BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43, UNION LOCAL 150

and

THELEN SAND & GRAVEL, INC., d/b/a WILMOT READY MIX

Case 3
No. 71647
A-6518

Appearances:

Soldon Law Firm, LLC, by **Attorney Scott D. Soldon,** 3541 Summit Avenue, Shorewood, Wisconsin, appeared on behalf of the Union.

Littler Mendelson, PC, by **Attorney Fredrick L. Schwartz,** 321 Clark Street, Suite #1000, Chicago, Illinois, appeared on behalf of the Company.

ARBITRATION AWARD

At all times pertinent hereto, Teamsters Local Union No. 43, (herein the Union) and Thelen Sand & Gravel, Inc., d/b/a Wilmot Ready Mix (herein the Company) were parties to a collective bargaining agreement covering the period June 1, 2010, to May 31, 2013, and providing for binding arbitration of certain disputes between the parties. On June 14, 2012, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration concerning the grievance of Steven Benedict over an alleged failure to recall him from layoff and pay him the contractual rate for hauling materials for the Company. The parties requested a panel of the WERC staff from which to select an arbitrator to decide the issue. The undersigned was subsequently selected to hear the dispute. The hearing was conducted on October 22, 2012. The proceedings were not transcribed. The parties filed briefs on November 28, 2012, whereupon the record was closed.

ISSUES

The parties stipulated to the following framing of the issues:

> Did the Employer violate the contract by 1) failing to properly recall the Grievant to perform bargaining unit work and 2) by failing to pay the correct rate of pay to the Grievant on DK customer work?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 3. RECOGNITION AND UNION SECURITY

Section 3. Work Assignments

A. The Employer hereby assigns all work involved in the operation of the Employer's truck equipment during the operation, loading and unloading thereof to the employees in the bargaining unit here involved. The Employer agrees to respect the jurisdictional rules of the Union an shall not direct or require its employees, or person other than the employees in the bargaining unit here involved, to perform work which is recognized as the work of the employees in said unit.

B. The Employer agrees that he will not enter into any leasing device or subterfuge of any kind to avoid or evade the terms and conditions of this Agreement.

ARTICLE 33. SUBCONTRACTING

The parties recognize that the Employer may hire additional trucking when his own equipment and his own employees are fully employed. The employer also agrees to use outside Union drivers whenever possible. Provided, however, that the Employer shall not be required to utilize the services of Super Mix or any of its related entities.

ARTICLE 34. MAINTENANCE OF STANDARDS

Section 1. The Employer agrees that all conditions of employment in his individual operation relating to wages, hours or work, overtime differentials, and general working conditions shall be maintained at not less than the highest standards in effect at the signing of this Agreement.

Section 2. Employees assigned to perform work covered by this Agreement within the geographical jurisdiction of any Local Union affiliated with the International Brotherhood of Teamsters, other than the Local Union which he is a member of, shall receive all of the benefits of the collective bargaining Agreement which prevails in the area in which his work is performed. In no case shall this result in a reduction of wages, hours, or working conditions of the employee.

Letter of Agreement Between Teamsters Union Local 43 and Thelen Sand & Gravel d/b/a Wilmot Ready Mix for Transfer Trailer Hauling

Teamsters Union Local 43 ("Local 43") and Thelen Sand and Gravel, Inc. d/b/a Wilmot Ready Mix ("the Company") and hereafter collectively, the "Parties," wish to enter into a Letter of Agreement ("Agreement") modifying certain terms of the existing Collective Bargaining Agreement ("Contract"). The Parties hereby agree that the contract shall be amended as follows:

1. For purposes of this Agreement, the recognized categories shall include: Transfer Trailer Hauling.

2. Local 43 Driver pay rate shall be 29% of the gross revenue of the vehicle, for the particular route driven according to attached Schedule A.

3. Local 43 Driver shall be initially assigned to a category as need on a daily basis, however, may be moved from category to category as needed based on customer orders during the day.

4. Company shall use best efforts to schedule all available transfer trailers on a daily basis to fill transfer orders, however, transfer trailers may not be scheduled first or for the entire day. Parties acknowledge that some transfer trailers may be parked at some point during the day to allow the particular Local 43 Driver who is assigned to or who will be assigned to transfer trailers, to be assigned a different Truck and work in a different category so that the Driver may alternatively deliver ready-mix, gravel or cement.

5. Seniority will be applied on a start time basis based on the needs of the Company and qualifications of Driver.

6. Drivers will be given reasonable time (not exceeding two weeks) to qualify to drive the truck and transfer trailer and perform the route satisfactorily and in timely manner. Those Drivers failing to and/or unwilling to qualify and maintain qualification and continue to perform in a timely manner for any assignment under this Agreement will be passed over regardless of seniority and less senior, qualified drivers will be given opportunity to drive routes.

7. Drivers shall be paid regular contract rate when performing task in other categories.

8. Drivers will be required to drive the number of routes required per day in compliance with DOT driver hour limitations.

9. When break down occurs where there is no fault of the driver, the driver shall be paid $21.00 per hour beginning one-half hour after contacting dispatch and continuing until Driver reaches home base or agreed upon drop off point.

10. Company maintains the right to hire additional trucking to haul their transfer trailers when the Company's qualified Driver or available equipment is fully employed or out of service.

Local 43 and Company shall act in good faith with respect to honoring the terms of the Letter of Agreement.

Local 43 and Company hereby agree that this Agreement is incorporated into remaining terms of the Contract, including, but not limited to, no strike clause and grievance procedure in the event of any alleged breach of the Agreement.

This Agreement shall be in effect June 1, 2010 through May 31, 2013 in conjunction with the present Contract.

BACKGROUND

Thelen Sand and Gravel, Inc., d/b/a Wilmot Ready Mix (herein the Company is an aggregate manufacturer and also operates a transfer trailer truck to haul organic materials (yard waste, leaves, grass clippings, etc.) to its compost facility in Antioch, Illinois, and from that compost facility to various customers who purchase the finished organic product (compost). The "transfer trailer haul" is a specific classification within the contract, and employees within that classification are paid a percentage of each haul, as opposed to the flat hourly rate that is paid to the other classifications within the contract.

The Union represents a bargaining unit consisting of all truck drivers, warehousemen and helpers employed by the Company. The Grievant in this matter, Steve Benedict, is a member of the bargaining unit and has worked for the Company for over nine years. He is the only member of the bargaining unit who is qualified to do transfer trailer hauling. Typically, the transfer trailer hauling component of the Company's business is suspended during the winter months, during which time the Driver is laid off.

Benedict was laid off in December 2011 and was not recalled until April 2, 2012. On April 2, 2012, he was contacted by the Company and instructed to pick up a load of yard waste from one of its regular customers, Eco Materials, and haul it to the Company's facility in Antioch, IL. While at Eco Materials, Benedict learned that Eco had been open for weeks and that another owner/operator had been hauling materials during the time he was laid off. Upon

returning to the Company's facility, Benedict lodged a complaint with the Company's Human Resources Director based on the fact that the labor agreement contains language that prohibits subcontracting while bargaining unit employees are laid off. Benedict was advised that the Company had not contracted with the outside haulers, but he indicated he would file a grievance, which he did.

A second issue involves transfer trailer hauling work the Grievant performed for DK Construction (DK), another of the Company's customers. According to the Letter of Agreement between the parties establishing the Transfer Trailer Hauling classification, the Driver's compensation is set at "29% of the gross revenue of the vehicle." During 2011, Benedict hauled materials to DK and was paid at a rate of .812 per cubic yard. In 2012, Benedict again hauled materials to DK, but his rate of pay was reduced to .58 per cubic yard. Benedict, likewise, grieved this action, alleging that reducing his compensation without notification or bargaining violated the Letter of Agreement and the Maintenance of Standards Clause of the Labor Agreement. The grievances were denied by the Company and the matter moved to arbitration. Additional facts will be referenced, as needed, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Union

Subcontracting

The Union asserts that the Letter of Agreement signed by the parties in 2009 makes Transfer Trailer Hauling bargaining unit work and prohibits the Company from subcontracting the work while a qualified bargaining unit employee is laid off. This agreement was violated when outside brokers were used to haul organic waste for Eco Materials in the spring of 2012 while the Grievant was laid off. The Union asserts that the independent brokers were hired by either Thelen Sand & Gravel, Inc. or by Thelen Materials, Inc. which are under identical ownership. The contract and LOA are clear that Transfer Trailer Hauling is bargaining unit work and that outside vendors may only be used when the bargaining unit is at full employment. The Company tried to get around this by employing another commonly owned entity to engage the independent brokers and should not be able to avoid its obligations under the labor agreement and LOA by hiding behind another company.

Transfer Trailer Hauling Rate

The Company has a Transfer Trailer Hauling contract with an entity known as "DK," which supplies organic materials to landscapers. During 2011, material hauling for DK was paid at the rate of 0.812 cents per cubic yard. In 2012 this rate was unilaterally dropped to 0.58 cents per cubic yard without notice to or bargaining with the Union, and without apparent

justification. The Company claims the rate went down because the rate it received from DK also went down, but, even if true, this reduction is prohibited by the Maintenance of Standards Clause and the Grievant is entitled to be made whole.

The Company

The Company asserts at the outset that the burden of proving its claims lies upon the Union and that there is an underlying presumption of contract compliance that must be overcome for the Grievant to prevail. The Company maintains that in this case the Union has failed to carry its burden.

Subcontracting

The Union claims that the Company violated the contract by improperly subcontracting transfer trailer hauling work in March of 2012 while the Grievant was laid off. The undisputed evidence proves, however, that the Company had no control over this work and that there was, therefore, no violation. The Union attempted to establish that one of the Company's customers, Eco Materials, retained independent brokers, to wit Matthews Trucking and JPG Trucking, to haul yard waste in March 2012, instead of hiring the Company. The Union was not, however, able to establish any connection between the Company, Eco, Matthews or JPG and the Grievant acknowledged any claim of such a connection would be pure "speculation." The Company, on the other hand, established that its Operations Manager Tim Krumm observed materials being hauled for Eco by Matthews and JPG in March 2012. When he inquired about it with Eco he was told that Eco retained Matthews and JPG because their rates were lower. Later, Eco agreed to the Company's rate, at which time the Grievant was recalled and went back to work. There is no evidence of any subcontracting of bargaining unit work by the Company, or the use of any subterfuge to avoid its contract obligations, so the grievance should be denied.

Transfer Trailer Hauling Rate

The Union claims that the Grievant was improperly paid a lower rate in 2012 for hauling material for DK Construction than he had been paid for the same work in 2011. The Letter of Agreement between the parties establishes that the Grievant is to receive 29% of the proceeds of any haul he makes while operating the Transfer Trailer. The Union maintains that the Maintenance of Standards clause in the contract requires that the Grievant be paid in perpetuity the highest rate that was ever paid for that work, which appears to have been in 2011.

It has been held by arbitrators that Maintenance of Standards clauses exist to assure continuation of working conditions not otherwise spelled out in a contract, but that where a subject is addressed in a contract the clause assures no more than compliance to the degree required in the agreement (citations omitted). Here, the Union seeks to use the Maintenance of Standards clause to override the terms of the Letter of Agreement addressing Transfer Trailer

Hauling. The LOA specifies the percentage rate the driver is to be paid. The evidence shows that the 2012 rate the Company was able to negotiate with DK was lower than the 2011 rate and the Grievant's pay, as a percentage of the rate was lower, as well. The Company's obligation, however, was only to pay the Grievant 29% of the gross revenue of the vehicle, which it did. The grievance should be denied.

DISCUSSION

In this case, the Union is alleging two separate contract violations against the Company with respect to its treatment of the Grievant herein, Steve Benedict. First, the Union asserts that while Benedict was laid off in March 2012 the Company retained two independent brokers to haul yard waste from one of the Company's customers, Eco Materials, to the Company's composting facility in Antioch, Illinois, which is alleged to be a violation of the subcontracting language in Article 33 of the contract. Second, the Union claims that the Company violated the terms of the parties' Letter of Agreement regarding Transfer Trailer Hauling and the Maintenance of Standards clause contained in Article 34 when it paid Benedict a lower rate for materials hauled for DK Construction in 2012 than it paid him for hauling for the same customer in 2011. I will address the claims separately.

Subcontracting

This claim focuses on the Union's allegation that while the Grievant was laid off in March 2012, the Company contracted with two independent brokers, Matthews trucking and JPG Trucking, to haul yard waste from Eco Materials to the Company's composting facility in Antioch, Illinois. The evidence presented by the Union was the testimony of Benedict that when he returned to work in April 2012 he was informed by an Eco employee that Matthews and JPG had been hauling waste for weeks. He asked the Company's Human Resources Director about this and was informed that the hauling had been done by independent brokers. This fact was confirmed to Union Representative Wesley Gable by the Company's President, Steve Thelen, and Operations Manager, Timothy Krum. Neither Benedict nor Gable had direct knowledge of whether the brokers had been retained by the Company or by Eco.

For the Company's part, testimony was offered by Krum, who stated that he became aware of the situation when he saw Matthews and JPG trucks hauling waste from the Eco yard and inquired about it to Eco's president. He was informed that Eco had retained the brokers because they offered lower rates than the Company. Krum declined to lower the Company's rates and so the Company did not receive work from Eco until April when the volume of material had increased. At that time Benedict was recalled from layoff. No evidence was offered establishing that the brokers were retained directly or indirectly by the Company, or that the Company had any connection to the brokers. No evidence was offered showing any identity of ownership or control between the Company and Eco Materials.

As the Company points out in its brief, in a case of claimed contract violation such as this it is the Union's burden to establish the facts supporting its claim. Where the claim is that

the Company wrongfully engaged in subcontracting bargaining unit work, there must at least be some modicum of evidence that the Company participated in or controlled the decision to contract out the work. That could arise in a number of ways, most obviously if the Company directly contracted with the outside vendor, but also if the Company exercised direct or indirect control over another entity that did the contracting in an attempt to insulate itself. Here, the Union witnesses suggested the possibility that another putative subsidiary of the Company, Thelen Materials, did the contracting or, if Eco did the contracting, that the Company had a controlling interest in Eco. If either scenario were established it would weaken the Company's position, but as it is the record does not provide credible evidence of any of these alternatives. That being the case, I cannot find that the Company played any part in contracting Eco's Transfer Trailer Hauling work to the independent brokers. To the contrary, the evidence indicates that the Company was unaware of the contracting until Krum discovered it after the fact and inquired about it with Eco. I find, therefore, that this claim has not been established.

Transfer Trailer Hauling Rate

Here the Union's contention is that the Company wrongfully reduced the rate at which Benedict was compensated for hauling materials for DK Construction in 2012. The operative language establishing the appropriate rate of compensation for this work is found in paragraph 2 of the Letter of Agreement establishing Transfer Trailer Hauling as bargaining unit work, and it states:

> 2. Local 43 Driver pay rate shall be 29% of the gross revenue of the vehicle, for the particular route driven according to attached Schedule A.

The LOA was signed in June 2009 and appended to the parties' existing contract. When a successor agreement for 2010-13 was negotiated the referenced Schedule A was eliminated, but the Driver's rate continued to be 29% of the gross revenue for the vehicle.

In 2011, Benedict received 81.2 cents per cubic yard of material hauled for DK Construction under the contract between DK and the Company. In 2012, Benedict's rate for the same work was reduced to 58 cents per cubic yard. The Union does not contest the fact that Benedict did, in fact, receive the 29% of the revenue generated by the vehicle as provided in the LOA. Rather, it asserts that under the Maintenance of Standards clause the Company was required to maintain Benedict's compensation at the 2011 rate, notwithstanding the Company's claim that the contract rate it received from DK went down in 2012, resulting in a corresponding reduction in Benedict's compensation, as well.

The Company provided testimony to the effect that the rate it negotiated with DK for hauling organic materials in 2012 was lower than in 2011 and that Benedict received the appropriate 29% of the revenue it received from DK albeit less in real dollars than was paid in 2011 for the same work. This testimony was uncontradicted.

The Maintenance of Standards clause, contained in Article 34, provides, in pertinent part:

> Section 1. The Employer agrees that all conditions of employment in his individual operation relating to wages, hours or work, overtime differentials, and general working conditions shall be maintained at not less than the highest standards in effect at the signing of this Agreement.

The Union argues that this language requires the Company to maintain the Grievant's pay rate for DK work, in real dollars, at the level established in 2011. I disagree.

In the first place the language states that wages must be maintained "at not less than the highest standards in effect at the signing of this Agreement." This language is problematic for the Union because the term 'highest standards" is not defined. Reference to Exhibit A of the contract and the LOA reveals, however, that the agreed wage rate for the Transfer Trailer Hauling classification was 29% of the gross revenue of the vehicle. That was the standard the parties adopted for Transfer Trailer Hauling that was in effect when the contract was signed in 2011. The .812 rate Benedict received for DK work in 2011 was a function of the haul rate negotiated between the Company and DK applied to the agreed 29% standard. This language clearly anticipates that the revenue generated by the vehicle may change over time, up or down, depending on a variety of factors, and that the driver's rate will likewise fluctuate correspondingly. The other job classifications in the contract are pegged to specific hourly rates. Transfer Trailer Hauling, alone, is compensated as a percentage of the revenue generated by the vehicle. Requiring the Company to pay 81.2 cents per cubic yard in this circumstance would result in the Grievant receiving significantly more than the 29% provided by the LOA, which is clearly not what the parties intended.

I note also that it is a tenet of contract interpretation that specific language in an agreement takes precedence over general language bearing on the same subject matter. Here, while the Maintenance of Standards clause generally addresses the maintenance of wage levels, the LOA and Exhibit A establish a specific, negotiated compensation scheme for Transfer Trailer Hauling. Applying the principle noted above, I find that the 29% rate takes precedence over maintenance of the highest wage generated by that rate and that a contrary result would make the 29% calculation provided for in the LOA meaningless. Thus, for the reasons set forth above, and based upon the record as a whole, I hereby issue the following

AWARD

The Employer did not violate the contract by 1) failing to properly recall the Grievant to perform bargaining unit work and 2) by failing to pay the correct rate of pay to the Grievant on DK customer work. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 25th day of March, 2013.

John R. Emery /s/
John R. Emery, Arbitrator

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