

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**VILLAGE OF ROTHSCHILD EMPLOYEES
LOCAL 1287-A, AFSCME, AFL-CIO**

and

VILLAGE OF ROTHSCHILD

Case 21
No. 68315
MA-14192

(Subcontracting Grievance)

Appearances:

Mr. John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 East 9th Street, Merrill, Wisconsin 54452, on behalf of the Union.

Mr. Phil Salamone, Labor Relations Consultant, 7111 Wall Street, Schofield, Wisconsin 54476, on behalf of the Village.

ARBITRATION AWARD

Village of Rothschild Employees Local 1287-A, AFSCME, AFL-CIO (herein the Union) and the Village of Rothschild (herein the Village) are parties to a collective bargaining agreement dated April 15, 2008 and covering the period from January 1, 2008 to December 31, 2009. On October 6, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the use of subcontracted labor by the Village to replace a culvert. The parties jointly requested the undersigned to hear the dispute and a hearing was conducted on November 10, 2008. The proceedings were not transcribed. The parties filed initial briefs by December 2, 2008, and reply briefs by December 22, 2008, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

Did the Village violate the collective bargaining agreement when subcontracted out to Tito, Inc. the work performed on the Alderson Street culvert replacement on July 9, 2008?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 3 – MANAGEMENT RIGHTS

Section 1. The management of the business of the Village and the determination and direction of the working force including the right to plan, direct and control Village functions; to schedule and assign work to employees; to determine the means, methods, processes, materials and schedules; to maintain the efficiency of employees; to establish and require employees to observe Village rules and regulations; to hire, lay-off, or relieve employees from duties; to maintain order, suspend, demote, discipline, and discharge employees for just cause, are the rights solely of the Village, its Board of Trustees, and President.

Section 2. The foregoing enumeration of management rights of the Village shall not be deemed to exclude other rights not specifically set forth and, therefore, retains all rights not otherwise specifically provided in this Agreement.

Section 3. The Village agrees there shall be no infringement on any employees' rights provided in this Agreement and will adhere to the provision of this Agreement.

Section 4. The Union has a right to appeal through the grievance procedure for any or all of the foregoing.

STIPULATIONS

The parties agreed to the following stipulations of fact:

1. Village employees have maintained and replaced culverts in the past.
2. The Union has never advanced in collective bargaining a proposal referencing subcontracting language.

BACKGROUND

The Village of Rothschild Employees' Union includes all the represented employees of the Village of Rothschild. Among these are five employees who work for the Village Street Department and one employee who splits time between the Street and Water Departments. Over the years, when culverts in the Village have had to be repaired or replaced this work has typically been done by bargaining unit members using Village equipment. There is, however, no language in the contract that defines this as bargaining unit work, nor is there language specifically restricting the Village's ability to subcontract such work to private contractors.

In the spring of 2008, the Village determined that it needed to replace a rusted culvert on Alderson Street. After considering its options, the Village Board decided to let out bids to private contracts for the job, and ultimately selected the bid of Tito, Inc. On July 9, 2008, the Village contracted with Tito, Inc., to replace the culvert. The cost of the culvert replacement to the Village was \$3,991.03, which, in its estimation, was less than it would have cost to have the work done by Street Department employees using Village equipment. The record does not indicate that the subcontracting resulted in a reduction of hours or pay to any bargaining unit employee. The Union grieved the Village's action and maintained that the culvert replacement was bargaining unit work under the existing practice of the parties. The Village denied the grievance and the matter proceeded to arbitration.

Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that despite the silence of the contract on the subject, the Village does not have an unfettered right to subcontract. It cites authorities to the effect that subcontracting is a mandatory subject of bargaining and where a contract is silent as to subcontracting, an employer cannot subcontract work without first either bargaining for the right to do so or obtaining the right in interest arbitration. It notes that the Village has never raised the issue of subcontracting in bargaining. It notes that job security is a fundamental concern to bargaining unit employees and that the assertion of an employer of an absolute right to subcontract bargaining unit work makes it possible to effectively undermine, and possibly eliminate, the bargaining unit.

The Union asserts that determining whether subcontracting is appropriate requires consideration of various factors, including whether the matter has been raised in bargaining, the good faith of the employer, whether the subcontracting resulted in layoffs, the effect on the Union or bargaining unit, whether the employer had the necessary equipment to do the work, whether the work was in an experimental or specialty line, the existence of the compelling business reason for the subcontracting, whether the work required special skills, experience, or

technique, similarity of the work to regularly performed work, past practice, existence of emergency conditions, and whether the work was part of the duties for a particular classification. The Union maintains that the Village's decision does not pass muster under this analysis. The Village had never bargained for the right to subcontract. Further, it artificially inflated the cost to have the Street Department workers do the work to justify bidding out the work. The Village has all the necessary equipment to do culvert replacement and Street Department employees have typically done this work in the past, so the skill and ability to do the work exists within the unit. There was no emergency requiring that the job be contracted out and the Village demonstrated no compelling business reason justifying its decision. Past practice further supports the Union because the example of the "50/50 program" raised by the city deals with concrete work, which is not typically done by Village employees. Further, while no employees experienced a layoff, unit members did lose overtime opportunities due to the Village's action.

The Village

The Village asserts that the clear and unambiguous language of the contract gives it the unrestricted right to subcontract work. Article 3, Section 1 enumerates the management rights of the Village, but is not exclusive, and Section 2 provides that the Village retains all other unspecified rights. Because the Village is small and has a small workforce, it needs the flexibility provided by this language to manage its various needs and responsibilities at reasonable cost.

The Village further notes that the past practice supports the Village, because the "50/50" sidewalk and curb program has always subcontracted this work, although Village employees are qualified to do it, and the Union has never grieved.

Assuming the arbitrator believes the contract to be ambiguous, it should be noted that where the contract is silent, the propriety of subcontracting is usually evaluated based on the effect on the bargaining unit. Here, no employee experienced any layoff or pecuniary harm as a result of the Village's action. The Village's action was based on cost and staffing concerns and was an isolated event. There is also no evidence that the Village did not act in good faith. Therefore, since the action was justifiable and resulted in no harm to the bargaining unit, it should be upheld.

Union Reply

The Union asserts that the doctrine of *expressio unius est exclusio alterius* applies here. The Village has several specified reserved rights in Article 3, but subcontracting is not among them. By specifically listing certain rights, the parties are deemed to have intended to exclude others not enumerated, including subcontracting. The Union is trying to read into the contract something that is not there.

The Village's past practice argument also does not apply here. The "50/50" program only applies to curb and gutter replacement, not culvert work. Curb and gutter is concrete work, which the Street Department is not equipped to do. On the other hand, Village has the equipment to do culvert replacement and the Street Department employees have done this work in the past. The example of the "50/50" program is, therefore, inapplicable. The Union does not contend that the Village may not subcontract in certain circumstances, but only where the work is integral to the regular work of the bargaining unit. The Union further disputes the Village's claim of no pecuniary harm. The record reveals that the project took ten hours and was completed in one day. Had Village employees done the work, it would have resulted in two hours of overtime for those doing the work. Claims by the Village that it would have spread the job over two days to avoid overtime is merely speculation.

The Village also pleads economic necessity, but the record does not support this claim. The Village's accounting method inflated the cost of having the bargaining unit do the work and there is no evidence of financial distress to justify the Village even using cost as a consideration. The Union further asserts that the cases cited by the Village are not on point and are irrelevant.

Village Reply

The Village argues that the cases cited by the Union are prohibited practice cases that refer to statutory duties to bargain. As such, they do not apply to the interpretation of contractual language and practice in grievance arbitration. The contractual grievance procedure specifically states that it applies to claims involving interpretation, application and allegations of breach of contract.

There is also no merit to the Union's job security argument. While subcontracting can be used to undercut bargaining unit security, in this case, it was used in the very limited context of a one day culvert replacement project and was not a frequent or ongoing practice. It was a sound and reasonable business decision that did not impair Union members' job security.

Further, the Union wrongly asserts that the Village acted in bad faith. The Union's argument is based on the premise that the Village incorrectly calculated the cost of the project and that the project ultimately experienced cost overruns. In the first place, if the Village made a mistake in costing the project, a mistake does not constitute bad faith. Further, the Village could not be expected to be able to anticipate cost overruns by the private contractor. Finally, despite its charge, the Union offers no alternative method of costing that it claims would have been better.

The Union's argument that there were no legitimate operational needs justifying the subcontracting also has no merit. The Union argues that the culvert project was routine work and that there was no immediate need to have the work done. However, the contract give management, not the Union, the right to make such determinations. The Alderson project was limited in scope and was based on legitimate business considerations. Further, the bargaining

unit was shorthanded at the time, due to an employee being on extended leave, justifying the contracting out of the project. The evidence also suggests that the Union was aware that the Village had previously subcontracted curb and gutter work as part of the “50/50” program, which undercuts its past practice argument. It contends that the concrete work was distinguishable because the Village did not have the necessary equipment, but the evidence shows that the equipment was not expensive and was readily available, so there was no meaningful distinction supporting its argument that the projects were significantly different.

DISCUSSION

In this case, the Village has engaged in subcontracting culvert repair/replacement work, which has historically been within the scope of operations of the Department of Public Works. There is no dispute that the Department has the equipment to do the work and that the Department employees have the requisite skills to do the work, as reflected by the fact that in the past the Department employees have actually been engaged in culvert repair/replacement. By the same token, there is no dispute that in the past the Village has engaged in subcontracting of work that arguably falls within the scope of the bargaining unit’s area of responsibility, to wit, the construction and replacement of concrete curb and gutter on Village streets in what has been denominated the “50/50 program.” This is work that is apparently within the skill level of the employees and the Village either has the equipment necessary to do the work, or could obtain it for a reasonable cost, but has historically elected to subcontract the work to private vendors. The Union distinguishes the “50/50 program” by arguing that the Union has not objected to this specific subcontracted work because the Village does not have the requisite equipment. It asserts, therefore, that culvert replacement is specifically bargaining unit work and is not subject to subcontracting. The Village, on the other hand, cites the subcontracting of the “50/50 program” work as evidence of a practice of permitting subcontracting of work that could be done by the bargaining unit, and asserts, therefore, that the subcontracting of the culvert project was within the scope of its authority under the management rights clause of the contract.

In the first place, the collective bargaining agreement is silent on the subject of subcontracting. Management reasons, therefore, that the right to subcontract is inherent under the rather broad language of the management rights clause. The Union takes the view that absent specific contractual authority, there is no right to subcontract. In my view, management’s position is the correct one. Most authorities would hold that where a contract is silent on the subject of subcontracting, such a power may be inferred under certain management rights rubrics, such as the right to determine the means methods and processes whereby the Villages functions are to be accomplished, or the right to right to seek efficiencies in Village operations. These rights are explicitly set forth in the contract and there is rather broad language regarding the Village’s reserved rights, as well. I find, therefore, that the contract’s silence on the subject of subcontracting does not support the Union’s contention that such a right does not exist.¹

¹ The Union cites several Commission decisions for the proposition that, where the contract is silent as to

The Union asserts, however, that past practice supports its position that culvert replacement is bargaining unit work and is not subject to subcontracting. In order to be binding, however, a practice must have certain characteristics that indicate its acknowledgement and acceptability by the parties. Generally, it must involve a clear and consistent pattern of conduct that has existed for an extended period of time. There must also be indicia that the parties have acknowledged the practice and have mutually agreed to it. In this case, the record does not reveal how long the bargaining unit has been doing culvert replacement, or how frequently. Further, there is a clear disagreement between the parties as to whether the alleged practice involves subcontracting generally, or just the subcontracting of culvert work. It is clear, therefore, that there is no understanding between the parties as to what is or is not permissible subcontracting, nor has there been in the past, for a practice the Union believed was restricted to curb and gutter work was regarded by the Village as just one manifestation of a general contractual right. Thus, under the circumstances I am unable to find that there is a binding past practice that culvert replacement is bargaining unit work and is not subject to subcontracting.

Nonetheless, the fact that management has the authority to engage in subcontracting does not mean that its discretion in this area is unfettered. As the Union correctly points out, unrestricted subcontracting has the potential to undermine the Union and also to curtail the working conditions of employees by causing layoffs, reducing hours of bargaining unit employees, or by diverting preferred work away from the bargaining unit. Consequently, it is necessary to inquire into the Village's use of subcontracting to determine whether it was reasonable under the circumstances and whether it was done in good faith.

The record reveals that the culvert replacement process requires the use of some combination of three employees within the classifications of Grader/Backhoe Operator 1 and 2 and Truck Driver/Laborer. At the time the subcontracting was undertaken, one member of the bargaining unit was on family medical leave, but there was a Grader/backhoe Operator 1, a Grader/Backhoe Operator 2 and a Truck Driver/Laborer available. The records indicate that all these employees were engaged in other tasks on the day in question, and George Peterson, the Public Works Administrator at the time of the project, testified that he was concerned about assigning three employees to the culvert project when the Department was short-handed. By the same token, there was apparently no urgency to the project such that it could not have been put off temporarily. Nonetheless, the decision as to how the work was to be accomplished clearly falls within management rights, as long as it did not infringe on the rights of employees or otherwise violate the contract.

Peterson also testified that his calculations indicated that the private contractor could do the work for less cost than the Village employees, when costing the usage of the Village's own

subcontracting, it is a prohibited labor practice for an employer to engage in subcontracting without first bargaining with the Union over the right to subcontract and the impact thereof. These are statutory duty to bargain cases, however, that arise under Chapter 111.70, Wis. Stats., the enforcement of which is outside the jurisdiction of the Arbitrator.

equipment against the Department budget was considered along with wages. In effect, in addition to wages, the Administrator included the value of the use of the Village's own equipment charged against the Department budget at the rate it would charge if it rented the equipment out to a third party. In its brief, the Union took issue with Peterson's costing, but did not provide an alternative formula for evaluating the total cost to the Village of having the work done internally. The Union merely indicated that the Village's analysis indicated a lack of good faith, especially inasmuch as the Village ultimately had cost overruns from the private contractor of approximately \$491.03. In my view, whatever the merits or defects in the Village's costing formula for having the work done internally, there is no evidence of bad faith in the process. Likewise, the fact that there were cost overruns incurred by the private contractor does not indicate a lack of good faith on the Village's part, although it does undercut the Village's argument that contracting privately was more cost effective.

The other significant consideration in whether the Village's action in this instance was reasonable and in good faith is whether there was a negative impact on the bargaining unit as a whole, or on the individual members. First, the record reveals that this was an isolated instance of subcontracting and that there does not seem to be any intention by the Village to expand subcontracting of work regularly into areas that are typically the responsibility of bargaining unit employees. The exception is the "50/50 program," which, as previously noted, has never been contented by the Union and is limited to concrete work which the Village employees have not typically done. Further, no employees were on lay off status at the time of this occurrence and none were laid off or reduced in hours as a result of the subcontracting. The Union asserts that bargaining unit employees lost overtime as a result of the subcontracting, but Peterson testified that had Village employees done the work he would have spaced it out over two days to avoid overtime and there is no reason to disbelieve this assertion. In my view, therefore, the Village did have the authority under the collective bargaining agreement to subcontract the culvert replacement project and its decision to do so in this instance was reasonable under the circumstances, did not impair the Union or bargaining unit employees and was undertaken in good faith.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The Village did not violate the collective bargaining agreement when subcontracted out to Tito, Inc. the work performed on the Alderson Street culvert replacement on July 9, 2008. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 3rd day of April, 2009.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc
7412