FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

IN THE MATTER OF ARBITRATION	)	
	)	
Between	)	
	)	**FMCS# 09-57413**
ST. PAUL PIONEER PRESS	)	
	)	
and	)	
	)	**John Remington,**
	)	**Arbitrator**
MINNESOTA NEWSPAPER GUILD/	)	
TYPOGRAHICAL UNION Local 37002	)	
	)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the replacement of warehouse workers, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on April 15, 2010 in St. Paul, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file post hearing briefs which they did subsequently file on May 17, 2010.

The following appearances were entered:

For the Company:

Alec Beck	Attorney at Law Seaton, Beck and Peters, P.A.
Marc Chrismer	Director of Labor Relations
Kevin Garris	Production Director

For the Union:

Zaidee Martin	Attorney at Law Rollins & Martin
Ron Rollins	Attorney at Law Rollins & Martin
Mike Bucsko	Executive Officer

THE ISSUE

DID THE COMPANY VIOLATE SECTION 3 OF THE PARTIES' COLLECTIVE AGREEMENT WHEN IT REPLACED CERTAIN WAREHOUSE EMPLOYEES WITH OUTSOURCED EMPLOYEES AND, IF SO, WHAT SHALL THE REMEDY BE?

RELEVANT CONTRACT PROVISIONS

JURISDICTION AND COVERAGE

SECTION 1. This agreement is made the 9th day of October 2003 between Northwest Publications, Inc. only as publishers of the St. Paul Pioneer Press, hereinafter known as the Publisher, and the Minnesota Newspaper Guild/ Typographical Union, CWA Local No. 37002, a local chartered by the Newspaper Guild, hereinafter known as the Guild, for itself and on behalf of all employees of the Publisher, except as hereinafter provided, in the Editorial, Advertising, Circulation, Accounting, Promotion, Telephone Switchboard (PBX), Systems, and Building Maintenance departments of said newspaper's governing conditions of employment in said departments. ……

SECTION 2. (Excludes supervisory, managerial and certain administrative and editorial personnel of the Company)

SECTION 3. Temporary employees shall be excluded except for wages, hours and overtime. A temporary employee is one employed on a special project for a period of not more than six months. The cost of utilizing an employee from a temporary agency shall always be at least 120 percent of the wage classification in which the work is being performed. The company shall provide the Guild with receipts as requested to verify this provision.

On call positions will be maintained to provide coverage for unusual or irregular unexpected coverage. ……
……

SECTION 15. Grievance Procedure

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(d) Step 3. A grievance shall be submitted only by a written notice from the complaining party to the other party which should be submitted with reasonable promptness, but in no event more than one hundred and eighty (180) days after the event in question is known, or should have been know, by the complaining party. ……

SECTION 22. The inherent right of the Publisher to reduce the force for reasons of economy is recognized by the Guild, and the Publisher recognizes the right of the Guild to question such dismissals within thirty days from the date it receives notice of such dismissal.

Such reductions shall be accomplished by dismissing the employee with the least seniority from the department and job classification group which in the judgment of the Publisher should be reduced. ……

……

Knight-Ridder re-engineering or the elimination of work notwithstanding, work may not be removed from the unit during the term of the contract is such a way as to cause a layoff of maintenance or systems employees.

BACKGROUND

Northwest Publications Incorporated, the publisher of the St. Paul Pioneer Press and hereinafter referred to as the "COMPANY," publishes and distributes a daily newspaper in the Greater St. Paul, Minnesota area. Warehouse and janitorial workers at the Company have traditionally been union members and are represented by the Minnesota Newspaper Guild/ Typographical Union, Communications Workers of America and its Local Union No. 37002, hereinafter referred to as the "UNION."

There is little dispute over the relevant facts of the grievance. Over the past ten years, the Company has reduced the number of warehouse employees from ten to three. Beginning in 2006, the Company began outsourcing some of the warehouse job functions to the Award Staffing Company, a provider of temporary employees. These employees are paid directly by the Company but are excluded from the bargaining unit. It is undisputed that the Company outsourced these positions to save money. The Company maintains that the outsourced employees were only added as the result of "natural attrition" within the bargaining unit (termination for cause, retirement, or medical leaves, for example) and that no current employees were displaced. The Company further maintains that the Union became aware of this situation at least by November of 2007 and complained to the Company but did not file a formal grievance until April 20, 2009.

This grievance remained unresolved and was ultimately processed to arbitration by the Union in accordance with the provisions of Section 15 of the parties' agreement. However, at the hearing the Company raised a question of arbitrability and contended that the above April 20, 2009 grievance was untimely filed within the meaning of Section

15. Accordingly, the question of arbitrability is a threshold issue and must be resolved by the Arbitrator prior to a consideration of the merits of the grievance.

CONTENTIONS OF THE PARTIES

The Company takes the position that the grievance is barred by contract as it was filed at least 180 days after the Union knew, or should have known of the alleged violation. In this connection the Company argues that even the most recent employee assigned to the Company by Award Staffing arrived on August 1, 2009, more than six months prior to the filing of the instant grievance. Accordingly, the Company asserts that to view the alleged violation as a "continuing violation" is inappropriate.

The Company further takes the position that the language of Section 3 is not controlling with respect to the merits of the grievance. It contends that Section 3 defines a "temporary employee" as "one employed on a special project for a period of not more than six months" and that this definition excludes the employees assigned by Award Staffing because none of these employees was assigned to a special project or worked less than six months. On the contrary, the Company concedes that these employees have been engaged in regular warehouse work and janitorial tasks and that there is no time limitation on those tasks. It is the Company's position that it has the contractual right under Section 22 to outsource this warehouse and janitorial work and reduce the regular workforce and dismiss employees for reasons of efficiency.

The Union takes the position that the Company never raised the matter of arbitrability prior to the arbitration hearing or provided the Union with a contractual justification for its use of employees provided by Award Staffing. Further, the Union

maintains that the violation is of a continuing nature since the Company creates a new violation each time that the Company utilizes an employee from Award Staffing to perform bargaining unit work for more than six months. In this connection the Union maintains that the Company has been well aware of the Union's objection to the way in which the Company has utilized Award Staffing personnel and has not been disadvantaged by the Union's delay in filing a formal grievance. Accordingly, the Union asserts that the Doctrine of Laches is not applicable here. The Union concedes that any remedy to the grievance is limited by the 180 day period specified in Section 15 (d).

The Union asserts that the Company has refused to hire bargaining unit employees to perform janitorial work in the warehouse even though it admittedly could not perform the necessary work without the use of Award Staffing personnel.[1] It argues that these "temporary" employees have worked in excess of the six month contractual limitation and have been compensated less than the minimum required by the provisions of Section 3. In essence, the Union contends that the Company has improperly utilized temporary employees to replace permanent positions formerly held by Guild members in violation of Section 3. It further contends that there is nothing within Section 22 of the collective agreement which permits the Company to avoid the requirements for the use of temporary employees.

DISCUSSION, OPINION AND AWARD

Prior to any consideration of the merits of this dispute the Arbitrator is compelled to address the question of arbitrability. While the language of Section 15 might appear to

[1] At least three of the former Guild employees who performed janitorial work in the warehouse terminated employment through what the Company characterizes as "attrition." One of these employees retired another left for medical reasons, and the third was discharged for cause.

support the Company's contention, the Union raises two relevant defenses to the timeliness claim. It is undisputed in the record that the Company failed to raise the timeliness issue prior to arbitration even though it was well aware of the gravamen of the Union's complaint. In this instance, such failure must be deemed a waiver of the Company's claim that the grievance was untimely filed. Secondly, the Union's assertion that the grievance protests a continuing violation of the agreement must be deemed meritorious. The record of the hearing clearly reveals that the Company continued to utilize Award Staffing employees to perform what the Company essentially concedes is bargaining unit work. If this practice by the Company is in violation of the agreement as the Union maintains, it is undoubtedly a continuing violation. The Arbitrator is therefore compelled to find that the merits of the instant dispute are arbitrable.

The Company relies on the language of Section 22 which grants it the inherent right to reduce the workforce for reasons of economy. There is no dispute that the Company's actions have been motivated by economic concerns. Key to the Company's argument in this regard is the meaning of the term "dismissals." The Company asserts that there is no guidance as to the meaning of this word as utilized in Section 22 and that dismissal means termination for anything other than economic reasons. The Arbitrator finds this argument to be unpersuasive. While dismissal is not specifically defined in this context, there can be little doubt that the term is here used as a synonym for the more common term or phrase "lay off." Indeed, Section 22 appears to be a standard reduction in force provision which retains to the Company the right to lay off employees for lack of work or other reasons of economy. This section provides for lay-offs or "reductions" by "dismissing the employee with the least seniority" as lay off clauses typically do. To

contend, as the Company does, that Section 22 somehow applies to the termination of employees for reasons other than economic layoff cannot be supported by the contractual language. Neither is such an interpretation supported by a common dictionary definition of "dismiss" which means to send away or remove from service. In an employment relations context, dismiss means to discharge. Employees who terminated their employment because of retirement or due to physical incapacity can hardly be described as having been dismissed. While one of the three employees noted above was dismissed in the sense of having been discharged, he was dismissed for misconduct and not economic reasons. Seniority was apparently not a factor in any of the three examples. While the Arbitrator is in accord with the portion of the Company's argument that maintains none of the three employees was dismissed (laid off) for economic reasons, the Company's contention that "dismiss" means terminations of any type other than economic layoff is not supported by the clear language of Section 22. "Dismissals" within the meaning of Section 22 can only mean economic layoff.

Finally, it must be noted that while Section 22 clearly grants the Company the right to lay off or dismiss employees for economic reasons, there is nothing within this section that permits the Company to replace such dismissed employees through outsourcing or subcontracting. Section 22 speaks only to reducing the workforce, not to supplementing it or replacing workers who have left the workforce.

A further difficulty with the Company's position in this regard is the final sentence of Section 22 which prohibits the Company from removing work from a bargaining unit during the term of the contract which causes a layoff of employees. It is clear then that Section 22 protects both union employees and union work. However, the

Company practice challenged by the instant grievance effectively results in the elimination of both Guild employees and work. The testimony of Company witness Kevin Garris illustrates this point. On direct examination Garris denied that any employees had been laid off. On cross examination he admitted that the work was still there but was being performed by non-bargaining unit employees. While no one may have been laid off, employees were added to the workforce and there can be no doubt that work was removed from the unit. Such practices are not authorized by Section 22.

The position taken by the Union in this dispute relies on the language of Section 3 and a determination of whether or not the employees provided by Award Staffing are "Temporary employees" within the meaning of that Section. The Company argues that Section 3 is not controlling and contends that the second sentence of Section 3 is intended to define the term "temporary employee." The Company reasons that the contracted for employees were not employed on a special project for a period of less than six months. Accordingly, the Company argues that these employees are not temporary employees within the meaning of Section 3. However, the Company does not indicate what type of employees these individuals are.

There can be little doubt that the language of Section 3 is ambiguous at best. Where language is ambiguous arbitrators are frequently required to apply the rules of contract construction in interpreting the intent of the parties. In this instance the meaning of the clauses must be judged by the context in which they appear. Here, the clause in question begins with the statement that Temporary employees are to be excluded from the bargaining unit and coverage under the contract with the exception of wages hours and overtime. The second sentence of the clause states that a temporary employee is one

employed on a special project for a period of not more than six months. The Company maintains that this second sentence is an exclusive definition of what constitutes a temporary employee. However, such a conclusion cannot be supported by the construction of the clause. Rather than a definition, it is apparent that the second sentence is simply intended to modify the first sentence. The first sentence of the clause excludes temporary employees from contract coverage, the second sentence further restricts temporary employees to work on special projects (which are not defined in the agreement) and for a period of no more than six months. Had the parties constructed Section 3 with the second sentence (special project/ 6 month limitation on work) preceding the first sentence (temporary employee exclusion from contract coverage), the Company's argument that Section 3 defines temporary employees would have been significantly strengthened. As it is, the Arbitrator must find that the parties did not intend to define "temporary employee" in Section 3; that the second sentence of Section 3 is not such a definition; and that temporary employees are excluded from contract coverage except for wages, hours and overtime and that they are further restricted to work on special projects for a period of no more than six months duration. Any other conclusion would effectively render Section 3 meaningless, an intent which the parties obviously never contemplated.

The foregoing discussion does not fully resolve the question of what a temporary employee is within the meaning of contract and whether or not the Award Staffing personnel are temporary employees. Section 1 of the collective agreement describes the Guild bargaining unit as "all employees of the Publisher, except as hereinafter provided" in certain Company departments including Building and Maintenance. Section 2

excludes managerial, supervisory, administrative and editorial personnel. Section 3 excludes Temporary employees and provides limited inclusion for "On Call" employees. There is no contention by either party that Award Staffing provided personnel are "On Call" employees. No other types of employees are identified or provided for in the agreement. Award Staffing personnel are clearly not bargaining unit employees within the meaning of Section 1, nor are they excluded employees within the meaning of Section 2. Neither can these individuals be in "new positions" as contemplated by Section 2 since no notice of exclusion from the bargaining unit was given to the Union and there was no evidence of agreement or arbitration to determine exclusion status offered by the parties. Accordingly, the Award Staffing provided personnel can only be deemed temporary employees within the meaning of the parties' collective agreement. Indeed, the Company's own documents which identify Award Staffing as a Temporary Agency support such a finding. The Arbitrator must therefore find that the Company violated the requirements of Section 3 when it utilized temporary employees from Award Staffing to perform bargaining unit work for more than six months and that the Company effectively utilized temporary workers to perform Guild represented work in violation of the collective agreement.

The Arbitrator has made a particularly detailed review and analysis of the entire record in this matter, and he has carefully read and reviewed the positions and assertions set forth by the parties in their respective post hearing briefs. Having considered the above review and analysis he is satisfied that the crucial issues raised by the parties in this dispute have been addressed above and that certain other matters which arose in these proceedings must be deemed immaterial, irrelevant or side issues at the very most and

therefore have not been afforded any significant treatment, if at all, for example: whether or not the temporary employees were engaged for a special project; whether or not there was a gap during the time any of the temporary employees worked; whether or not the purpose of Section 3 is to protect Guild jobs from being permanently replaced; and so forth.

Having considered the above review and analysis, together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the facts of the subject grievance and within the meaning of the parties collective agreement, the Union has demonstrated by a preponderance of the evidence that the Company violated Section 3 of the parties' collective agreement in the manner it utilized temporary employees provided by Award Staffing. Accordingly, an award will issue, as follows:

AWARD

THE COMPANY VIOLATED SECTION 3 OF THE PARTIES' COLLECTIVE AGREEMENT WHEN IT REPLACED CERTAIN WAREHOUSE EMPLOYEES WITH OURTSOURCED EMPLOYEES. THE UNION GRIEVANCE MUST BE, AND IS HEREBY, SUSTAINED.

REMEDY

1) FOR THE TIME PERIOD ONE HUNDRED AND EIGHTY (180) DAYS PRIOR TO THE FILING OF THE GRIEVANCE ON APRIL 20, 2009 AND ONOING, THE COMPANY SHALL COMPLY WITH THE PROVISIONS OF SECTION 3 OF THE LABOR AGREEMENT AS SET FORTH ABOVE.

2) FOR THE FIRST SIX MONTHS THAT EACH TEMPORARY EMPLOYEE WORKED SINCE NOVEMER 20, 2008, THE COMPANY SHALL PAY TO THE UNION (GUILD) THE DIFFERENCE, IF ANY, BETWEEN THE COST OF THE TEMPORARY EMPLOYEE, PAID TO AWARD STAFFING, AND 120% OF THE WAGE CLASSIFICATION SET FORTH IN THE COLLECTIVE AGREEMENT.

3) FOR ANY TEMPORARY EMPLOYEES WHO WORKED FOR MORE THAN SIX MONTHS, THE EMPLOYEE SHALL BE CONSIDERED A GUILD EMPLOYEE, WITH THE SAME CONTRACTUAL RIGHTS AS OTHER GUILD EMPLOYEES. FOR ANY TEMPORARY EMPLOYEE WHO WORKED FOR MORE THAN 12 MONTHS, THE EMPLOYEE SHALL BE CONSIDERED TO BE A GUILD EMPLOYEE AND TO HAVE SUCCESSFULLY COMPLETED THEIR TRIAL PERIOD. IF SUCH AN EMPLOYEE WAS DISMISSED AFTER 12 MONTHS OF WORK, THEY SHOULD EITHER BE REINSTATED, IF A NO LAY OFF CLAUSE APPLIED, OR GIVEN SUCH SEVERANCE AND OTHER BENEFITS APPLICABLE TO GUILD REPRESENTED EMPLOYEES.

4) FOR ANY TIME SINCE NOVEMBER 20, 2008, THAT A TEMPORARY EMPLOYEE WORKED MORE THAN SIX MONTHS, THE COMPANY SHALL PAY TO THE EMPLOYEE THE DIFFERENCE BETWEEN THE WAGE THE EMPLOYEE RECEIVED AND THE WAGES THEY SHOULD HAVE RECEIVED AS A GUILD EMPLOYEE AND IN ALL OTHER RESPECTS MAKE THE EMPLOYEE WHOLE.

5) THE WAGE CLASSIFICATIONS ARE HEREBY CLARIFIED TO BE AT LEAST “X” SCALE FOR WAREHOUSE WORK AND “Y” SCALE FOR JANITORIAL WORK AND THAT THE SECOND SIX MONTH’S WAGE SCALE SHALL APPLY WHEN THE EMPLOYEE HAS WORKED FOR 6 MONTHS OR MORE.

6) THE COMPANY SHALL PROVIDE THE GUILD WITHIN FOUR WEEKS OF EACH PAYROLL THE NAMES OF ANY TEMPORARY EMPLOYEES WORKING WITHIN THE GUILD'S JURISDICTION TOGETHER WITH THE PROJECT ASSIGNED, THE HOURS WORKED, THE WAGES PAID, AND THE BILL RATE.

7) THE ARBITRATOR RETAINS JURISDICTION IN THIS MATTER FOR NINETY (90) DAYS FROM THE DATE OF THIS AWARD, SUBJECT TO EXTENSION AT THE REQUEST OF EITHER PARTY, SOLELY WITH RESPECT TO IMPLEMENTATION OF THE REMEDY.

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JOHN REMINGTON
ARBITRATOR

July 16, 2010

St. Paul, Minnesota