the last full 12 months immediately preceding the date of injury. Supplemental benefits will be the difference between the average weekly wage workers' compensation benefits payable for such week.

Duration of supplemental benefits and other provisions as outlined in the labor contract will be the same as for full-time employees.

Dental Insurance

Eligibility for dental insurance would be three months of continuous employment. Employee contribution to premium would be 50 percent of the full premium for single coverage and 100 percent for family coverage.

Holiday, Sick Leave, and Vacation

This part-time employee shall receive holiday, sick leave, and vacation benefits (accumulation and pay) provided in the contract, pro rata in proportion to the hours which he works as they bear to 40 hours.

Rate of Pay

The rate of pay shall be that specified in the wage and employment classifications of the labor contract. No shift premium shall be paid to the janitor.

Overtime Pay

Overtime shall be paid after eight continuous hours of work per day or 40 hours per week.

Bereavement and Jury Duty

Bereavement leave and jury duty benefits as stated in the labor contract are not granted to this part-time position. However, if the part-time janitor is required to serve on a jury for more than four hours between 3 and 11 p.m. on a day that the employee is scheduled to work between 3 and 11 p.m., the employee will be paid jury duty pay as provided in the labor contract.

Thereafter, Roberto Jiminez was hired as part-time night shift janitor at the Blount Street Plant.

The parties' 1989-1992 collective bargaining agreement included the following language:

ARTICLE I

. . .

Section 2

> **A. Union Shop and Departments Included.** The Employer agrees to recognize the Union Shop and also that all employees of the Gas Production Department, the Electric Production Department, the Line and Pole Department, including Cable Splicers, the Garage, the Storeroom, the Meter and Connection Department, the Electric Meter Shop, the Gas Meter Shop, the Gas Distribution Department, and all other employees directly connected with the mechanical performance of these departments, with the exception of the Supervisory, Clerical, Technical and Part-Time Employees, shall be members of the Union.
>
> The Company will inform the Business Manager, the Union Chief Steward, or the Department Steward of any work that is to be done by a contractor in cases where the work is ordinarily and customarily done by the Union.
>
> The Company agrees that it will not contract any departmental work which is ordinarily and customarily done by its regular employees if, as a result thereof, it would become necessary to lay off any such employees.
>
> **. . .**

By letter dated June 14, 1994, Robert E. Domek, the Employer's Senior Vice-President of Human Resources, notified Union Representative Poklinkoski, *inter alia*:

> Thank you for your call on Tuesday, June 7 confirming that the three year labor agreement between Madison Gas and Electric Company and the International Brotherhood of Electrical Workers, Local Union #2304 had been ratified in accordance with the attached summary of terms.

Attached to this letter was a "**1994 IBEW LOCAL 2304 CONTRACT SETTLEMENT SUMMARY**" that included the following:

Attachment M

PART-TIME

I. Reference the "settlement of Plant Janitor Subcontracting Grievance – Grievance #P91-2" for outline of conditions for the establishment of Part-Time employees, with the noted exceptions;

*Bereavement and Jury duty benefits shall be provided for as under the existing labor agreement on a pro rata basis.

II. The number of Part-Time employees shall be limited to no more than five percent (5%) of the full-time labor force in the IBEW bargaining unit.

III. Current employees cannot be demoted or assigned to Part-Time status. Full-time employees may volunteer for the Part-Time status, if they so desire.

IV. Part-Time employees cannot be worked overtime until such overtime is first offered to full-time employees in that department.

V. Part-Time positions will be posted in accordance with the provisions of the Labor Agreement. Modify the language in the Labor Agreement, **P. Posting & Bidding for Jobs,** (a), (b), or (c) When a new regular, Part-Time Employee is to be added.

VI. Remove "Part-Time Employees" language from section 2,
A. Union Shop & Depts Included.

The parties' 1994-1997 agreement includes the following:

ARTICLE I

. . .

Section 2

A. Union Shop and Departments Included. The Employer agrees to recognize the Union Shop and also that all employees of the Electric Production Department, the Line and Pole Department, including Cable Splicers, the Garage, the Storeroom, the Meter and Connection Department, the Electric Meter Shop, the Gas Meter Shop, the Gas Distribution Department, the Viroqua Gas Company, Facilities Management Department, and all other employees directly connected with the mechanical performance of these departments, with the exception of the Supervisory, Clerical, Technical employees, shall be members of the Union.

Part-time employees may be hired but are limited to no more than 5 percent of the full-time labor force within the Union. Employees cannot be demoted or assigned part-time status. Part-time employees cannot be worked overtime until such overtime is first offered to full-time employees within the department where the work is available.

The Employer will inform the Business Manager, the Union Chief Steward, or the Department Steward of any work that is to be done by a contractor in cases where the work is ordinarily and customarily done by the Union.

The Employer agrees that it will not contract any departmental work which is ordinarily and customarily done by its regular employees if, as a result thereof, it would become necessary to lay off any such employees.

By letter dated October 10, 2005, Jiminez notified the Employer that he was resigning from his employment as part-time night shift janitor at the Blount Street Plant, effective October 21, 2005. Thereafter, the Employer advised the Union that the Employer intended to contract out night janitor work that had been performed by Jiminez and the Union filed a grievance that states, *inter alia*:

NATURE OF GRIEVANCE:

The Company violated the Labor Agreement and the terms of the grievance settlement regarding Janitor subcontracting in the Electric Plant (Blount Generating Station).

VIOLATION(S) OF CONTRACT:

(1) Article I, Section 1, A. Union Recognized (Page 2)
(2) Grievance #P91-2, Settlement of Electric Plant Janitor Subcontracting Grievance

SETTLEMENT DESIRED:

The Company shall post for the vacancy for the night janitor position and fill the position with an employee who is represented by the bargaining unit under the terms of the Labor Agreement.

The Employer provided Poklinkoski with a grievance response that includes the following:

This is in reference to Grievance No. 05-04 filed by the Union (IBEW Local 2304) with the Company on October 31, 2005. The grievance contends the Company cannot contract janitorial services to perform work the part-time

night janitor performed at Blount Generating Station (Blount). The Company denies the Union's contention.

A third and final step grievance meeting was held on November 16, 2005 with you, IBEW representatives Leonard Moe and Bruce McCulloch, and management representatives Todd Grossnickle, Steve Schultz, and me. In the meeting you referenced a June 10, 1991, Grievance Settlement in which the Union and the Company agreed a part-time, night shift janitor position at Blount would be filled by a member of the bargaining unit. You stated the Union's position is that the intent of the Settlement Agreement was to ensure the janitor position is always filled by a bargaining unit employee and not replaced by a contractor.

The Company's position is that the 1991 Settlement Agreement is nonprecedential and, therefore, does not require the Company to fill the position. The last paragraph of the Agreement states, "The settlement of this grievance shall not be considered to be precedential. The sole purpose of this settlement is to resolve this particular grievance." Furthermore, Article I, Section 2A, only prevents the Company from contracting work normally done by regular employees if it would result in the layoff of bargaining unit employees. Because the part-time, night shift janitor position at Blount is vacant, using a contractor to perform the janitorial work does not result in a layoff. Additionally, Article I, Section 4N, provides the Employer has the right to determine the number of employees it will employ and has the ability to manage the size of its workforce through attrition, retirement, etc. For these reasons, the Company must deny the grievance.

. . .

Effective January 3, 2006, the Employer contracted out night shift work that had been performed by Jiminez.

POSITIONS OF THE PARTIES

Union

In Article I, Section 2A, the Employer has agreed that it will not contract any departmental work which is ordinarily and customarily done by its regular employees if, as a result thereof, it would become necessary to lay off any such employees. Article I, Section 4N, provides that "It is the Employer's objective to manage the size of its work force through attrition, early retirements, and transfers."

At issue is whether the Employer created an exception to these rights when it settled the 1991 grievance protesting the Employer's contracting out of the night janitor position. The

Union submits that an application of basic principles of contract construction compels a conclusion that it did.

The current Article I, Section 2A, contracting language was in effect in 1991. That the Company intended to waive its rights to contract out the night janitor position under Article 1, Section 2A, is made clear by the following language of the 1991 settlement agreement:

> The part-time janitor position created by this settlement is an exception to the exception contained in Article I, Section 2, paragraph A of the Labor Agreement in this instant case alone.

The "exception to the exception" language refers to the structure of Article I, Section 2A. The last paragraph of this provision creates an exception by permitting subcontracting under certain circumstances. The "exception to the exception" language must mean the company has permanently given up its right to subcontract the night janitor position. The "in this instant case alone" language must be construed to be a limitation upon the subcontracting right for this position alone.

The conclusion that the parties intended to carve out the night janitor position from the Employer's Article I, Section 2A, right to subcontract bargaining unit work is reinforced by the 1991 settlement agreement language in which the Employer agreed a "part-time **permanent** member of the bargaining unit, IBEW Local 2304, will be hired to fulfill the janitorial duties of the 'night shift' janitor in the Blount Street Electric Plant..." (emphasis added), as well as by the settlement agreement language that states what is to happen to the night janitor position in the event of future vacancies. Specifically, "Any vacancy in the night janitor position will be subject to the Posting and Bidding for the Jobs clause of the Labor Agreement." The plain meaning of this posting requirement is to ensure that the job remains in the bargaining unit and is not outsourced.

The settlement agreement language, standing alone, is sufficient to establish intent to exempt the night janitor position from being contracted out. Such intent is also evidenced by subsequent bargaining history.

During the 1994 negotiation, the parties created the first contractual authority to use part-time employees in the bargaining unit. Attachment M of the Contract Settlement Summary expressly incorporates by reference the 1991 grievance settlement agreement and provides that part-time positions will be posted. This incorporation of the 1991 grievance settlement agreement places the settlement agreement on equal contract footing with the language of Article I, Section 2A.

It is not reasonable to construe the non-precedential language of the 1991 grievance settlement agreement as limiting the agreement to the first employee hired into the position because such a construction would nullify the language requiring that vacancies be posted. Posting is the agreed upon method of filling vacancies – not outsourcing. If the night janitor

first hired into the position had left after two weeks, would the Employer have been free to outsource the work?

Union Representative Poklinkoski testified without contradiction that the non-precedential reference was intended to ensure that the Union could not use the settlement agreement to challenge the contracting of work other than that of the night janitor; which testimony comports with the usual meaning of such language. The only durational term in the 1991 settlement agreement is the word "permanent;" meaning that the commitment to not outsource survives, regardless of the number of employees who occupy the position.

Article I, Section 4N, states an objective, not a right, and does not reference outsourcing. Any management right possessed under this section is waived by the specific terms of the settlement agreement. Whether or not the Employer is able to save money by subcontracting the janitor work is immaterial.

The Employer's argument that settlements are not binding if they are considered non-precedential rests on two cases that are readily distinguishable. Unlike these two cases, this grievance presents the same situation that gave rise to the grievance, *i.e.*, the outsourcing of the night janitor position.

The facts of the other case relied upon by the Employer bear a superficial similarity. In the present case, however, the terms of the settlement are clear.

The Employer's contention that it was proceeding in good faith is not credible. Its decision to convert the Blount Street plant from coal to natural gas was not announced until well after the decision to outsource the janitor position in November, 2005. It cannot retroactively bootstrap this rationale for the outsourcing.

The grievance should be sustained. The work should be restored to the bargaining unit.

Employer

Prior to the 1991 grievance settlement, the duties of the full-time, night janitor had been reduced to the point that it needed only a part-time employee. The collective bargaining agreement did not include part-time employees and, as a result, the Employer subcontracted these duties.

The parties resolved the grievance filed over this subcontracting by, *inter alia*, creating a part-time position that would be covered by the collective bargaining agreement. This was unique because the contract language expressly excluded part-time employees.

The contract language in effect at that time began with the identification of the employees who would be covered by the agreement and then concluded with the following language ". . . with the *exception* of the supervisory, clerical, technical and *part-time*

employees. . .” (emphasis added) This is what the parties were referring to in the “exception to exception” language at ¶3 of the settlement agreement.

The “exception to the exception” language had nothing to do with subcontracting. As admitted by the Union President, the parties were agreeing that the created part-time position would be an exception to the exclusion of part-time employees in the recognition clause. Subsequently, the “exception to the exception” language became irrelevant because the parties agreed, in 1994, to include part-time employees in the recognition clause.

The settlement agreement details benefits and other terms and conditions of employment, but is devoid of any language stating that this position, unlike the other positions, could never be subcontracted in the future. Union President Poklinkoski, who negotiated the settlement agreement and the successor collective bargaining agreements, admitted that none of these documents contain any language limiting the Employer’s ability to subcontract the part-time janitor position or part-time positions in general.

The settlement agreement expressly states that it “shall not be considered precedential.” and that “The sole purpose of this settlement is to resolve this particular grievance.” The subject of the settlement agreement (the creation of a part-time position) has been superseded by at least four, successor collective bargaining agreements; none of which limit the Employer’s ability to subcontract the janitor position in dispute.

The fact that the non-precedential language may be common to grievance settlements does not mean that it can be ignored by the Arbitrator. Grievances settled without precedent cannot govern the resolution of later grievances. The settlement agreement, which is not found in any of the addendums to the contract, is not a part of the current collective bargaining agreement.

The Arbitrator should not accept the self-serving, parole evidence offered by the Union’s witness to add new, non-negotiated language to the 1991 settlement agreement. If, as the Union President testified, that the parties intended the 1991 agreement to mean that the part-time janitor position could never be subcontracted, they would have so stated.

In 1994, the parties agreed, for the first time, to include part-time employees under the contract and that part-time positions would be subject to the posting and bidding provisions. These same posting and bidding procedure apply to full-time employees and do not preclude the Employer from subcontracting these positions. The Union’s argument that the grievance settlement language subjecting the night janitor position to the contractual posting and bidding procedures means that the parties were ensuring that this position remains in the bargaining unit is absurd.

Arbitrators routinely recognize that management has the right to determine whether a vacancy exists and if the company should fill the position. The parties’ agreement does not include language restricting this right. Under Article I, Section 4N, the Employer has the right to determine the size of its workforce and to manage its workforce through attrition.

Under Article I, Section 2A, the Employer has the right to subcontract bargaining unit work so long as the subcontracting does not result in layoffs and the Employer provides proper notice. It is undisputed that, in the instant case, the subcontracting of the part-time janitor's position did not result in layoffs and that the Employer provided the proper notice. The Union presented no evidence that, with respect to posting/bidding or subcontracting clauses, the part-time positions are treated differently than full-time positions.

Arbitrators, typically, impose a requirement that subcontracting be done in good faith for legitimate business purposes. These requirements have been met. The Union understood the Employer's goal of reducing the number of bargaining unit employees through attrition when it agreed to the language of Article I, Section 4N and has not filed grievances over the Employer's decision to not fill the positions of three employees who left after the resignation of the part-time janitor.

The collective bargaining agreement expressly provides the Employer with the right to subcontract the position in dispute. The 1991 settlement agreement does not waive, or limit, the Employer's right to rely on its contractual right to subcontract. The grievance should be denied.

DISCUSSION

Issues

The parties were not able to stipulate to a statement of the issues. The Union's statement of the issues more closely mirrors the issues presented in the grievance and processed through the grievance procedure. Accordingly, it has been adopted by the undersigned as the more appropriate statement of the issues.

Merits

At issue is the Employer's right to contract out the work of retired part-time night shift janitor Roberto Jiminez. At the time of his retirement, Jiminez had performed work which is "ordinarily and customarily done" by the Union. As both parties recognize, Article I, Section 2A, addresses the Employer's right to contract out such work.

Article I, Section 2A, requires the Employer to inform the Union that this work will be done by a contractor. The Employer provided this notice to the Union. (Jt. Ex #5)

Article I, Section 2A, expresses only one other restriction upon the Employer's right to contract out this work, *i.e.*, that such contracting not be done if, as a result thereof, it would become necessary to layoff any such employee. No employee was laid off.

The Union argues that the Employer has conceded that, in exercising its Article I, Section 2A, right to contract out work, it must act in good faith. Contrary to the argument of

the Union, the record does not establish that the Employer has acted in bad faith. Rather, the record establishes that, consistent with the objectives announced in Article I, Section 4N, the Employer contracted out the work in dispute in order to manage the size of its workforce through attrition, as well as to reduce costs.

In summary, Article I, Section 2A, provides the Employer with the contractual right to contract out the work in dispute. The undersigned turns to the issue of whether or not the 1991 grievance settlement agreement provides any restriction upon this contractual right of the Employer.

At the time that the parties entered into the 1991 grievance settlement agreement, Article I, Section 2A, contained the same contracting language as is contained in the current agreement. Union President and Business Manager Poklinkoski, who negotiated this settlement agreement on behalf of the Union, states that the Union understood that, under the existing contract language, the Employer had the right to contract out the work which was the subject of the grievance that gave rise to the settlement agreement, *i.e.*, the night shift janitor work which had been performed by Wayne Boyle. According to Poklinkoski, the Union filed the grievance because the Union was "ticked" that the Employer had reneged on the October 12, 1990 memo, which the Union viewed as a promise to not contract out Boyle's job once Boyle had returned to work.

Given that the 1991 grievance settlement agreement resulted in an agreement to hire a Union member to perform work for which the Employer had an Article I, Section 2A, right to contract out, it must be concluded that the 1991 grievance settlement agreement did restrict the Employer's Article I, Section 2A, right to contract out work. The question then becomes, what was the nature of this restriction?

In arguing that no permanent restriction was intended by the parties, the Employer primarily relies upon the last paragraph of the 1991 grievance settlement agreement, which states:

> The settlement of this grievance shall not be considered precedential. The sole purpose of this settlement is to resolve this particular grievance.

The Union responds that this is generic language reflecting, as Poklinkoski testified at hearing, an intent that the settlement would not apply to any position other than the part-time night janitor position created by the settlement agreement.

The "particular grievance" was the Union's assertion that the Employer had reneged on an October 12, 1990 promise to not subcontract Wayne Boyle's work when Wayne Boyle returned to work. Thus, the last sentence of this provision reasonably indicates that this settlement has no purpose other than to resolve the dispute over who should perform night janitor work upon Wayne Boyle's return to work. The stated purpose, together with the non-precedential language, reasonably leads to the conclusion that this settlement agreement has no

application beyond the issue of who will perform night janitor work upon Boyle's return to work.

The Union, contrary to the Employer, argues that such a construction is inconsistent with other provisions of the 1991 settlement agreement. One such provision states as follows:

> As full and complete settlement of the aforementioned grievance, a part-time permanent member of the bargaining unit, IBEW Local 2304, will be hired to fulfill the janitorial duties of the "night shift" janitor in the Blount Street Electric Plant subject to the following stipulations by and between IBEW Local 2304 and MGE.

The word "permanent" modifies "member of the bargaining unit, IBEW Local 2304 member." Accordingly, the language of this provision most reasonably indicates an agreement with respect to the bargaining unit status of the individual to be hired under the settlement agreement. It does not, as argued by the Union, reasonably indicate a commitment to not outsource the duties of the referenced "night shift" janitor, regardless of the number of employees who occupy this position.

The Union also relies upon the following settlement agreement provision:

> The part-time janitor position created by this settlement is an exception to the exception contained in Article I, Section 2, paragraph A of the Labor Agreement in this instant case alone.

According to the Union, this "exception to the exception" language refers generally to Article I, Section 2A; that the last paragraph of this Article creates an "exception" by permitting subcontracting under certain circumstances; and, thus, the Employer has waived any subcontracting right contained in Article I, Section 2A, by "excepting" this "exception." The more reasonable interpretation of the above language is that "exception to the exception" refers to that portion of Article I, Section 2A, that expressly references an "exception," *i.e.*, "with the exception of the Supervisory, clerical, Technical and Part-time Employees, shall be members of the Union." As argued by the Employer, in the "exception to the exception" language, the parties are recognizing that the part-time position created by the settlement agreement is an "exception" to that portion of the recognition clause contained in Article I, Section 2A, that specifically excludes part-time employees from Union membership. It is not reasonable, as the Union argues, to interpret this language as expressing any limitation upon the Employer's Article I, Section 2A, right to contract out work.

The Union also relies upon the following settlement agreement language:

> Any vacancy in the night janitor position will be subject to the Posting and Bidding for Jobs clause of the Labor Agreement.

As the Employer argues, the contractual Posting and Bidding for Jobs clause is applicable to vacancies in other bargaining unit positions and, yet, the work of these positions remains subject to the Article I, Section 2A, subcontracting language. Thus, an agreement to subject a vacancy in the night janitor position to the contractual posting and bidding provisions does not reasonably indicate that the parties intended to exclude the work of this position from the contractual subcontracting provision.

It is generally recognized that the employer has the management right to determine whether or not there is a vacancy in the work force. Accordingly, it would not be reasonable to conclude that, by imposing a duty to post a vacancy, the parties are also imposing a duty to declare a vacancy. Contrary to the argument of the Union, the language subjecting a vacancy in the night janitor position to the contractual posting and bidding provision does not reasonably indicate that the parties' intended to ensure that this position remains in the bargaining unit and is never outsourced.

In summary, the best evidence of the parties' mutual intent is the language of the 1991 grievance settlement agreement. Contrary to the argument of the Union, the basic principles of contract construction do not compel the conclusion that the 1991 grievance settlement agreement contains any waiver of, or restriction upon, the Employer's Article I, Section 2A, right to contract out the work in dispute. Rather, the most reasonable conclusion to be drawn from the language of the 1991 grievance settlement agreement is that it has no applicability to the present dispute.

In 1994, the parties negotiated a 1994-1997 collective bargaining agreement in which they agreed, *inter alia*, that "Part-time position language will become part of the Labor Agreement." The parties' agreement with respect to part-time positions was identified in "Attachment M." The Union, contrary to the Employer, argues that "Attachment M" expressly incorporated the 1991 grievance settlement agreement into the parties' collective bargaining agreement.

"Attachment M" states, in relevant part:

> Reference the "settlement of Plant Janitor Subcontracting Grievance – Grievance #P91-2" for outline of conditions for the establishment of Part-Time employees, with the noted exceptions;
>
> *Bereavement and Jury duty benefits shall be provided for as under the existing labor agreement on a pro rata basis.

The "noted exception" is contained in the attachment to the 1991 grievance settlement agreement identified as "Part-time Employee Benefits."

"Attachment M" does not incorporate the 1991 grievance settlement agreement into the parties' collective bargaining agreement. Rather, it references this settlement agreement for

the purpose of identifying the agreed upon benefits and conditions of employment of part-time employees.

The parties' intent with respect to the "Attachment M" agreements is reflected in the language that was inserted into their 1994-97 collective bargaining agreement; without any apparent objection from either party. With respect to Article I, Section 2A, language was inserted to accommodate agreements regarding part-time employees. The resulting provision does not contain any language exempting part-time employees from the contracting language of Article I, Section 2A. One may reasonably conclude, therefore, that the parties did not intend to exempt part-time employees from the contracting provisions of Article I, Section 2A.

The 1994-97 agreement to include part-time positions in the labor agreement did not distinguish among part-time positions. One may reasonably conclude, therefore, that the parties did not intend any distinction. Thus, assuming *arguendo*, that the 1991 grievance settlement agreement was intended to exempt the part-time position created by this agreement from the Employer's Article I, Section 2A, right to contract out work, this exemption would be nullified by the agreements reached in the 1994-97 negotiations; which, *inter alia*, subjected all part-time positions to the subcontracting language of Article I, Section 2A.

Conclusion

Article I, Section 2A, provides the Employer with the contractual right to contract out the work in dispute. The 1991 grievance settlement agreement does not restrict, in any way, the Employer's contractual right to contract out the work in dispute.

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

AWARD

1. The Employer did not violate the collective bargaining agreement and a grievance settlement when it contracted out the night Janitor position at its Blount Street Plant.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 29th day of September, 2006.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/gjc
7047