ARBITRATION

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In the Matter of the Interest Arbitration between,

CHEQUAMEGON UNITED TEACHERS

Petitioner

and

Case 40 No. 54533
INT/ARB-8039

Decision No. 29240-A

WASHBURN SCHOOL DISTRICT

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Award of Arbitrator

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Introduction

On June 24, 1996, representatives of the Washburn School District (hereafter "District" or "Employer") and Chequamegon United Teachers (hereafter "Union") began collective bargaining on a successor agreement covering support staff employees of the District. On or about October 25, 1996, the County filed a Petition for Arbitration requesting the Wisconsin Employment Relations Commission (WERC) to initiate final and binding arbitration pursuant to Section 111.70 Wis. Stat. On January 30, 1997, Deborah L. Wojtowski, a member of the WERC staff, conducted an investigation which reflected that the parties were deadlocked. Final offers were exchanged and submitted to the WERC and on November 10, 1997, the WERC certified that the investigation was closed. Accordingly the WERC issued an order providing for binding arbitration. The parties selected Arlen Christenson of Madison, Wisconsin as the arbitrator and he was appointed on December 10, 1997. A hearing was held in Washburn on March 3, 1998. Pursuant to an agreement of the parties, a briefing schedule was established and briefs were filed with the arbitrator. Briefs, including reply briefs were filed by the parties with the final reply brief being received by May 13, 1998.

Appearances

Barry Delaney, Executive Director, Northern Tier UniServ-West, Hayward, Wisconsin appeared for the Union.

Kathryn J Prenn, Attorney at Law, Weld, Riley, Prenn & Ricci, S.C. Eau Claire, Wisconsin appeared for the District.

The Issue

The parties agree that, although their final offers contained a number of items, the dispute submitted to arbitration is limited to the issue of subcontracting. The District's final offer calls for continuing the current language of the collective bargaining agreement as follows:

> The Board will not subcontract if such subcontracting results in reduction of time and/or layoffs of any bargaining unit members This provision shall only apply to employees hired before July 1, 1998.

The Union's final offer would change the subcontract language by deleting the second sentence so that it would read:

> The Board will not subcontract if such subcontracting results in reduction of time and/or layoffs of any bargaining unit members.

Statutory Criteria

Section 111.70(4)(cm)7, Wis Stat. requires that an award in an interest arbitration consider a list of factors. The factors directly or indirectly relevant to this proceeding and/or referred to by the parties in their arguments, are the following:

7r. . . .

a. The lawful authority of the employer.

b. Stipulations of the parties.

c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of the proposed settlement.

d. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in public employment in the same community and in comparable communities.

. . .

j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties in the public service or in private employment.

Discussion

The current language governing subcontracting has been a part of the agreement since 1988. When the 1988-1990 agreement was negotiated the Union proposed a ban on subcontracting which led to the compromise language that has remained in the agreement until now.

In each round of collective bargaining since 1988 the Union has proposed that the second sentence of the subcontracting provision be removed. The parties draw different conclusion from this history. The Union cites it as confirming the importance of this issue to the members of the bargaining unit. The Employer points to it as evidence of bad faith in that immediately after agreeing to the provision the Union wanted to eliminate it.

In addition to pointing to the importance of this issue to its members and their need for long term job security, the Union's argument emphasizes the fact that among comparable communities, as that term is used in the statutory criteria, the majority have subcontracting limitations similar to that sought by the Union. Seven of the nine school districts comprising the Indianhead Athletic Conference, which the parties agree comprises the comparable communities, have subcontracting provisions at least as limiting as the Union's proposal. The remaining two have no contractual provisions regarding subcontracting. None has language specifically authorizing subcontracting.

The District argues that the Union's final offer is a major change in the status quo for which the Union has shown neither a compelling need nor a quid pro quo. Additionally it is important that the District retain the flexibility to respond to changing conditions by subcontracting, for example, the special education services that change from year to year and month to month. Nor, the District contends, has the Union shown any threat by the District to erode the bargaining unit by drastic subcontracting even though the current language gives it the right to do so.

The briefs of the parties include discussions and citations to arbitration decisions concerning the role of an arbitrator in interest arbitration. Under Wisconsin law the arbitrator's role is nothing more nor less than selecting the final offer which best meets the statutory criteria. Unlike grievance arbitration where the parties chose arbitration as the means to resolve contractual disputes, the interest arbitration is imposed by law. The grievance arbitrator is to carry out the purposes of the contract according to the parties intentions The interest arbitrator is to carry out the purposes of the law. The question, therefore, is not what the parties might have agreed to under different circumstances or if they could use economic pressure instead of arbitration or anything other than how their respective offers fare applying the statutory factors. The arbitrator's duty is to select the offer comes out ahead in that process.

The Union's final offer calls for a change in the status quo. The District contends that arbitrators are reluctant to impose change through arbitration, preferring that be done by

voluntary agreement. If change is to be arbitrated, the District argues, the Union must meet a stringent test requiring it to show, by clear and convincing evidence, both a compelling need for the change and a quid pro quo The Union, on the other hand, points out that unlike the private sector, public employees cannot strike to force change. Nor can an employer lock out or otherwise use economic pressure. A resistant employer or union can avoid change simply by not agreeing unless it can be done through arbitration. There is authority for this proposition as well.

The statutory criteria make no distinction between final offers that call for change and those that stick with the status quo. There is nothing in the law that requires or encourages arbitrators to be reluctant or enthusiastic about proposals for change. The question is still which final offer is better, applying the statutory factors. It is appropriate to require the party proposing change to produce evidence supporting its proposal. In the absence of such evidence no change should be mandated. Beyond that, however, the statute simply requires the arbitrator to apply its terms and choose the better offer.

The District contends that the Union's proposed change in subcontracting limitations should not be selected because it has provided no quid pro quo for the change. During the course of the hearing the Union produced evidence of proposals it had made in bargaining which it considers quid pro quo but which, due to the District's objections and changes in position, are not included in the Union's final offer. The District objected to the introduction of evidence of what took place in bargaining on the ground that to do so would hamper free and open exchange during bargaining. There is no flat ban on the use of bargaining history in an interest arbitration proceeding. However, in this case it does not appear to be relevant. The question is not whether a quid pro quo was offered The question is which of the two final offer should be chosen. That decision must be based on the terms of the final offers and the statutory factors alone.

The primary applicable statutory factor is Sec. 111.70(4)(cm)7r.e. which requires a comparison of the wages, hours and conditions of employment in the Washburn School District with those in school districts in comparable communities The parties agree that for this purpose the comparable school districts are the nine others in the Indianhead Athletic Conference. Of those nine, seven have collective bargaining provisions forbidding subcontracting if it would cause a layoff or reduction of hours of any bargaining unit employee. The other two contracts are silent on the subject. Thus seven of the nine have provisions similar to that would result from the Union's final offer. This factor obviously weighs heavily in favor of the Union's offer.

Neither of the parties makes any other argument focussing on the specific statutory factors. The District's primary contention is that the Union's offer is a major change in the status quo for which the Union has not demonstrated a need nor provided a quid pro quo. The relevance of this argument to the statutory criteria is through the "catch-all" language of Section 111.70(4)(cm) which directs the arbitrator to consider "other factors . . . normally or traditionally taken into consideration . . . [in interest arbitration.]" The District cites arbitration awards in which arbitrators express reluctance to impose change and require the party proposing to change the status quo to demonstrate a clear need and a quid pro quo. The Union cites awards in which

arbitrators demonstrate a reluctance to place obstacles in the way of desirable change, stressing that, in the absence of the ability to use economic pressure, public sector bargainers have to rely on arbitration to force change on a reluctant employer or union.

The District also stresses its need to be free to subcontract. The Districts special education needs, for example, vary from year to year and even from month to month The District must retain the flexibility to respond to those changes. The District has subcontracted with the CESA district for much of its special education needs. Two special education aides are employed by the district working 7.5 hours a day. The remainder of the services provided by special education aides has been subcontracted through the CESA district since 1988. Each year two or three aides are employed full or part-time depending upon the fluctuating needs of the District.

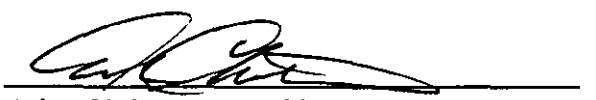
The District has demonstrated its need to subcontract for some of its special education needs but it has not shown that the Union's subcontract proposal would stand in the way of doing that just as it has done for the last ten years There is no indication that the hours of the two aides now in the bargaining unit have been affected by the subcontracting to date nor that they will be in the future The exhibits show that in 1990 the aides were reduced from 8 hours a day to 7.5 but not that this is related to subcontracting The District asserts that it has no intention of subcontracting any other work now done by the bargaining unit. Its need to subcontract seems to be limited to the special education subcontracting now done.

Interest arbitrators are invested by law with substantial powers. Those powers should be exercised in a way that is faithful to the arbitrator's statutory charge That charge is to apply the statutory factors in making decisions. In this case the one specific statutory factor relevant to the decision strongly favors the Union's offer. Arbitral authority, which makes its way into the picture through the "catch-all" provision of Section 111.70, is mixed. In these circumstances it is the arbitrators duty to select the Union's offer

Award

The Union's final offer is selected and shall be incorporated into the collective bargaining agreement.

Dated at Madison, Wisconsin this 17 day of June, 1998.



Arlen Christenson, Arbitrator