BEFORE JOSEPH
V. SIMERI
ARBITRATOR
Simeri # 3

THE ARBITRATION	**)**	
	)	**FMCS Case No. 12-01470-3**
Between	**)**	
	)	
EMPLOYER	**)**	
	)	
And	**)**	
	)	
UNION	**)**	

ARBITRATION AWARD

This dispute was arbitrated on March 28, 2012 in Burns Harbor, Indiana. The Grievant, ("the Union"), was represented by M_____, ("the Company"), was represented by P_____, Senior Human Resources Department. The Union and the Company presented witnesses and introduced evidence. The parties submitted post-hearing briefs on May 30, 2012. This Award is issued within 30 days from the submission of the post-hearing briefs.

RELEVANT CONTRACT PROVISIONS

Master Contract (Joint Exhibit 1)

ARTICLE I: UNION RECOGNITION AND UNION MEMBERSHIP
Section 1

The Company recognizes the union as the exclusive representative for the purpose of collective bargaining concerning wages, hours of employment and other conditions of employment of full-time/part-time employees employed by the Company at its facilities covered by this Agreement, but excluding employees of independent contractors, office clerical employees, administrative employees, professional employees, guard and supervisors, as defined in the National Labor Relations Act and all other employees. The term "employee", as used in this Agreement, applies to all individuals occupying jobs included in the bargaining and transportation units and no other employee or employees of the Company.

ARTICLE II
MANAGEMENT RIGHTS

The Company retains the exclusive rights to manage the business and to direct the workforce in a manner that is in the immediate and long-term best interest of the business entity. This encompasses the assignment of employees to best utilize skills and abilities; to schedule the plant in a way that is most cost effective and profitable for all concerned parties.

The Company has the right to hire, suspend or discharge for proper cause or any legitimate reason deemed appropriate. It is the intent of the Company not to have a disruptive workforce but to work harmoniously toward the business goals of the AMROX/MII facilities, which shall include, not preclude, input, cooperation, compromise, and commitment from Union and Management participants.

ARTICLE IX: GRIEVANCE PROCEDURE
Section 2 Arbitration

Should any Grievance remain unsettled after exhausting the aforementioned procedure, either party may request arbitration with five (5) working days after failing to settle the Grievance as outlined in Step Three above. The arbitrator shall be appointed by mutual consent of the parties. In the event the parties are unable to agree upon an arbitrator within seven (7) working days after arbitration is invoked, the party requesting arbitration shall petition the Federal Mediation and Conciliation Service for a panel of seven (7) qualified arbitrators. If the parties cannot find an acceptable arbitrator on the panel, the party requesting arbitration shall strike one (1) name from such panel, after which the other party shall strike one (1) name. The above procedure shall then be repeated, and the person remaining on the panel shall serve as arbitrator.

The decision of such arbitrator shall be final and binding upon both parties. The arbitrator shall not be empowered to rule contrary, to amend, add, or eliminate any of the provisions of this Agreement. Expenses incidental to the services of the arbitrator shall be borne equally by the parties.

It is further agreed that the parties hereto and the employees covered hereunder shall be bound by any decisions, determinations, agreements or settlements which may be effectuated pursuant to invoking the Grievance-Arbitration Procedure. The Employer agrees not to subpoena or call as witness any bargaining unit employees in any step of the Grievance or Arbitration Procedure, unless the Union otherwise agrees – refer to Step Three.

Any arbitrator appointed under the terms of the Grievance Procedure of the Agreement is prohibited from making any award of monetary damages under any Federal, State or Local Law, statute or regulations. However, this does not supersede any existing language of the Labor Agreement. Related arbitration expenses will be shared equally by the parties.

ARTICLE XVIII: CONTRACTING OUT

Section 1

The employer will not normally contract-out or out-source any work the Bargaining Unit is capable of performing within the scope of the workforce's skills, capabilities and availability of qualified employees, unless the Union is altered in advance of the nature and scope of such out-sourcing. It is the intent of the parties to discuss contracting-out issues in advance and to reach accord when contracting-out is in the parties' best interest to achieve plant-operating goals.

Section 2

This section relates to the Company's commitment to the internal Transportation Group and those circumstances where contracting-out services are or may be necessary.

(a) Management is committed to attracting and retaining the most qualified and knowledgeable technicians to operate its equipment and to deliver an optimal level of service to its customer base. Management is also committed to have its own Transportation workforce and equipment consistent with the business demand and in accordance with D.O.T. regulations.

(b) Management reserves the right to use the services of an outside contractor in support of "non-routine" transportation activity or the area where a route is temporary and not of a full-time, permanent nature.

(c) Notwithstanding (a) and (b) above, in the event additional customers and/or routes are needed or are added, Management will staff accordingly and add manpower and the necessary equipment to support such business requirements.

PRELIMINARY MATTER

The admissibility of the Affidavit of W_____, Chairman and Chief Executive Officer of the Company, is before me. The Affidavit was not offered at the

hearing. The Company states that Mr. S_____ was in Bejing, China, on the date of the hearing. The Company did not request a postponement of the hearing. The Company did not indicate in any way at the hearing that it intended to submit a post-hearing affidavit. Nothing in the Company's post-hearing brief discusses this Affidavit.[1]

Both the Company's post-hearing brief and the Union's post-hearing brief were submitted to me by the agreed upon deadline of May 30, 2012. I exchanged the post-hearing briefs by mail, dated May 30, 2012. The affidavit is dated June 8, 2012. Thus, the Affidavit was not signed until after the Company received the Union's post-hearing brief.

The Company says that the introduction of affidavits is an accepted practice in arbitration. Further, the Company says that post-hearing affidavits submitted by Mr. S_____ were admitted in evidence in two other arbitrations involving the Union before a different arbitrator, those arbitrations held the same week as this arbitration.

The Union understandably objects to the introduction of the Affidavit. The Union says that if the Affidavit is accepted into evidence, then the Union deserves the opportunity to reply.

An arbitration proceeding is not a trial before a judicial officer, or before a jury

1 The contents of the affidavit do not plough new ground. The points about efficiency and cost in the affidavit were made during the hearing from witnesses ably presented by the Company's representative.

of one's peers. Affidavits are, depending on the circumstances, admissible in arbitration proceedings. This is so despite the fact that even Clarence Darrow would have difficulty cross-examining a piece of paper. Arbitrations operate with agreed upon rules and notions of fair play. Here, the Affidavit was not offered at the hearing. There was no request by the Company to postpone the hearing. There was no request by the Company to keep the hearing open, pending the submission of the Affidavit. Instead, the Affidavit knocks on my door after the filing and exchange of the post-hearing briefs. But, says the Company, "Mr. Arbitrator, accept the Affidavit and give it whatever value you deem appropriate under the circumstances." Some arbitrators would do so. They would cut the proverbial baby in half and admit the Affidavit, with the caveat that the weight to be given it would be determined in the hidden depths of the arbitrator's mind. But the Company and the Union deserve more than a milquetoast response. The Company and the Union are entitled to an up or down answer.

This arbitration hearing was closed on March 28, 2012. What does "closed" mean? I am reminded of a long time ago radio serial program, which I faithfully listened to as a youngster. It was called Sergeant Preston of the Yukon. Sergeant Fred Preston was an officer of the Canadian Northwest Mounted Police. He went after the "bad guys" in the Alaskan Northern Wilderness during the gold rush era of the 1880's.

His faithful companion was a trusted Alaskan Husky dog named King. At the conclusion of each episode, Sergeant Preston, having captured the crook, turned to King and said "King, this case is closed." King would then bark approvingly. I hear King barking. The hearing is closed. The Affidavit is not admitted.

FACTS

At the risk of over-simplification, one of the ways to process steel is to dip it in a bath of acid to remove the oxide scale. This bath of acid, or "pickling" is called waste-pickle liquor. The Company has a process to recycle this waste-pickle liquor, enabling the Company to produce iron oxide. This iron oxide is a powder that is then packaged in one-ton bags, and shipped to customers. Through this process, the Company produces at least 60,000 tons of iron oxide per year. The waste-pickle liquor, which is not transformed into iron oxide, remains a liquid and is also transported from the Company's facility by truck.

The Contract between the Company and the Union includes as bargaining-unit employees both production employees and truck drivers. The Company's bargaining-unit truck drivers transport the acid liquid for disposal from the Company's facility. All of the Company's drivers that transport acid liquid are also qualified to transport iron oxide. There are no additional licensing requirements. The bargaining-unit truck drivers no longer transport the iron oxide, as they once used to do. Instead, the

Company subcontracts with D_____ Trucking Company, Inc. ("D_____ Trucking"), an outside contractor, to transport the production of the Company's iron oxide. It is this transfer of iron oxide transportation work from the Company's bargaining-unit employees to an outside contractor that gives rise to this grievance. The Contract contains an Article specifically addressing subcontracting.

ISSUE

Did the Company violate the provisions of the Contract by subcontracting the transportation of iron oxide from its internal Transportation Group to an outside trucking company? If so, what is the appropriate remedy?

ANALYSIS

Where a labor contract is silent on the issue of subcontracting, arbitrators have looked to a variety of factors to determine whether the contract was violated. These factors include the parties' past practice; the reasons for the subcontracting; the effect on the bargaining-unit employees; the type of work involved; the skills necessary to perform the work; the availability of the equipment and facilities to perform the work; and the duration of the outside contracting. A detailed analysis is found in Elkouri & Elkouri, *How Arbitration Works* (6th ed. 2003), at pgs. 746-753. Because of these variables, arbitration decisions, where the contract is silent on subcontracting, result in an uneven quilt of decisions, making it difficult to

discern a pattern.

This will not be such a case. Here, the Contract is not silent. It speaks. The parties do not agree on what it is says. They have asked me to tell them what it says, and I will do so.

Article XVIII, Section 1 of the Contract states that the Company will not normally contract out any work within the skill, capability and availability of the bargaining-unit workforce, unless the Union is notified in advance of the nature and scope of the proposed outsourcing. This language is what is generally referred to as a "meet and confer" provision. If that were the Contract's only language on subcontracting, then the sounds I hear would be muffled. I would need a special hearing device to determine its meaning. But there is much more.

The Contract, in Article XVIII, Section 2, is specific. It is unerringly directed to the work of the Company's truck drivers, the Transportation Group. It begins with the Company's commitment to the Company's Transportation Group. The word "commitment" is actually used in the Contract. The Company and the Union agree in their Contract that the Company is committed to having its own transportation workforce and equipment consistent with business demand and in accordance with D.O.T. regulations. In Article XVIII, Section 2, part (b), the Company retains the right to subcontract only if the transportation activity is

"non-routine" transportation activity, or if the transportation route is temporary and not of a full-time, permanent nature. This language is clear. To buttress the commitment to the Transportation Group, in Article XVIII, Section 2, part (c), the Company agrees that it will add manpower and the necessary equipment to support additional customers and/or routes, as needed.

Faced with this clear Contract language, how does the Company justify its decision to use an outside trucking company to transport its iron oxide? In the Company's view, the trucking work to transport iron oxide to the shipyard from the plant, and then to transport empty containers from places where the containers are stored back to the plant, is very inefficient. Through no fault of the Company, or the Company's drivers, there are long delays waiting to pick up containers from the rail terminal located approximately 50 miles from the Company plant, and bringing back the loaded trailer to the terminal for shipment. The Company's drivers are not able to make a sufficient number of daily roundtrips to be cost-effective. Delays may cause the Company to be unable to ship the iron oxide to customers timely.

The Company hired D_____ Trucking to transport iron oxide. D_____ Trucking is in the container business. D_____ Trucking has a storage facility where it can store containers. Use of D_____ Trucking enables the Company to

meet its

shipping requirements on a more timely basis than through use of its own truck drivers. The Company pays D_____ Trucking a set amount for each container shipped. The Company pays its bargaining-unit truck drivers an hourly rate, whether the truck drivers are driving, or sitting in the truck for hours waiting for a container. The Company's position is that the use of an outside contractor saves the Company money. I do not doubt the Company's cost calculation. Because the outside contractor is paid per container, and not per hour, the risk of delay in securing available containers falls on the outside contractor, and not on the Company. But the Contract, the hallowed accord between Company and Union, reached at the bargaining table, does not use, or refer to, "efficiency" or "cost-saving" as the means to the end. Those considerations are not the agreed upon touchstones. Instead, the Contract confirms the Company's commitment to have its own transportation workforce. A commitment is a promise, a pledge, an obligation. I did not use the word commitment. It is the word chosen by the Company and the Union. It is a word that must be given its meaning.

The Company did reserve the right to use outside truck drivers in Article XVIII, Section 2, part (b) to support "non-routine" transportation activity, or where a route is temporary and not of a full-time, permanent nature. The Company says the production of iron oxide is only 20% of its business. The Company says

the regeneration of waste-pickle liquor is the Company's core business. The Company says regeneration of waste-pickle liquor is the business around which the transportation workforce was organized. But the Contract does not permit dollar volume of business as a basis for subcontracting. Instead, the question is whether the transportation of iron oxide is a routine or a non-routine activity. It is, in fact, routine transportation activity. The Company's production of iron oxide is a by-product of the regeneration of waste-pickle liquor. One follows the other, and lots of it. At least 60 containers of iron oxide are shipped each month. Each container contains 20 one-ton bags.

The next question posed by the Contract's language is whether the routes taken to transport iron oxide are temporary. As long as iron oxide is being produced, it must be transported. The routes to the shipping yards are permanent places to which the iron oxide is transported. The routes to the places where the empty containers are located are also permanent.

Finally, the Company contends that using the outside contractor to transport the iron oxide has not adversely affected the bargaining-unit truck drivers. No truck driver has been laid off. No truck driver has lost any pay or benefits. Thus, posits the Company, the effect of the subcontracting has not harmed the Union truck drivers. But if the Contract prohibits the subcontracting of the truck driving

work, then continued full employment and no loss of wages affects only the remedy. Full employment and maintenance of wages is the Company's shield against damages. It is not a sword to slice away the Contract's prohibition against the contracting out of bargaining-unit work.

The Union's legitimate concern is to protect the work of its members. In *New Britain Machine Co.*, 8 LA 720 (Wallen 1947), the Company employed unionized, unarmed, civilian-clothed watchman, and also employed non-union, armed, uniformed guards. The Company assigned work previously performed by the union watchmen to the non-union guards, and laid off the watchmen. The Contract contained no specific prohibition against subcontracting. Nevertheless, Arbitrator W_____ stated:

> Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. Id. at p.722.

What was true in 1947 about job security is still true in 2012. This Contract's prohibition against subcontracting is there to secure bargaining-unit truck driving jobs. I am bound by the four corners of the Contract. It is not my Contract. It is the Company and the Union's Contract. It is not for me to write them a new or different Contract. When, and if, they want to change their bargain, they can do so.

FINDINGS

Based upon the testimony of the witnesses, the Contract, and all of the exhibits introduced at the arbitration hearing and, considering the positions of the Company and the Union, professionally advocated by their representatives, and recognizing my role as Arbitrator, I make the following findings:

1. The Company's truck drivers have the skills and capabilities to transport iron oxide, and there are sufficient Company truck drivers to do so.

2. The transporting of iron oxide is bargaining-unit work.

3. The transporting of iron oxide is routine transportation activity.

4. The iron oxide transportation routes are of a full-time, permanent, nature.

5. No evidence was introduced to demonstrate any loss of earnings, or loss of other benefits by any of the Company's truck drivers resulting to date from the Company's use of an outside trucking firm to transport iron oxide.

AWARD

I make the following Award:

1. The grievance is sustained. The transporting of iron oxide is within the Union's work jurisdiction and the Company is ordered to cease and desist from contracting that work to any outside trucking company, including, but not limited to, D_____ Trucking Company, Inc.

2. The Company and the Union must pay the Arbitrator his fee and expenses as provided in the Contract between the parties.

3. The Arbitrator retains jurisdiction over this case for implementation of the remedy.

Dated: June 14, 2012

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Joseph V. Simeri, Arbitrator