Beitner #11

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

EMPLOYER

-and

UNION

Arbitrator:

ELLIOT I. BEITNER

OPINION AND AWARD

An arbitration hearing was held in City A, Michigan on July 18, 1983 in accordance with the applicable provisions of the collective bargaining agreement in effect between the parties. Post-hearing briefs have been filed by the parties and have been considered.

Issue:

Did the Employer violate the collective bargaining agreement by participating in the "work release program" of the District Court?

Background:

The basic facts of this grievance are not in dispute. The District Court has instituted a "work release program." Defendants convicted of misdemeanors who are unable to pay a fine are given the alternative to incarceration of being allowed to perform unpaid voluntary labor with non profit agencies including Employer for a specified number of hours. The program has been in effect since January 1, 1981.

The parties stipulated that some of the work being performed under this program is work that was previously performed by Building Custodian I employees. The work consisted in part of moving furniture and cleaning at the Center A and in the Employer Building and doing cleanup work in the library and museum. This bargaining unit does not perform work at the library and museum; therefore, the grievance is concerned only with work performed at the Employer Building and at the A Center. The work is being performed while two Building Custodians are on layoff status.

On December 14, 1982 the Union initiated a class grievance (Joint 6) on behalf of laid-off employees in the classification of Building Custodian I. The grievance reads:

> Nature of Grievance: Article IV, Section 1; Article XIII, Section 2.a.; Section 6.a. & b.; Section 7.a., b., & c.; Section 8; and where it may apply.
>
> Date of Occurrence: December 10, 1982 - Continuing and on-going
>
> Statement of Facts: On December 10, 1982 the Employer used four (4) "work release program people" to move furniture at State Street - a Employer Business Office with Employer furniture. This is work that is to be performed by Building Custodian Is. Two (2) Building Custodian Is were recently laid off. This is a continuous and on-going practice by the Employer.

On that same date a written denial of the grievance (Joint 7) was executed reading as follows:

> THIS GRIEVANCE IS DENIED.
>
> The people referred to in the grievance were individuals who volunteered to donate their labor at Employer work sites in lieu of going to jail. In exchange for their voluntary effort, the District Court grants them credit against outstanding fines.
>
> Nothing in the cited articles or anywhere else in the Contract prohibits the Employer from participating in this program.
>
> The laid off Building Custodian Is are not entitled to back pay or any other "make whole" remedies because the Contract has not been violated.
>
> For the above stated reasons, this grievance is denied.

Contract Provisions:

ARTICLE IV - MANAGEMENT RIGHTS

Section 1. Except as otherwise specifically provided in this Agreement, the Management of Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, together with the right to determine the methods, processes, and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of his or her membership in the Union.

ARTICLE IX - GRIEVANCE PROCEDURE

Section 1. Grievance

a. A grievance is any dispute, controversy or difference between (a) the parties, or (b) Management, and an employee or employees, on any issue with respect to, on account of, or concerning the meaning, interpretation or application of this Agreement or any terms or provisions thereof.

b. A grievance shall refer to the specific provision or provisions of this Agreement alleged to have been violated. Any grievance not conforming to the provisions of this paragraph shall be denied. The grievant and/or the Union may amend a grievance at any step of the grievance procedure prior to advancement to arbitration by the deletion or addition of Articles of the Agreement as supported by evidence presented during the grievance procedure.

Section 3.

Step 3.B. Arbitration

* * * *

c. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association. The power of the arbitrator shall be limited to the interpretation and application of the express terms of this Agreement and he/she shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written. His/ her decision or grievance within his/her jurisdiction shall be final and binding on the employee or employees involved, the Union, and Management.

ARTICLE XIII - LAYOFF AND RECALL

Section 1. Definition. Layoff shall mean the separation of employees from the active work force due to lack of work or funds or to abolition of positions because of changes in organization.

Section 2. Order of Layoff.

a. No permanent or probationary employee shall be laid off from his/her position in any Department or Division while any seasonal, temporary, or provisional employees are serving in the same classification in that Department or Division. In the event such layoff becomes necessary, such laid off persons shall replace a seasonal, temporary, or provisional appointee in the same classification in another Department or Division, and shall continue to so serve until the normal layoff of the replaced person would have occurred.

Section 6. Preferred Eligible Lists.

a. Employees demoted in lieu of layoff shall have their names placed on preferred eligible lists in order of seniority for each classification from which displaced. Employees laid off shall have their names placed on preferred eligible lists in order of seniority for each classification from which displaced.

b. Names shall remain on the lists for six (6) months or the length of their seniority whichever is greater, unless removed as provided below. Employees shall be recalled from layoff or shall be restored to positions from which demoted or transferred based on Employer-wide seniority before any other persons are selected for employment or promotion in those classifications.

Section 7. Recall from Layoff.

a. Employees to be recalled from layoff shall be given a minimum of ten (10) calendar days to respond after notice has been sent by Certified Mail to their last known address.

b. Employees who decline recall or who, in absence of extenuating circumstances, fail to respond as directed within the time allowed, shall be presumed to have resigned and their names shall be removed from seniority and preferred eligible lists.

c. Permanent and probationary employees shall have city wide seniority in their classifications.

Section 8. In the event that an employee's position is to be abolished through subcontracting, Management shall meet with the Union in order to reach a mutual agreement as to the future employment and compensation of said employee.

Union's Position:

The Union asserts that management does not have the right even under the management rights provisions to use non-bargaining unit people to replace laid-off workers. Management is prohibited from exercising any management right, moreover, in violation of specific contract terms and will not discriminate in exercising its rights. An employee is discriminated against, the Union states, when subjected to the unfavorable treatment of a layoff when a non-bargaining unit person is used to replace him.

The layoff and recall provisions prohibit management from retaining seasonal, temporary or provisional appointees when permanent or probationary employees are being laid off. The provision has the intent of providing elementary job security to bargaining unit employees, and the clause means that non-bargaining unit workers are not to be employed in classifications affected by a layoff. The recall portions of these provisions state the intent that laid-off employees or those demoted or transferred are to be restored to their positions before any other persons are selected for employment or promotion. Management violated its obligation to laid-off employees in using people on the work release program to perform work done by Building Custodians.

Further, the Union asserts that management is supposed to meet with the Union when jobs are abolished through subcontracting. A situation similar to subcontracting exists here, and management failed to discuss it with the Union.

The Union asserts further that the contract implies limits on the rights of management to use non-bargaining unit personnel to do the work of laid-off employees even in the absence of expressed limits. The work done by the work release program people is not really voluntary: the choice of working off a fine or going to jail cannot be

called voluntary. The Employer has actually found a way of replacing laid-off workers with persons who cost the Employer only the amount of the fines.

The Union measures the reasonableness of management's decisions by criteria used by Arbitrator David Dolnick in American Air Filter Co.,54 LA 1251, 1255 (1970), which case discussed subcontracting. The work release people, the Union states, are working for inferior wages and under inferior standards. The work being done is part of maintenance work regularly done by Employer personnel, and the work being done is substantial. It is work that bargaining unit workers are capable of doing, and the effect upon the bargaining unit has been adverse.

Allowing this practice to continue will erode the bargaining unit and adversely affect the job security secured at the bargaining table. The Union asks that the arbitrator order the Employer to cease and desist from this practice and to make laid-off employees whole for any losses incurred.

Employer's Position:

The Employer's position is that none of the cited articles and no other provisions of the contract expressly prohibits the Employer's participation in the work release program. The management rights section of the contract reserves to the Employer the right to manage the Employer's affairs except as specifically prohibited by specific contract language. The grievance procedure states that a grievance must refer to the specific provisions allegedly violated and that "any grievance not conforming to the provisions of this paragraph shall be denied." The merits of the instant grievance then, the Employer argues, must be found in the cited provisions.

The management rights section gives management the right to layoff if there is a lack of work or funds. The Building Custodians on layoff were put on layoff status because of a lack of funds, and the Union has not grieved this action. The layoff and recall provisions refer to seasonal, temporary or provisional employees stating that while these employees are working in the same classification, no permanent or probationary employees shall be laid off. Work release people are not "employees," and this section of the contract does not bar the Employer from using them.

The work release people are not hired or fired by the Employer, are not paid wages or benefits, and have no status of employment under the Employer Civil Service System. There is no continuing relationship between the Employer and the participants in the program. No Employer funds are being used in this instance.

The Employer cites the decision of Michigan State University v Union, Local 1585, Michigan Council 25, AFL-CIO, 82-2 ARB, 8507. In that case Arbitrator Borland noted that social services recipients who were in a work release program doing bargaining work were not "employees" since no University funds were used. The Employer states that the Union is asking the arbitrator to amend the provisions of Article XIII, Section 2.a by granting work release program participants employee status. An arbitrator has no authority to do so.

The Employer asserts that Article XIII, Section 6.a deals with the status of employees who have been demoted instead of being laid off and says that this provision has no applicability here. Section 6.b refers to laid-off, demoted, or transferred employees, requiring that such employees be restored to their prior positions before other persons are selected for employment or promotion to those classifications. No one has

been hired or promoted to the classification of Building Custodian; work release people are not hired, and no violation has resulted.

The recall procedures stated in Article XIII, Sections 7, a., b., and c., have no application here, the Employer states. Two positions of Building Custodian were abolished by the Employer Commission because of necessary budget cuts. The use of work release people is only occasional, depending on who is sent by the District Court and when they are sent.

Section 8 of Article XIII refers to the status of Employer employees displaced by the Employer's exercise of subcontracting rights. Participation in the work release program, the Employer states, is not subcontracting as that term is used in the contract. The Employer and the District Court have no contract to perform any specific body of work. Similarly, there is no agreement that payment will be given or performance rendered to the Court or any of the participants. Subcontracting implies an actual relationship between the parties and payment by one party to another. The positions of Building Custodian were not abolished because of any subcontracting work.

With regard to the recognition provision of the contract, the Employer states that this has no application since the Union did not allege such a violation as required by the grievance procedure. The recognition provision, moreover, simply recognizes the Union as the exclusive bargaining agent for employees in the bargaining unit. That unit is made up of all employees, except those designated as excluded, who are in classifications listed in Appendix A. The clause addresses only employees of the Employer; work release participants are not employees of the Employer nor part of the bargaining unit. No exclusive claim of work is granted to the Union by the clause.

Finally, the Employer argues, Article XL is applicable in that it states that the contract is the full agreement between the parties. Had the parties wished to place restrictions on the work release program, they could have done so in negotiations and did not. The Employer asks that the grievance be denied.

Decision:

Article IX of the collective bargaining agreement, the grievance procedure, defines a grievance in Section 1(a) as a dispute with respect to the meaning, interpretation or application of any of the provisions of the agreement. Section 1(b) provides further that it is incumbent upon the Grievant to recite the specific provisions being violated and adds: "Any grievance not conforming to the provisions of this paragraph shall be denied." The section allows either party to amend a grievance by adding or deleting specific provisions of the contract prior to advancement to arbitration; no such amendments were made with regard to this grievance. The grievance must then rise or fall upon the specific provisions alleged to have been violated.

The first provision cited by the Union is Article IV, Section 1, Management Rights. This provision grants management its traditional rights. The section reads:

> Section 1. Except as otherwise specifically provided in this Agreement, the Management of the Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, together with the right to determine the methods, processes, and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of his or her membership in the Union.

The only restrictions on the stated rights are: 1) that they not be exercised in violation of any other provisions of the collective bargaining agreement; 2) that they not be exercised in a discriminatory manner. The grievance then will not have been proven insofar as the management rights section is concerned unless a violation of some other provision or provisions is shown or discrimination is shown.

The Union has alleged discrimination based on the layoff of two Building Custodians followed by what it terms "replacement of the laid off worker with a non-bargaining unit person." The Union states that this is unfavorable treatment because of membership in the Union. The concept of discrimination because of Union membership is not generally applied in this way, however. Discrimination against a particular employee is prohibited in the sense that such an employee cannot be treated in a manner different from the manner in which other employees are treated based upon membership in the Union. Non-discriminatory treatment would mean, for example, that penalties brought against an employee must not be more harsh for a Union member than for a non-Union member. Similarly, a layoff would be discriminatory if Union members were laid off while non-Union workers were allowed to continue in their jobs. Such clauses are placed in agreements to prevent employers from discouraging Union membership by treating those who join in a less favorable manner than those who do not thus weakening the organizing efforts of unions. No evidence or testimony was presented to show that any such discrimination was present in this instance.

The Union must then show a violation of a specific provision of the contract and must have set forward the provision in its grievance. Alleged to have been violated are:

Article XIII - Layoff and Recall, Sections 2.a.; 6.a. and b.; 7.a., b., and c. Section 2.a. provides in pertinent part:

> No permanent or probationary employee shall be laid off from his/her position in any Department or Division while any seasonal, temporary, or provisional employees are serving in the same classification in that Department or Division.

The question then that must be addressed is, of course, whether the court convicted participants in the work release program are employees of the Employer. If they are not "employees," they clearly cannot be "seasonal, temporary, or provisional employees . . . serving in the same classification."

Certainly, the work release program participants do not meet the customary definition of an employee: they are not hired by the Employer and cannot be fired by the Employer, and they are paid no wages or benefits by the Employer. They enjoy no seniority status with the Employer, nor are any rights afforded them under the Civil Service System. A separate and autonomous agency, the District Court, allowed convicted defendants to perform voluntary duties for the Employer as well as for other public non-profit agencies in lieu of paying a fine or serving a sentence. These convicted defendants cannot be found to be Employer employees and cannot, therefore, be said to be taking the place of laid-off employees.

With regard to Article XIII, Section 6.a. and b., these provisions relate to eligible lists. Subsection a. addresses itself to employees demoted instead of being laid off and has no relevance to the work release program since no employees were demoted in this instance. Subsection 6.b. does include laid-off employees whose names are on eligibility lists, but here again it must be said that work release program participants were not

"selected for employment or promotion in those classifications" since they were never hired by the Employer.

Subsections 7.a. and b. of Article XIII discuss recall from layoff. No evidence was presented that the Employer was attempting to subvert the contract by bringing in work release people to replace workers who would otherwise have been called back to work. The Employer has been faced with budgetary problems and has eliminated certain jobs to meet its fiscal obligation. The jobs of two Building Custodians were apparently among the cuts made. The Employer did not initiate a program to bring in work release participants; the Court imposed the program. Moreover, the amount of work done by these employees is apparently incidental in nature and is done by program participants if and when the Court sends them. The Employer cannot and does not ask that these participants be sent to fill a particular shortage in its staff; the Employer does not, as stated, initiate any part of the program.

A violation of Section 8 of Article XIII was also alleged by the Union, but this provision deals with the Employer's right to subcontract and employees who are displaced by the exercise of that right. The work being done by work release people cannot, however, be considered subcontracting. While it may be true that the work being done is work that would normally be done by custodial workers and those custodial workers are capable of performing the work, it cannot really be said that the work is being done for wages. The program participants are receiving no real wages and are not held to any standard of performance that the Employer imposes. No evidence was given that the amount of work is even substantial. As stated previously, the work is done on a

schedule that is convenient for the District Court and would appear to be incidental in nature.

It should be added that the Employer and the District Court have no contract between them that demands either that a specific amount of work be accomplished or that a specific payment will be made. When the Building Custodian positions were abolished, the change was not made because of any subcontracting work. Rather, budget cuts forced these job cuts. The wisdom of the Employer's participation in the work release program is not at issue here. It is certainly possible that the Employer may be subjecting itself to future liabilities resulting from any injuries that might befall work release participants. The determination to use these participants so that they might work off their fines is, however, an appropriate management decision, and it would be impermissible for an arbitrator to substitute his judgment or discretion for that of management.

It is obvious that the Employer's participation in the program must be especially irritating to the Union at a time when some of its own members are on layoff status. However, the Union's understandable and legitimate irritation does not provide a contractual basis to challenge the Employer's action. It is clear to me that the participants do not meet any of the traditional characteristics of employees and are, therefore, not employees. The layoff and recall provisions of the contract are, therefore, not applicable, and the subcontracting provisions are also inapplicable because the nature of the work done by program participants cannot be characterized as subcontracting.

It should be noted that the arbitrator's powers are limited to the interpretation and application of the express terms of the agreement. He is precluded from altering, adding, or subtracting or otherwise modifying the terms of the agreement. My role then is

restricted to determining a contract violation, and I am not authorized to uphold the grievance on the basis of a belief that it is not a wise policy for the Employer in terms of potential liability for the Employer and in terms of harmonious labor relations. It should be further noted that this contract contains a "zipper" clause reading:

> ARTICLE XL - ENTIRE AGREEMENT
> Section 1. During negotiations, each party had the right to make proposals with respect to all bargaining matters. This sets forth the basic and full agreement between the parties. During its life, neither will require the other to engage in further collective bargaining as to any matter whether mentioned herein or not, except as such bargaining is provided for herein.

This provision is meant to restrict the agreement of the parties to that which they have specifically provided in the provisions of the collective bargaining agreement. This provision restricts an arbitrator from attempting to expand the recognition clause to preclude the Employer's participation in this work release program.

It is true that in the area of subcontracting some arbitrators have given a broad interpretation to the recognition clause as prohibiting subcontracting if it is detrimental to the bargaining unit and/or not done in good faith by the employer. The grievance procedure prohibits a consideration of the recognition clause, however, because it requires that specific provisions of the collective bargaining agreement be cited and further states that the grievance will be denied if those provisions are not cited. The provision is not unduly restrictive because it does allow for amendments and deletions up to the point of arbitration. In this case there has been no assertion of a violation of the recognition clause.

Furthermore, the recognition clause itself does not restrict subcontracting. For all of the above reasons, this grievance must be denied even though the Union has presented

good common sense arguments as to why it is not in the Employer's best interests to participate in the program while bargaining unit workers are laid off.

AWARD

No violation of the management rights provisions or the layoff and recall provisions was shown. Management did not act in any discriminatory fashion and did not hire any employees to replace laid-off custodial workers in using work release program participants supplied by the District Court. The work being done is not subcontracting and participants are not employees. The grievance is denied.

ELLIOT I. BEITNER

DATED: September 12, 1983