

IN THE MATTER OF ARBITRATION BETWEEN

Ainsworth Engineered USA, LLC)	FMCS Case No. 07-57672-3
Grand Rapids, Minnesota)	
)	Issue: Outside Contracting
“Employer” or “Company”)	
)	Hearing Site: Grand Rapids,
and)	Minnesota
)	
The United Steelworkers and)	Hearing Date: 10/29/07
Affiliated Unions, Local No. 1095)	
)	Briefing Date: 12/03/07
“Union” or “USW”)	
)	Award Date: 01/19/08
)	
)	Mario F. Bognanno,
)	Arbitrator

JURISDICTION

The above-captioned matter was heard on October 29, 2007 in Grand Rapids, Minnesota pursuant to Article XI of the parties’ 2005 – 2011 Collective Bargaining Agreement (CBA). The parties appeared through their designated representatives. Each party was afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into the record. Post-hearing briefs were exchanged on or about December 3, 2007 and thereafter the case was taken under advisement

APPEARANCES

For the Employer:

Douglas R. Christensen	Attorney-at-Law
Shelly Bristol	Observer

Paul Undeland	Supervisor
R.J. Roberts	Supervisor, Human Relations
Randall Richards	Supervisor
For the Union:	
Gerard A. Parzino	Staff Representative, USW
Michael Thompson	Recording Secretary, Local No. 1095
James Rasley	President, Local No. 1095
Dan Dagle	General Millwright, Local No. 1095
Ray Guertin	Financial Secretary, Local No. 1095

I. BACKGROUND AND FACTS

At its Grand Rapids, Minnesota plant, the Company manufactures oriented strand board, which is utilized in new home construction. Due to the slump in the market for new homes, since September 22, 2006, the Grand Rapids plant has been shut down and its workforce laid-off. Nevertheless, from time-to-time the Company calls back workers, as needed, to perform plant and equipment maintenance tasks. The Union represents the Company's 135 production and maintenance employees who are covered by the parties' 2005 – 2011 CBA. (Joint Exhibit 1)

On April 17, 2007, as two (2) millwrights were performing maintenance tasks on a steel shaft into which they determined that holes needed to be bored. Accordingly, Dan Dagle, General Millwright, testified that he and Donnie Curtis attempted to bore four (4) 1" holes in the shaft, but were unable to do so: a milling/drill press machine was required to accomplish this task and the

bargaining unit's machinist was not on site. Messrs. Dagle and Curtis informed Paul Undeland, Supervisor, of their dilemma and he inquired whether they could operate the milling/drill press machine, to which they replied "no": neither was a trained mechanic. At this point, Mr. Dagle testified that he and Mr. Curtis recommended that Mr. Undeland call Mr. Nils Vann: the Company's machinist who was on layoff. In reply, Mr. Undeland offered to train them to operate the milling machine. Declining this offer, Mr. Dagle testified that, in his opinion, it is not possible to train an employee to run that machine in part of a day. Mr. Underland demurred, testifying that to perform the boring task at hand, the millwrights could have easily learned how to operate the milling machine.

Mr. Undeland's testimony substantially corroborates Mr. Dagle's, but he added that the millwrights suggested that he take the part "downtown" to a local machine shop. In contradiction, James Rasely, Local No. 1095's President, testified that the millwrights [later] told him that they did not tell Mr. Undeland to take the work outside. Regardless, the work was in fact outsourced and the Employer stated that the boring task was completed in about one-half (1/2) hour at a cost of \$160. (Mr. Undeland's testimony and Joint Exhibit 3) On April 25, 2007, Grievance #7.07 was filed by the Union, alleging that the Company had violated Article 3.03 in the CBA, which states in relevant part that "...work normally performed by members of the bargaining unit will not be contracted out if it will result in the layoff of any employee covered by this Agreement." (Joint Exhibit 2)

On April 26, 2007, the Company again used an outside contractor to perform alleged unit work. On May 8, 2007, the Union filed Grievance #14.07, objecting to the use of the outside contractor. (Joint Exhibit 4) Mr. Rasley testified that while a unit electrician was on layoff, he personally observed an outside electrician working in the plant on two (2) machines: a “tuner” and “sander”. In denying this grievance, the Employer acknowledged the utilization of an outside electrician, observing that

Due to time restraints and cost factors (Article 3.03) an electrical contractor was call in as Union didn’t want us to use a qualified “salaried” electrician that was on site at the time. Above settlement request denied.¹

(Joint Exhibit 4)

Unable to resolve Grievance #7.07 and Grievance #14.07, the parties referred them to the instant arbitration, the Union alleging CBA violation of Article 3.03 and Articles 3.03 and 9.03, respectively. (Joint Exhibits 1, 2 and 4) However, during the instant arbitration hearing, it became clear that these two (2) grievances did not exhaust the set of “contracting out” issues in dispute. Following the April 17, 2007 contracting out event, the Company also contracted out alleged unit work on April 18, May 1 and May 2, 2007 (hereafter sometimes referred to as “additional” work), as shown in Union Exhibit 2: a Union memorandum addressed to the attention of the Arbitrator that identifies

¹ Mr. Rasley testified that an electrician was needed to perform the identified work and that an electrician-supervisor was available to do it. Continuing, Mr. Rasley further testified that he objected to a supervisor performing unit work and that David Sorby, Plant Manager, told him that to call a laid off electrician would require a letter and that the “good” laid off electricians already had work. Notes from a joint labor-management meeting held on June 15, 2007, having to do with a host of outstanding grievances, indicate that Mr. Sorby stated: “If we strictly follow the CBA we have a problem economically. We are not going to recall ee’s for every little job.” (Union Exhibit 3)

the April 17 and April 26, 2007 contracting out events, plus the dates of the “additional” work”, and the monetary remedy associated with each. Mr. Rasley testified that he and Darryl Showen – a management representative – verbally agreed to “package” Grievance #7.07 and the three (3) “additional” incidents. In addition, Mr. Rasley testified that on June 3, 2007, he sent an e-mail to Mr. Showen outlining proposed settlements to several grievances then under discussion, including Grievance #7.07, which featured the accompanying comment:

When we have a machinist laid off and contract out his work we will never agree to that so we can not move on our position. We also want to add the additional times you sent out machinist work since then.

(Union Exhibit 1; emphasis added) Mr. Rasley testified that Union Exhibit 1 was his only written notice to the Employer regarding the April 18, May 1 and May 2, 2007 incidents and that none of the Company officials who were copied on the e-mailed memo to Mr. Showen objected to the above-underlined amplification of the grievance.²

At the hearing, the Company objected to Union Exhibit 2, arguing that the Union’s allegations of “additional” instances of contracting out were a “surprise”, dealing with matters about which the Company had no prior notice, and that none of these incidences were specifically grieved under Article XI of the CBA.

² Mr. Undeland acknowledged during his testimony that “additional” outsourcing took place, but the dates he mentioned did not match those appearing in Union Exhibit 2. He also testified that each of the “additional” outsourced jobs only took three-to-four hours to complete. Along these lines, the dates identified by Messrs. Rasley and Dagle also did not match the dates of the “additional” outsourcing events referred to in Union Exhibit 2.

II. ISSUES

The undersigned will address the two (2) issues stated below.

Issue #1: Whether the “contracting out” incidences of April 18, May 1, and May 5, 2007 may be combined with Grievance #7.07 and, as such, are arbitrable?

Issue #2: Whether the Employer violated Article 3.03 of the Collective Bargaining Agreement as alleged in Grievances #7.07 and #14.07? If so, what is the appropriate remedy?

III. RELEVANT CONTRACT LANGUAGE

Article II – General Purpose of Agreement

2.04 Except as otherwise specifically provided in this agreement, the Company retains the sole and exclusive right to exercise all the rights and functions of management. Should the Company fail to exercise any of its rights or exercise them in a particular way, it shall not be deemed to have waived such rights or be precluded from exercising them in some other way.

Article III – Recognition

3.01 The Union shall be recognized as the sole collective bargaining agent for all production and maintenance employees.

3.03 The Union recognizes that the Company has the right to subcontract work due to time limitations, cost factors, contractor’s guarantees and warranties, and available people skills and equipment, provided:

The Company recognizes the jurisdiction of the Union over work which is of the type that could be performed by the Company’s own employees.

The Company shall not subcontract to avoid its obligations under this agreement nor as a means of reducing the scope of the Union or the size of the crews. Further, work normally performed by members of the bargaining unit will not be contracted out if it will result in the layoff of any employees covered by this Agreement. Should the Company fail to follow the commitments set forth in this Article, the Union may challenge this failure through the grievance procedure up to and including arbitration.

The normal work week and number of employees regularly assigned to the bargaining unit shall not be reduced as a result of the subcontracting work.

The Company will inform the Union in writing, as soon as possible prior to work commencing, the nature and scope of subcontracting work.

The Company and the Union Shop Committee will discuss subcontracting issues at their regularly scheduled meetings. The Company and Union will discuss alternatives to use our employees first.

Bargaining unit employees will be used for labor work before outside contractors when possible.

In case of emergency which cannot be planned for the Company will notify a Union officer or the on-shift steward as soon as possible.

Article VI – Interpretation of Contract

6.01 It is understood and agreed that the Company and Union Shop Committee will meet periodically to consider interpretations under this contract. Such interpretations will be reduced to writing, signed by 3 members of the Union Shop Committee and 3 representatives of the Company. Such interpretations will be considered official interpretations, filed and remain in force and effect until expiration of the current contract.

Article VIII – Working Hours

8.10 Call time is paid for the inconvenience of having to report immediately when off duty for some unforeseen reason for immediate work.

* * *

C. Call time will not be paid for recall from layoff.

Article IX – Seniority

* * *

9.03 Layoffs and Shutdowns

With the exception of Dryer and Press Operator classifications, departmental seniority within the crew shall govern for the first week and the procedure for layoffs will govern after the first week. In either case, regarding Dryer and Press Operator classifications, these jobs will be assigned to the senior qualified employee. Should a shutdown or layoff become necessary the company will allow senior employees to voluntarily accept a layoff unless circumstances require otherwise.

A. Layoffs:

When it may become necessary to reduce the overall number of employees in the unit, the following will apply:

* * *

6. An employee who is laid off and fails to report back to work within five (5) calendar days after being notified by certified mail will be subject to immediate discharge.

Article XI – Grievance Procedure

11.01 The purpose of this section is to provide an orderly method for the settlement of a dispute between the parties over the interpretation, application or claimed violation of any of the provisions of this Agreement. The crew Steward or Union representative will meet with the Team Leader. If there is an employee involved in the dispute, that employee may be present. A written fact finding sheet will be used to outline the alleged dispute. If an agreement is reached it would not be precedent setting for either party. If an agreement can not be reached the parties will proceed to 11.02.

All grievances must state specifically what the alleged aggrieved employee is seeking and specify the article and/or section of the contract that has been violated...

11.02 The dispute must be presented within seven (7) days after its occurrence. In the case of disputes involving Article 19 the dispute must be presented within 7 days of its occurrence of the Unions [sic] knowledge thereof. Written grievances will be processed in accordance with the following steps, time limits and conditions herein set forth...

Step 1 – The grievance shall be reduced to writing and taken to the department head within seven (7) days...

Step 2 – If the grievance is not settled in Step 1, the Union, after receipt of the Step 1 answer, may appeal it by giving a written notice of such appeal within seven (7) days to the Plant Manager or his/her designated representative ...

Step 3 – If the grievance is not settled in Step 2, it may be appealed to arbitration in accordance with the procedure and condition set forth below...

The parties agree to follow each of the preceding steps in the processing of the grievance. Any time limits stated will be calendar days unless

stated otherwise. The above time limits may be extended or the grievance placed in abeyance by mutual agreement.

* * *

H. The expense of the Arbitrator shall be borne by the party against whom the decision is rendered...

Article XII – Supervisor Working

12.01 Shift Supervisors, back-up (relief) supervisors, any salaried employee and Supervisors of the Company may not perform work done by employees in the bargaining unit except in emergencies when the absence of a covered employee could cause the shutdown of any part of the Production, Finishing or Shipping line.

* * *

12.03 No hourly employee will be required or asked to fill in for any salaried or supervisory position due to vacation or other absences, except in emergency cases.

Article XIX – Employee Benefits

19.01 The Company agrees to maintain the negotiated benefit program for permanent employees as follows:

A. Medical insurance is covered under the Ainsworth Managed Care plan administered by Blue Cross/Blue Shield of Minnesota.

Single employee pays 10% and Family pays 15% of premium costs which will be recalculated each year.

Monthly Premium Cost for 2006:

Total Monthly Cost	Company Portion	Employee Portion
\$284.00	\$255.60	\$28.40
\$786.67	\$668.67	\$118.00

Medical insurance premiums in the event of a layoff: Full-time employees who are laid off will be able to maintain their medical and dental insurance for the balance of the month of their layoff plus the two (2) months following date of layoff by

continuing to pay their share of the monthly health care premiums.

III. **EMPLOYER'S POSITIONS**

Issue #1 – Arbitrability: The Employer objects to expanding Grievance #7.07 to include the alleged “additional” incidents of April 18, May 1, and May 2, 2007. First, the Employer contends that Mr. Rasley’s alleged conversation with Mr. Showen and his subsequent June 3, 2007 e-mail do not meet the standard of proof required to demonstrate that the Company agreed to waive the Article XI procedures necessary to bring a grievance to arbitration. (Article XI is largely reproduced in part III of this Award.) *Inter alia*, the Company continues, said Article XI procedures require the parties to make a full and written disclosure of their grievance-specific arguments and defenses; and the Union failed to make these disclosures in spite of its contractual obligation “...to follow each of the ... steps in the processing of the grievance.” (Joint Exhibit 1) In addition, the Employer contends that it was unfairly disadvantaged by the Union’s 11th hour attempt – at arbitration – to broaden the scope of the issues to be arbitrated.

Second, the Employer asserts that Mr. Rasley’s testimony on point was vague and inconclusive and, that due to a medical condition, Mr. Showen was unable to testify about Mr. Rasley’s self-serving testimony. Finally, the Employer avers, the Union’s e-mail statement regarding Grievance #7.07, which states, “We also want to add the additional times you [the Employer] sent out machinist work since then”, is too vague to establish that the Employer waived the provisions of Article XI in the CBA.

Issue #2 – Merits of Grievances #7.07 and #14.07: The Employer contends that it did not violate Article 3.03 in the CBA as alleged in Grievances #7.07 and #14.07 and that the Union failed to prove otherwise. With respect to Grievance #7.07 the Employer admits that on April 17, 2007 it contracted out drilling work on a steel shaft, as the Union claims. However, the Employer observes, its actions were reasonable given that the two (2) millwrights refused Mr. Undeland’s offer to train them to do the job themselves. With their refusal, the Employer contends, it was at liberty to contract out that work due to time and cost factors, and the absence of skilled unit employees, as permitted by Article 3.03:

The Union recognizes that the Company has the right to subcontract work due to time limitations, cost factors, contractor’s guarantees and warranties, and available people skills, and equipment ...

(Joint Exhibit 1)

The Employer next contends that when the millwrights’ unreasonable refusal to learn to operate the milling machine an “emergency”, as provided in Article 3.03, was created, justifying the outsourcing. Moreover, the Company argues that the Union did not prove that Mr. Vann, the Company’s only machinist, was available and willing to performing the work in question.

With respect to Grievance #14.07, the Employer admits that on April 26, 2007 it used an outside electrical contractor, who was on the job for approximately six (6) hours. The Employer observes that Mr. Sorby did not want to force a [unit electrician on layoff] to choose between quitting his new job to perform a few hours of work, or to refuse the offer of work and be discharged.

Accordingly, the Employer urges, Mr. Sorby's actions on the day in question were reasonable under the circumstances, and were not intended to, and did not have the effect of derogating the bargaining unit. Finally, the Employer maintains that the Union offered no evidence that a unit electrician was available and willing to perform the work in question, as was its burden.

IV. UNION'S POSITIONS

Issue #1 – Arbitrability: The Union on brief argues that the Company knew of the “additional” multiple contract violations and that its argument of “surprise” lacks foundation. As proof, the Union points to Union Exhibit 1 wherein Mr. Rasley explicitly refers to the “additional times” the Company outsourced machinists work; and to Union Exhibit 3 wherein Mr. Sorby, in so many words, admits that the Company is not going to recall laid off unit members “...for every little job.” Finally, the Union maintains that Mr. Rasley and Mr. Showen agreed to “package” Grievance #7.07 and the “additional” incidents, testimony that was not contradicted.

Issue #2 – Merits of Grievances #7.07 and #14.07: The Union contends that the Company's decision to contract out the work in question – rather than to recall unit members who were on lay off at the time – was made to circumvent its wage and health benefit payment obligations under the Agreement, to limit the unit's work “jurisdiction” and “scope” or “crew size”, all in violation of Article 3.03 and Article XIX of the CBA. (See specifically Joint Exhibit 1, paragraphs two (2) and three (3)) In support of this contention, the Union cites several provisions of the Agreement that were allegedly violated.

The Union concedes that the Company has the right to subcontract work under the language in the first paragraph of Article 3.03; however, the Union points out that said paragraph ends with the word and punctuation, “provided:” (Joint Exhibit 1; emphasis added) And that the paragraphs in Article 3.03 that follow the colon largely limit the Company’s right to subcontract.

Next, the Union argues that both the bargaining unit machinist and electrician were on layoff status at the time of the alleged violations and that the work contracted out was “... work normally performed...” by said unit members. (See specifically Joint Exhibit 1, paragraph three (3)) The Union also contends that the Company did not provide it with written documentation of any unit work that was to be contracted out: a specific violation of Article 3.03 paragraph five (5).

In addition, regarding the April 17, 2007 incident, the Union asserts that Mr. Undeland’s offer to give Messrs. Dagle and Curtis a “crash course” in the use of a milling machine conflicts with its own “clear and defined” safety policies. That is, the Union argues, since neither of the millwrights had been trained in the use of a milling machine and since they could not reasonably be expected to learn how to operate it in a matter of minutes, the millwrights in question would have been in violation of the Company’s policy that an employee must be qualified before performing machine-driven jobs/tasks.

Finally, the Union points out that that since the plant’s shutdown, unit members have been called back to work on an intermittent basis on numerous occasions without regard to the Article 9.03 A(6) condition that failure to return

to work within five (5) days of recall could result in an employee's discharge. With this provision in mind, the Union challenges the Employer's assertion that it outsourced the challenged work out of a concern for the mechanic or electrician in question. That is, in the Union's view, the Company's argument – that had it ordered the laid off workers return to interim work, it would have placed them in the awkward position of choosing between returning to work (and facing discharge in the alternative) or losing their outside job – is pure rhetoric.

V. OPINIONS AND DISCUSSION

Issue #1 – Arbitrability: Arbitrators enjoy some latitude in adjusting the scope of a grievance when it comes to matters not specifically presented or alleged during the pre-arbitration grievance proceedings. Such might include, for example, adding details that relate to the originally grieved incident. However, the incidences that are alleged to have occurred on April 18, May 1 and May 2, 2007 are not mere amplifications of the original April 17, 2007 grievance (i.e., Grievance #7.07). Rather, as the Employer implies on brief, they represent three (3) separate and additional allegations of contract violation, each with its unique facts and proposed remedy. Moreover, in objecting to the Union's motion that the "additional" incidents be folded in with Grievance #7.07, the Company claims "surprise", and credibly so in the opinion of the undersigned.

The record evidence is clear on a number of points. First, as Mr. Undeland acknowledged, the Company did outsource the challenged work,

although the dates he referenced in his testimony do not precisely correspond to the April 18, May 1 and May 2, 2007 dates that appear in Union Exhibit 2. Second, Mr. Rasley believes that he and Mr. Showen had verbally agreed to “package” the “additional” incidents with Grievance #7.07 and he believes that this Rasley-Showen agreement is inferentially documented by specific text in Union Exhibit 1. Third, from Union Exhibit 3, it is clear that the Company signaled its intent to continue to contract out alleged unit work for reasons of time and economy. However, these points notwithstanding, it is also clear that Mr. Rasley’s “package” testimony is “self-serving” and the record is devoid of any mutual and written Rasley-Showen agreement, waiving Article XI in the CBA.

Whether the Company contracted out the “additional” work is not the fighting issue. They did. The question in dispute is: Whether the facts of these alleged violations should be heard and adjudged in the instant arbitration? From the foregoing, this question must be answered in the negative. The Union’s argument that the parties had agreed to “package” the “additional” incidences with Grievance #7.07 is not persuasive. In the absence of confirmatory testimony from Mr. Showen, the undersigned requires documented evidence that the parties agreed to the so-called “package” deal and waiver of Article XI.³ Such evidence was not forthcoming, except by insinuation in Union Exhibit 1 and that exhibit was unilaterally prepared by the Union. More critically, however,

³ A waiver is defined as “An intentional relinquishment of a known right, claim or privilege”. *Ballantine’s Law Dictionary*, 3rd ed., 1969. In this case, the Arbitrator is unable to conclude that the Employer *intentionally relinquished* its right to insist on strict observance of the procedural and timeliness requirements set forth in the CBA.

it reads in relevant part: "We want to add the additional time ..." (emphasis added). This phraseology sounds more like a proposal than an agreement.

Further, to achieve arbitrability a grievance, under the terms of the parties' CBA, must have been processed through the steps of the grievance procedure (i.e., conditional precedence) and it must have been processed through these steps in a timely manner (i.e., timeliness). Neither of these conditions is met in this case inasmuch as the "additional" incidences were never grieved under Article XI of the CBA. Therefore, the Arbitrator, who lacks the "... power to add to, subtract from, or to modify any of the terms of the Agreement..." must enforce its terms and, specifically, the terms in Article XI that provide: "The parties agree to follow each of the preceding steps in the processing of the grievance." (Joint Exhibit 1) Absent a credible showing that pre-arbitration conditions in Article XI were waived, the undersigned concludes that the "additional" incidences/grievances are not arbitrable.

Issue #2 – Merits of Grievances #7.07 and #14.07: The analysis of Issue #2 begins with the April 17, 2007 incident. As previously discussed, the Employer takes the position that upon the two (2) millwrights refusal to be trained to operate the milling machine, the Company rightly outsourced the work in question, pointing to the first paragraph in Article 3.03 of the CBA. While ostensibly plausible, this position collapses under close scrutiny for the simple reason that the Employer's subcontracting right is conditional on a number of limiting considerations. For example, consider the following two (2) specific limitations:

(1) Article 3.03, paragraph two (2):

The Company recognizes the jurisdiction of the Union, over work which is of the type performed by the Company's own employees.

(2) Article 3.03, paragraph three (3):

The Company shall not subcontract to avoid its obligations under this Agreement nor as a means of reducing the scope of the Union or the size of the crews. Further, work normally performed by members of the bargaining unit will not be contracted out if it will result in the layoff of any employees covered by this Agreement. Should the Company fail to follow the commitment set forth in this Article, the Union may challenge this failure through the grievance procedure up to and including arbitration.

(Joint Exhibit 1) These two (2) provisions, and the others in Article 3.03, do not explicitly or implicitly provide that the Employer has an untrammelled right to subcontract once the untrained millwrights refused to be trained to perform the work of a laid off machinist: work that is beyond the scope of their job classification. Further, given these contractual terms, the Employer recognizes that the Union has jurisdiction over the work that is performed by its members; and that the Employer will not subcontract unit work if it will result in the layoff of any unit employees.

The record makes clear that the work that was contracted out on April 17, 2007 was unit work, in the sense that it is work normally performed by its employee-unit member-machinist. Moreover, it is clear that the machinist in question, namely, Mr. Vann, was on layoff at the time; and that he might have been able to work, at least intermittently, if the Employer had called him back in lieu of contracting out the steel shaft work. A reasonable interpretation of Article

3.03, paragraph three (3), is that this language neither intended nor contemplated this result.

Next, the Employer urges that the April 17, 2007 incident constitutes an “emergency” within the meaning of Article 3.03, paragraph eight (8), which states:

In case of an emergency which can not be planned for the Company will notify the union officer or the on-shift steward as soon as possible.

(Joint Exhibit 1; emphasis added).

Ballantine’s Law Dictionary, 3rd ed., 1969, defines the word “emergency” as follows:

... confrontation by sudden peril; a ‘pressing’ necessity; an exigency; an event or occasional combination of circumstances calling for immediate action or remedy; a condition calling for immediate action to avoid imminent danger to life, health or property.

The Employer argues that the millwrights’ refusal to be trained to use the milling machine created an “emergency” situation under the Agreement. However, the Arbitrator is not persuaded, as the above definition of the term “emergency” certainly does not encompass the circumstances herein. This finding might have been different were the plant in full or even partial operation on April 17, 2007. Moreover, there is a dearth of evidence that immediate action was required under the circumstances of either this or the April 26, 2007 incident. There is no evidence that the Employer acted out of a “pressing necessity” or “imminent danger to life, health or property”. This conclusion is buttressed by the fact that the plant has been shut down since September 2006, and that the tasks at issue were in the nature of routine maintenance. Finally, it appears that

at the time the CBA was entered into, the parties understood that the term “emergency”, as it is contended herein, refers to situations “... when the absence of a covered employee could cause the shutdown of any part of the Production, Finishing or Shipping line.” (See Article 12.01, which is reproduced in part III of this Award.)

Further, arbitral notice is taken of the fact that the Employer did not attempt to call Mr. Vann, the laid off machinist, to determine whether he was available and willing to work on the shaft in question; and there is no record evidence to support the assumption that he had outside employment. These facts tends to buttress the Union’s contention that the Employer was seeking a cost minimizing excuse to outsource said work, the offer to train the two (2) millwrights notwithstanding. Corroborating this insinuation is Mr. Sorby’s “... for every little job” statement in reference to Grievance #7.07 and the Company’s “...time restraints and cost factors...” response to Grievance #14.07. (Union Exhibit 3 and Joint Exhibit 4, respectively)

The Employer urges that since the Union bears the burden of proof in this case, the Union ought to have established that Mr. Vann was in fact available to perform the challenged work. The undersigned disagrees. Rather, given that machinist work was contracted out, while Mr. Vann was laid off, the Union has sustained its burden of proof with respect to Grievance #7.07.

With respect to Grievance #14.07 – the April 26, 2007 incident – there is no factual dispute that the Employer used an outside electrician to perform approximately six (6) hours of repair work on a “turner” machine and “sander”

machine. On substantially the same grounds, the Employer justifies its action by indicating that it did not want to force a laid off electrician to choose between coming in to work for a short time, and leaving his interim employment, or forfeiting his right to reinstatement pursuant to the terms of the CBA. Further, the Employer urges that Mr. Sorby's actions on that day were reasonable, under the circumstances, and that the Company neither intended to derogate the bargaining unit, nor did his action have that effect. It also raises the argument that the burden of proving that the electrician, Dale Anderson, was available and willing to work rested with the Union. Again, for the reasons outlined above, the Arbitrator rejects these arguments. The Employer presented no evidence to establish that an "emergency" existed that demanded the immediate repair of the machines in question. Indeed, there was no showing that the machines were even engaged in production. Further, the record of this case does not support the theory that the Employer was trying to avoid forcing Mr. Anderson to resign from an interim job (he may have had) simply to return to the Company for short – term work.

As was previously noted, on other occasions laid off employees who were recalled to work were not made subject to the five (5) day limit to return to work in lieu of termination. And, in the instant cases, since the out contracted work did not have to be performed immediately and was of short duration, it is reasonable to conclude that the laid off employees could have performed the work on a day off, on the following day, or perhaps even on a weekend or other off – work day from the interim employment. Additionally, as noted above, there

is evidence that the overriding concern of the Employer was to minimize costs.⁴ Further, although the Arbitrator dismissed the “additional” work incidences of contracting out, he cannot conclude that the arbitrated grievances were *de minimis* in light of the clear evidence of multiple occurrences of this nature.⁵

For the reasons discussed above, the Arbitrator sustains Grievances #7.07 and #14.07. Employee Nils Vann is awarded his hourly rate of pay as set forth in the CBA for the equivalent time the outside firm spent in performing unit work on April 17, 2007. *Per* Article 8.10.C, Mr. Vann is not entitled to call-in pay. Lastly, the Union requests that Mr. Vann receive three (3) months of health benefits, based on its reading of Article XIX – **Employee Benefits**, 19.01 A. (Reference part III of this Award) However, the record of this case is devoid of evidence showing that when a laid off employee is knowingly recalled for a short spell and then returned to layoff, that said employee is entitled to multiple rounds of Article 19.01 A medical insurance premium benefits. Given this unresolved ambiguity in contract language, Mr. Vann is not entitled to the Article 19.01 A medical insurance premium benefits.

Employee Dale Anderson is entitled to his regularly hourly pay rate for the equivalent number of hours spent on repair of the “turner” and “sander” machines. No additional benefits are awarded to Mr. Anderson.

⁴ The Arbitrator understands the cost minimizing concerns of the Employer, given the plant’s seven (7) month shutdown. But this fact does not override the CBA’s terms.

⁵ Although the Arbitrator dismissed the Union’s “additional” claims, the incidences asserted did occur.

VI. AWARDS

For the reasons previously discussed, the contracting out incidences of April 18, May 1 and May 5, 2007 are not arbitrable grievances. Next, Grievances #7.07 and #14.07 are sustained and unit members Vann and Anderson are awarded the monetary remedies presented in part V of this Award. For the limited purpose of resolving any dispute that might arise over the implementation of the monetary remedy aspect of this Award, the undersigned shall retain jurisdiction of this case.

In addition to paying the remedial compensation to Messrs. Vann and Anderson, the Company is ordered to cease and desist in the subcontracting conduct identified herein, as same is a violation of Article 3.03 in the CBA.

Finally, Article 11.02 H provides that "The expenses of the Arbitrator shall be borne by the party against whom the decision is rendered." (Joint Exhibit 1) On brief, the Employer maintains that the Arbitrator's expenses should be *pro-rated*, depending on the number of alleged incidences won by either the Union or Company. This suggestion is dismissed. The parties jointly stipulated that Grievance #7.07 and Grievance #14.07 were arbitrable issues in this case. The Union also moved the arbitrability of the "additional" incidences that were collectively regarded as a threshold issue in the instant proceedings. The Employer objected to this motion. This matter was determined on the basis of procedural as opposed to meritorious considerations. Under these circumstances, the undersigned finds that it is reasonable to conclude that the word "decision" as used in Article 11.02 H is a reference to the issue(s) on the

“merits” or the “main” issue(s), and not to “procedural” or “threshold” matters. As the party against whom the merits issue was decided, the Company shall bear the total of the Arbitrator’s fees and expenses in this case.

Issued and ordered from Tucson,
Arizona on this 19th day of January
2008.

Mario F. Bognanno, Labor Arbitrator