The Right To Contract Out

CASE STUDY 11-1

Background

This matter of arbitration stems from the following grievance: "The Company has unilaterally eliminated all janitor jobs and did not honor the contract. After foundry janitor jobs were evaluated, the Company informed the Union in a job evaluation meeting that the jobs would be cut. this action is in direct violation of the contract and did not comply with discussions between Company and Union over subcontracting during negotiations. Adjustment sought? Make employees whole."

William Ikerd, the Company HR manager, provided the Company Answer which was:

"The Company has honored the re-evaluation of the foundry janitor jobs and upgraded these jobs from Class L-1 to Class 1. We have also paid $.80 per hour more, effective 6/26/06, the date of the upgrade.

In 1989, the Company negotiated an L-1 rate for janitors to spread the pay scale through ten job classifications rather than eight. We agreed to "red circle" the wage rate of the employees who already held title to the Class 1 janitorial jobs. Effective 9/18/89, we agreed that all future janitors would be classified as Class L-1 with a lower pay scale. We agreed to an $.80 per hour lower rate for the Class L-1 job classification.

For 17 years, the L-1 rate has been sufficient pay for janitorial pay in our facility. However, in June of this year, the Union requested a re-evaluation of all class L-1 janitors.

On the morning of June 21, 2006, as we assembled to evaluate the L-1 janitor's job, I made statements that we already had the highest wages for janitors in our labor market. We had conducted a wage survey. We didn't evaluate the job that day. We waited until the following day so Roy Gander could be present. I voiced my concern about the wage rate being raised that day. the upgrade of the L-1 janitor to a Class 1 janitor meant an increase of $.80 per hour for seven employees. Two janitors continue to be "red circled" as Class 1. After 17 years, the Union wanted and successfully removed L-1 classification, which took out the low rate of pay we negotiated in 1989. The Company lost its right to hire any future foundry janitors at Class L-1. A newly hired foundry janitor would come off the street making $10.50 an hour and progress to $13.98, with a $.40 per hour increase due September 18, 2006.

After the evaluation meeting, Randy Elbert and I discussed the additional cost for janitorial service. We concluded we must consider contracting out the janitorial service.

I contacted the Union president, and he told me to hold off and let him talk to the janitors. After he talked with the janitors, the Union president called me back and said the janitors wanted the money. Our purchasing department contacted janitor vendors. On July 10, 2006, one of the senior janitors came to me and stated the janitors wanted to remain Class L-1 and not receive the raise. I told him the plant manager was on vacation, but I would talk to the purchasing manager, who took a sheet of paper to the senior janitor and asked the other janitors to sign to stay Class L-1. On July 12, 2006, the purchasing manager returned the paper. All janitors in the foundry had signed, except one. On July 18, 2006, when the Union president returned from vacation, he told me to honor the evaluation. The Company typed the payroll authorization and paid the foundry janitors back wages of $.80 per hour from 6/26/06 to current payroll date.

On August 11, 2006, we contracted with a vendor to supply janitorial service for the plant.

I notified the Union president that we would contract out janitorial work on August 14, 2006. On August 15, 2006, Larry Tate and I discussed the matter and I explained the events as they occurred. On August 22, 2006, Randy Elbert and I met with the Union president and vice president to discuss this matter.

The Company has contracted janitorial service for the front office, main cafeteria, and restrooms since January 1994.

The Company will save a substantial amount of money. The employees can now devote their time to meeting customer orders, maintaining an efficient operation, and shipping a quality product, etc.

Article 4.1.2 of the Contract Agreement provides the placing of production, service, maintenance, or distribution work with outside contractors or subcontractors due to the savings and the ability to spend more time operating the

plant, the Company will contract out janitorial services effective September 2, 2006."

The Grievance was appealed. Mr. Ikerd provided the Company's Step 4 Answer. In addition to the company's previous response, Mr. Ikerd wrote:

> "The maintenance laborers used to do the yard work. We have contracted out that work for many years. the Company has contracted out janitorial service for the front office, main cafeteria, and restrooms since January 1994.
>
> The Company will save a substantial amount of money. Employees can devote their time to meeting customer orders, maintaining an efficient operation, and shipping a quality product, etc.
>
> The Company has honored the change in evaluation of the foundry janitor job and upgraded it from Class L-1 to Class 1. We have paid an additional $.80 per hour since effective date of June 26, 2006.
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> All the janitors who are able to perform jobs have bid jobs to return to work for the Company and they have returned to jobs with higher wage rates.
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> The Union and the company recognize that the success of the business is vital to all concerned. Increasing the wage rate of janitor job to $13.89 effective June 26, 2006, and effective September 18, 2006, to $14.38 will not allow the Company to be successful.
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> The grievance is denied."

Mr. Larry Tate, International Union Representative, appealed the grievance. he stated:

> "In Article 2.1.1 the Company recognizes the Union as the sole and exclusive bargaining agent with respect to rates of pay, wages, hours, and all other conditions of employment for all employees covered by this Agreement.
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> For the Company to eliminate the janitors from the contract is a violation of the contract. In 2004 the Company and the Local Union were in negotiations. during the negotiations the subject of subcontracting came up. The Company said it would be necessary from time to time to contract out some maintenance work, because we did not have the time or the manpower to do all the work that had to be done. Robert Holcomb, the plant manager at the time, made a statement in the negotiations that the Company would not eliminate any jobs, that was a very strong statement on the word of the plant manager, and the Local Union decided to trust the Company. Less than two years later the Company eliminated the janitors from the Contract.
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> It has always been established that, if the Union could show enough change in a job, the Company would agree to reevaluate the job. When the Union approached the Company about the evaluation, the Company did not state that there had not been enough change to warrant a reevaluation. After the evaluation was done, the Company notified the Union that they were going to contract out the jobs. The Union considered the evaluation binding on both the Union and the Company, as stated in Article 29. If the Company can contract out jobs just because they do not like the rating, then the contract has been bastardized. How can the Company expect the Union to ever evaluate another job for fear of retaliation? If the Company does not like the results. then the next step is to do away with the job.
>
> The Union had offered a solution that was to remove some of the duties that had been added to cause the reevaluation, and reevaluate the job. The company refused to do this.
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> Just as the Union did during the negotiations. the Company had the right to make proposals. If the Company had wanted to exclude the L1 rate from the evaluation process, then it should have made such proposals. By trying to exclude the L1 rate in the middle of a contract is like trying to slip in the back door without getting caught. For the Company to eliminate the jobs because of the job evaluation is a violation of the contract.
>
> Therefore, the Company leaves me no choice but to appeal this grievance to arbitration."

Issue

Did the Company violate the Agreement when it contracted out the janitorial jobs? If so, what is the remedy?

Relevant Provisions of the Agreement

Article 2–Recognition

2.1.1 The Company recognizes the Union as the sole and exclusive bargaining agent with respect to rates of pay, wages, hours, and all other conditions of employment for all employees covered by this Agreement.

2.1.2 The term "employee" as used in this Agreement shall mean and include: All production and skilled trade employees employed by the employer, including all plant clerical employees, but excluding all office clerical employees, confidential employees, professional employees, technical employees, inspectors, managerial employees, guards, and supervisors as defined in the Act.

Article 4–Managerial Functions

4.1.2. Without limiting the generality of the foregoing, and subject to the other provisions of this Agreement, as used herein the term "rights of management" includes: The right to manage the plant; the right to direct the working forces, including the right to hire, promote, or transfer any employee,... introduction of new, improved, or different production, maintenance, service, or distribution methods or facilities; the placing of production, service maintenance, or distribution work with outside contractors or subcontractors; the determination of the amount of supervision necessary; the right to terminate, merge, or sell the business, or any part thereof.

Article 6–Grievance and Arbitration

6.4.3 The powers of the Arbitrator are limited as follows:

(1) He shall have no power to add to, subtract from, or modify any of the terms of this Agreement.

(2) He shall have no power to substitute his discretion for the Company's discretion in cases where the Company is given discretion by this Agreement, except where the issue before him involves discharge for "just cause" and the Union is seeking to mitigate the discharge penalty.

Article 19–New Departments

19.1.1 Whenever the company establishes a new department and/or jobs, the new jobs resulting from this establishment shall be described and evaluated by the Company. These descriptions and evaluations shall be presented to the Union and discussed with Union representatives. Following such discussions, the descriptions and evaluations will be implemented. If the Union believes that any of the jobs have been evaluated improperly, the evaluation committee will convene to discuss any alleged specific errors in the evaluation. The dispute will be resolved by the evaluation committee, either by mutual agreement or reevaluation as soon as feasible. If there is a change in pay, it will become effective on the first day of the following week of the evaluation by the committee.

19.1.2 The new jobs so established will be subject to Article 19 dealing with job bidding.

Article 25–Wages

25.3.1 Job Descriptions. Job descriptions have been developed for existing jobs in the plant and new or revised job descriptions will be developed when new jobs are introduced or existing jobs are changed substantially. It is specifically recognized by the parties that job descriptions are for the sole purpose of assisting in the proper evaluation of jobs for wage rates, and in no way constitute a limitation or restriction on the Company's right to assign employees to various tasks, duties, or jobs as the company deems necessary or desirable.

Article 29–Job Evaluation Committee

29.1.1 It is the intent of the Union and the Company to evaluate plant jobs in a fair and consistent manner in order to promote harmony and efficiency in the plant. The evaluation committee will consist of three voting delegates from the Union and three from the Company.

29.1.2 The Union will submit a list of two employees for the Company to select one member of the Union committee when and if a change from the current members is necessary. In no case will there be more than one delegate from a department. It shall be the aim of both parties to settle evaluation conflicts in an expedient manner.

29.1.3 Any new job evaluation delegate shall be trained by the committee in the principles of the job evaluation as it relates to the company plan. The job evaluation delegates will be paid by the company for all time served as a delegate.

29.1.4 The evaluation committee's decisions in evaluating jobs will be binding on the Union and the Company since the parties at the local level have more knowledge of the jobs and job duties.

29.1.5 When a job evaluation meeting is scheduled, the Union will invite one employee from the job being evaluated to explain the job duties to the committee.

Positions of the Parties

The Union:

The Union stated that it approached the Company in June 2006 and requested a re-evaluation of the janitorial job in the foundry department. This department employs seven janitors at labor grade L1. The Union presented the Company with a list that consisted of current job duties and job duties that had been added over the years. This process has always been used to request an evaluation of any job in the plant. The Company never told the Union that the janitors in the foundry should not be evaluated. On June 21, 2006, the Company and Union evaluation committee convened to evaluate the janitorial job in the foundry department. On this day, the Company and Union attempted to evaluate the job; however, the absence of one committee member, Ronald Gander, halted the evaluation until all committee members could be present. During this meeting, the Company informed the Union that it really did not want to evaluate the janitorial job because a wage survey had been conducted and the survey showed that the foundry janitors were the highest paid in the area.

On the following day, the committee evaluated the job. This job evaluation method has 11 different categories with five degrees of difficulty and a range of points in each degree. For each category, the six voting members discussed how each category related to the job being evaluated. After the discussion, each member assigned a point value for the degree most suitable for the job. After all members had assigned a point value to each category, the points were added up and the average of all the scores became the points given to each category.

There didn't appear to be any real disagreements in how the points were assigned. Then one company representative said "These jobs are probably gone." The Company could have done what had reasonably been done in the past, that is, discuss the importance of the job remaining an L1 in classification with the committee. Tim Adams testified that, in other evaluations, if the Company did not feel the points fit the job, the Company requested that the committee review the evaluation in order to determine whether adjustments could be made. In this case, Company officials could have requested a way to lower the points as it had in the past or increase the points on previous jobs. The Company did not make a request to lower the points so the Company's actions proved that the evaluation must have been fair, even in the Company's eyes.

After the Company announced the jobs would be eliminated, the Union requested that the Company review Article 19 Section 19.1.1 to determine whether another evaluation would be warranted. The Company made no attempt. Instead, the Company decided to contract out the janitorial jobs.

The Union stated that it made several attempts to retain the janitorial jobs in the bargaining unit. The Company's response was that it was too late because the Company had already signed a contract with the outside contractor. This turned out not to be true. The Company had an oral agreement with the contractor, but not a contract. Further, the agreement for its services was on a month-to-month basis.

The Company stated that the only reason for removing the jobs from the bargaining unit was cost. If cost was the only reason, the Union asked, then: "Why did the Company wait until after the re-evaluation to eliminate the janitorial jobs?" The Company stated it was obtaining the same janitorial services at less cost. The Union claimed that the contractor's janitors were not performing the same duties as the bargaining-unit janitors. There were several duties identified. These included weekly checks of the fire extinguishers, operation of the trash compactor, cleaning of mirrors in the forklift aisles, and cleaning in the assembly bays. The contractor's employees are now performing all of these jobs. this work takes away from employees' core duties and this means less production and less profit for the Company. If the Company had contracted out all the work that the bargaining-unit janitors were performing, the Union asked: "How can the Company say they are getting the same work done at less cost when the contractor employees are not doing all the work the bargaining-unit janitors were doing (apples for apples)?"

The Union argued that the Company accused the Union of using the contract to "backdoor a wage increase for the janitors." The Union stated that it was not the Union's fault if the Company did not secure language during contract negotiations to prevent the janitorial job from being reevaluated.

The Union stated:

> *Some people may say they're just janitor jobs, not jobs that require a lot of skill. Good jobs in the United States are hard to come by. The Union has always known the janitorial jobs could be contracted out for less than the labor agreement called for, but the Union took pride that our janitors were paid a fair wage. What will be next, the shipping department, the maintenance department, or maybe the tool and die department? These particular departments are not on a wage scale as the janitors are not; however, the above-mentioned departments as well as the janitors are still part of the current labor agreement. If the Company wants to contract out our jobs, then do it at the bargaining table. At least give the Union a chance to retain the jobs.*

The Union claimed that the Company had no intention of honoring Article 19 and Article 29. The Company led the Union into the evaluation so the Company could justify eliminating the janitorial jobs "just as you would lead a lamb to slaughter." The Company allowed the evaluation to happen without complaining and went through the process without problems. Then, it took the jobs out from under the Union, claiming it was a management right. The Union asked: "Why does the Company say it's too late? There is no contract with the contractor." The Union argued that it can never be too late to do what is right. In Article 2 of the Agreement, the Union retained the right to be the sole and exclusive bargaining agent for all jobs in the contract, not just the ones the Company chooses to allow the Union to represent.
The Union concluded:

> *The Union has shown the Company was in violation of the current labor agreement. Therefore, the Union would respectfully request(s) the arbitrator to sustain the grievance and order the return of the foundry janitor jobs to the bargaining unit and make whole all employees affected by the elimination of the foundry janitor jobs.*

The Company:
The Company stated that the "very broad Management Rights clause" contained in the current Collective Bargaining Agreement was set forth verbatim in the first agreement between the Company and Union dated January 29, 1977. The Company and Union representatives both acknowledged that the Union has proposed changing or limiting this broad language on numerous occasions in contract negotiations over the past 30 years, but no change has ever been effected. In the contract negotiations in 2004, the Company's response to the Union's perennial proposal in this regard was to note that the clause is as sacred to the Company and is as important to the Company as seniority is to the Union.

The Company stated that jobs have been evaluated to fit within its wage scale since 1980. At that time, the Company had eight job classifications. The jobs were evaluated in accordance with the Company Job Evaluation Method. The evaluation was carried out by the Company representatives. The lowest rated job in the plant was the janitor, and the highest rated jobs in the plant were maintenance or tool and die maker. The janitor job was a Class 1; the maintenance and tool and die jobs were Class 8; the other jobs in the plant would be spread evenly throughout the classifications by dividing up the point differential between the rating of the janitor's job and the rating of the maintenance and tool and die jobs equally.

In 1989, the company conducted a wage survey of the jobs in the area and determined that the wages paid to janitors were much higher than average. Also, the company found that its wage rate for the most highly skilled workers was lower than in the region. To correct this situation, the Union and the Company agreed in 1989 that there would be 10 job classifications. The janitorial job was changed from Class 1 to L-1, and the most highly skilled jobs were moved up to a Class 9. The parties agreed that any janitors at the plant at the time of the change would be "red circled" and would continue to be paid as though they were in Class 1.

The Management Rights clause has been the basis for the Company's decision to contract out certain work formerly performed by bargaining unit employees over the years. In 1994, the company subcontracted out the janitorial work for the front office. The Union grieved that decision, but withdrew the grievance prior to arbitration.

Mr. Ikerd, HR Manager, stated that over the years the Company had contracted out the lawn and landscaping work, some machining work, and certain maintenance and installation work. None

of these decisions were challenged by the Union. All agreed that the Management Rights clause has never been abrogated or limited, either with respect to contracting out or anything else. Every decision by the Company to contract out has either not been challenged by the Union or the challenge has not been successful.

In 2000, the Joint Job Evaluation Committee was established and included representatives from both the Union and the Company. This committee continues in operation today. However, the Committee is limited in the jobs it may consider. It evaluates jobs when new jobs are added at the plant (Article 19), and when existing jobs are "changed substantially" (Article 25).

A number of jobs have been evaluated over the years. the ratings of some jobs have gone down, while others have gone up. Until this situation, no job had ever been contracted out after an evaluation had changed its rate.

In the summer of 2006, the Company stated that the Union requested that the foundry janitor job be re-evaluated. The Company's initial response was that evaluation was not appropriate because none of the duties were new and the job had not changed substantially as required by the contract. However, the Union insisted that the re-evaluation go forward and the re-evaluation was carried out on June 21 and 22, 2006.

Mr. Ikerd informed the evaluation committee that the Company did not want the wage rate of the foundry janitor job to go up and did not feel that was reasonable. Ikerd stated that the Company might take other measures if that occurred. When the evaluation was completed, to no one's surprise, the janitor's job was reclassified from Class L-1 to Class 1 and the wage rate increased.

The Company felt that the result of this evaluation caused the janitors' wage rate to be badly out of line with prevailing wages in the labor market area for janitors. The Company also felt that the Union was using the evaluation system to get around its previous agreement, which established the L-1 classification. After giving the Union several opportunities to withdraw its request, the Company implemented the Evaluation Committee's decision, but, shortly thereafter, contracted out the work of the foundry janitor.

Mr. Ikerd presented the cost information that was available to him at the time the decision was made. This information showed an annual cost savings of over $370,000 due to the change.

The Company claimed that none of the janitors at the plant suffered financially from this decision. Two of them quit for reasons unrelated to the decision. The other five were all still employed at substantially higher hourly rates. No one lost any wages.

The Company stated that the question in this decision is whether the Company violated the Collective Bargaining Agreement in contracting out the foundry janitorial work. The clear language of the contract allowed precisely the action taken by the Company. The Union attempted to circumvent its own agreement, which led directly to the action of which it now complains.

The Company stated:

> *The Management Rights provision in the Collective Bargaining Agreement unequivocally states that the Company has the right to place "production, service, maintenance, or distribution work with outside contractors or subcontractors." This provision has been in every Collective Bargaining Agreement between the Company and the Union, and has survived numerous attempts by the Union to have it modified in negotiations. The negotiation notes introduced by the Union demonstrate that the Management Rights clause is "sacred" to the Company. Mr. Ikerd testified that the Company would take a strike over removal of that language. There would be no point in taking such a strong position on the language unless the Company intended to be able to utilize it, at least on occasion. On that ground alone, there can be no contract violation here.*

The Company contended that the Union appeared to claim that the Company's actions are "unfair" and in retaliation for the Union's rightful use of the job evaluation procedure. The Union appeared to claim that it would be unwilling to use the evaluation procedure in the future because of these actions, but neither of these positions is justified. First, the union's use of the job evaluation procedure for these positions can hardly be characterized as "in good faith." In 1989, two new job classifications were created to broaden the spectrum at the Company. By agreement, janitors were placed in a lower L-1 classification with protection for those who currently held the job. At the time, everyone knew that this was being done

because janitors' wage rates were so out of line with the norm for the labor market.

The Company argued that the Union appeared to argue that the Company should have bargained and changed its mind after the contracting out decision was made. This argument comes too late. During the evaluation process, Mr. Ikerd told the Union plainly that the Company viewed the evaluation as improper and would consider its options, including contracting out if the Union persisted. Undeterred, the Union went forward with the evaluation procedure, which inevitably resulted in the janitor's job being upgraded to a Class 1 job. Afterwards, the Company held off on implementing the decision to give the Union an opportunity to reconsider. Despite that opportunity and despite the fact that all but one of the janitors signed a sheet which indicated that they did not want the raise and in fact were perfectly content with their current situation, the Union still insisted that the change be made. Despite all of these warning signs, the Union never considered or offered any sort of compromise in its position. When the work was contracted out, the Union began to complain loudly that the Company refused to negotiate, bargain, or compromise. In fact, the Company's decision was caused by the conduct of the Union.

The Company stated that it chose to contract out this work because of the enormous cost savings involved. Of course, that is almost always the reason for decisions to contract out and is clearly understood to be the reason for having such a right in the labor agreement in the first place. Mr. Ikerd did not conduct a cost comparison until the Union pushed forward with the evaluation. If the Union had not improperly raised the issue, things would probably still be as they were in the spring of 2006. However, once the Union opened the Pandora's Box of re-evaluating the janitor's jobs, the Company considered its options and found to its surprise that the savings were very significant. What this demonstrates primarily is the fact that the janitor's wage rate was grossly inflated from a market standpoint. The cost comparison showed annual savings of $370,000. Those savings provide ample justification for the Company's decision, which in any event is left to its sole discretion according to the labor agreement.

The Company noted that no one has been damaged by this action; all are still at work, and are making substantially more money. Some may prefer to have their old jobs back. What that primarily suggests is that their old jobs (at least as they performed them) were so easy that they didn't mind the lower wage rate. In any event, none of the Union's membership has been harmed financially and that hardly demonstrates a retaliatory motive.

Questions

1. Which party has the burden of proof? Which level of proof should be used? Why?
2. Is this case a matter of "good faith" on the part of the Company or a contract interpretation issue? Why? Why not?
3. Develop some general guidelines for companies to retain the right to contract out bargaining unit work.
4. When a company contracts out work formerly performed by bargaining unit employees, is the company violating the recognition clause of the Labor Agreement?
5. Be the arbitrator. How do you rule? Why?

Did the Company Violate the Agreement When It Did Not Pay Holiday Pay?

CASE STUDY 11-2

Background

During September 2005, the parties were negotiating the Labor Agreement due to expire on October 31, 2005. The Union had proposed to add Martin Luther King, Jr.'s birthday and Memorial Day as non-work holidays. The Company countered with a proposal to "Swap George Washington's birthday for Memorial Day." On October 25,