AWARD

The grievances are denied.

PITTSBURG & MIDWAY COAL MINING CO. —

Decision of Arbitrator

In re PITTSBURG & MIDWAY COAL MINING CO. (Colonial Mine) and UNITED MINE WORKERS OF AMERICA LOCAL 1142, DISTRICT 23, Grievance No. 88-23-93-11, January 24, 1994

Arbitrator: Lamont E. Stallworth

SUBCONTRACTING

— Post-shutdown work — Union jurisdiction — Past practice ▸117.382 ▸117.383 ▸117.385 ▸7.15

Employer that shut down mine did not violate collective-bargaining contract when it contracted out restoration and painting of mining equipment to be sold at auction, even though bargaining-unit employees historically had painted vehicles in question when needed, and cessation of operations does not precipitate automatic destruction of past practices, where employees had performed only "spot" painting to prevent rust and deterioration, employer needed "like-new paint restoration" job to obtain good prices for equipment at auction, employees had performed work of that standard only once, 27 vehicles were involved, and employer did not have sandblaster to perform necessary preparation work.

Appearances: For the employer — Robert L. Oswald, consultant; Clarence Washburn, former mine manager; Richard McGuffin, acting mine manager. For the union — Randall Duncan, district executive board member; Billy G. Clark, local president; Jerry D. Kelley, grievance committee chairman.

POST-SHUTDOWN WORK

The Issue

STALLWORTH, Arbitrator: — The Parties presented the following issue(s) to the Arbitrator:

1. Did the Company violate Article II of the labor agreement when it contracted out the cleaning and painting of mobile equipment in October through November, 1993?
2. If so, what shall the remedy be?

Relevant Contract Provisions

ARTICLE II — SCOPE AND COVERAGE

Section (a) Work Jurisdiction

The production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above shall be performed by classified Employees of the Employer covered by and in accordance with the terms of this Agreement. Contracting, subcontracting, leasing and subleasing, and construction work, as defined herein, will be conducted in accordance with the provisions of this Article.

Nothing in this section will be construed to diminish the jurisdiction, express or implied, of the United Mine Workers.

* * * * *

Section (g) Contracting and Subcontracting

(2) Repair and Maintenance Work — Repair and maintenance work of the type customarily performed by classified Employees at the mine or central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under warranty, in which case, upon written request on a job-by-job basis, the Employer will provide to the Chairman of the Mine Committee a copy of the applicable warranty or, if such copy is not reasonably available, written evidence from a manufacturer or a supplier that the work is being performed pursuant to a warranty; or (b) where the Employer does not have available equipment or regular Employees (including laid-off Employees at the mine or central shop) with necessary skills available to perform the work at the mine or central shop.

Background

The Employer has operated the Colonial Mine as a surface mining operation in this area since 1946. In 1991, the Company determined that the mine would be closed, due to the loss of a contract with a utility company. In October, 1991, the Company notified the Union that the mine would be closed permanently at the end of the year. About 100 bargaining unit members were employed by the mine at that time.

Initially about 37 employees were kept on to perform reclamation and closing work. At the time this dispute arose, about twelve (12) employees remained working. By the time of the arbitration hearing about six (6) bargaining unit employees remained employed.

In closing the mine, management determined how to dispose of its equipment. Some mobile equipment was sold on an "as is, where is" basis and other pieces were transferred to other mines owned by the Company. Management determined that a third group of machinery and equipment should be auctioned off to the highest bidder. The Company hired a professional auction company, and the auction was set for November 16, 1993.

A Company witness testified that, on the advice of the auctioneer, the Company decided to give the equipment a "like new" appearance. The Company hired an outside contractor to power wash, sandblast and spray paint the equipment in order to achieve this look.

The Company did not have records detailing precisely how much time the painting work entailed. However, it appears that twenty-seven (27) pieces of equipment were involved, and that it took about a month for the job to be completed. The crew performing the work varied in size, with the six (6) employees at most performing the operation at any given time, according to a management witness.

The Union filed a grievance dated October 6, 1993 over the subcontracting of the work. The Union alleged that the work was repair and maintenance work customarily performed by bargaining unit employees. The Company denied the grievance, asserting that the mine was permanently closed, the duties in question were not bargaining unit duties (i.e. like new restoration and not repair and maintenance), the work was intended to facilitate the sale of equipment, not the production of coal, there has not been a past practice of having this work done at the mine, the Company did not have the equipment available to perform the work, and lastly, that all active employees were working full time and that there were no employees with the skills to perform the work. The Parties were unable to resolve the dispute on the property and they proceeded to arbitration. It is within this factual context that the instant dispute arises.

The Union's Position

The Union contends that the instant grievance should be sustained. According to the Union, the Grievants have performed painting on this equipment since the mine began operating in 1946. There has been a consistent past practice, the Union urges, of bargaining unit employees performing the work in question.

Therefore, the Union urges, this is work which has customarily been performed by the bargaining unit, and falls under its jurisdiction. Under the Agreement, the Union notes, the Company may not subcontract work which has been performed customarily by members of the bargaining unit.

In addition, the Union points to the evidence that there have been no complaints from management regarding the quality of the painting work performed by bargaining unit employees. Therefore, the Union argues that bargaining unit employees possess the skills to perform the work in question. Even if the outside contractors might have performed the work better, the Union urges, the labor agreement requires the Company to use its own bargaining unit employees if they have the requisite skills to perform the work.

In the instant dispute, the Union argues, bargaining unit employees were never given the opportunity to demonstrate that it could perform the work satisfactorily. The Union suggests that bargaining unit employees must at least be offered this opportunity before assigning the work to outside contractors.

The Union argues further that the work is part of the production of coal, and its jurisdiction over the work is therefore not changed by the fact that the mine had ceased operation at the time that the equipment was prepared for auction. The Union argues that the equipment belonged to the Company until the time at which it was sold. The Union also relies upon certain arbitral awards for the position that work which was customarily performed as part of the production of coal prior to a shutdown remains under the jurisdiction of the Union after the closing.

In addition, the Union contends that the Company had adequate equipment to perform the painting work satisfactorily. If the Company had wanted bargaining unit employees to use sandblasters, etc., the bargaining unit employees would have been glad to do so, the Union asserts. According to the Union, the employees had the skills necessary to perform the work with any equipment provided by the Employer.

For all of the above reasons the Union argues that the instant grievance should be sustained.

The Company's Position

At the outset the Company argues that the painting in issue here was not related to the production of coal. According to the Company, the work in question did not in any way affect the mining operation because the equipment involved would not ever again be used in the production of coal at Colonial Mine or any other Company mine. The Company argues that the purpose of the work and the circumstances under which it is performed help determine whether it falls under the Union's jurisdiction, and in this case it did not do so.

The Company contends that the Union has not demonstrated that the

employees had customarily performed the work in question, According to the Company, the painting of equipment customarily performed by the bargaining unit has been done to stop the equipment from rusting i.e. repair and maintenance work. This is very different from the restoration painting required in this instance, which had never been performed before, the Company contends.

According to the Company, the Union has failed to show that bargaining unit employees performed the same work, under the same conditions, repeatedly and customarily. In support of this position, the Company also relies upon arbitral awards which hold that practices or customs which exist during production of coal do not necessarily extend into the mine closure period.

The Company argues that the bargaining unit employees did not have the experience to perform the work in question here. An outside contractor does this work all of the time, the Company argues, and it only stands to reason that the contractor would be able to do a better job more efficiently than the bargaining unit employees.

The Company argues further that it did not have the equipment to perform the disputed work. According to the Company, there were no sandblasters, paint guns or steam cleaners. The chipping tool which the Union argues could have been used to remove the old paint would dent the metal, the Company argues, which would not be acceptable in this case. The Company relied upon arbitral support for its position that it need not purchase or rent special equipment just for this project. The Company further contests the Union's suggestion that management made an agreement with the Union to assign the disputed work to them. For all of the above reasons, the Company argues that the grievance should be denied.

Opinion

This is a case involving the subcontracting of the preparation and painting of heavy mobile equipment prior to its sale at auction. The Parties have submitted the following issue(s) to the Arbitrator for resolution:

1. Did the Company violate Article II of the labor agreement when it contracted out the cleaning and painting of mobile equipment in October through November, 1993?
2. If so, what shall the remedy be?

The Arbitrator has considered the testimony, other evidence, arguments and arbitral awards submitted by the Parties and concludes that the Company did not violate the labor agreement when it contracted out the cleaning and painting of mobile equipment in October and November, 1993. The Arbitrator's findings, conclusions and reasoning are set forth below.

At issue in this case are two provisions of Article II of the labor agreement, involving work jurisdiction. Section (a) reserves to classified employees work involving "the production of coal, including . . . repair and maintenance work normally performed at the mine site or at a central shop of the Employer. . . ., and work of the type customarily related to all of the above." Section (g)(2) specifically prohibits subcontracting of repair and maintenance work "of the type customarily performed by classified Employees at the mine or central shop," *except* for warranty work, or where the Employer does not have available equipment or regular Employees (including laid-off Employees) with necessary skills available to perform the work.

As a threshold matter, the Company argues that because the mine was not producing coal at the time the disputed work arose, the work did not involve the production of coal, and therefore the Union did not have jurisdiction over it. There is a substantial split of opinion among coal industry arbitrators over whether a Union has jurisdiction over work which is performed after a mine ceases to produce coal. The Company relies upon those arbitral awards which suggest that any work performed after a mine ceases to produce coal does not necessarily fall within the jurisdiction of the Union, even if it is of a type customarily performed by the Union in the past. For example, in *Arch of West Virginia, Hinman Mine v. United Mine Workers of America, District 17, Local 6712*, ARB. File No. 88-17-89-500 (Davies, Arb., 1989), the Arbitrator stated,

> The removal of mining equipment from a permanently closed mine has no reasonable relationship to the production of coal. The mine has been permanently closed and no more coal will be produced in that mine. The removal of the equipment in that mine will not result in the production of one ounce of coal in that mine. Actually a removal of mining equipment will result in *non* production of coal, rather than in the production of coal, the very opposite of what is covered in Article 1A(a) of the contract. I come therefore to the inevitable conclusion that the applicability of the provisions of Article 1A(a) cease when the mine is permanently closed. Inevitably then the classified employees of a Local Union have no right to claim the removal of the mining equipment as their work.

See also, *Drummond Co., Inc. (Beltona Mine) v. United Mine Workers of America, District 20, Local 1554*, (Sergent, Arb. 1993)) "most work that is performed after a mine is permanently

closed is not classified work pursuant to work jurisdiction provisions of Article 1A, Section (a) because such work does not fall within the ambit of the 'production of coal.'"

The Undersigned Arbitrator's views of the Union's work jurisdiction after the cessation of coal production are closer to those expressed by Arbitrator Thomas M. Phalen in a series of cases he has decided on this issue over the years. He has suggested that the fact that coal is no longer being taken from the mine does not necessarily mean that the Union's work jurisdiction has ended. The following excerpt reflects Arbitrator's Phalen's interpretation of the jurisdiction language,

> The work in question in this case was obviously not the production of coal and had nothing to do with the furtherance of coal production. The actual production of coal at the mine had ceased months before the work here was done. But to say that it was not related to production work is, in my view, too restrictive a reading of Article 1A, Section (a) of the contract. As I understand that provision, its scope includes both work which goes before and work which follows actual production work. The fact that coal production at a mine may have ceased does not therefore necessarily mean that the work jurisdiction of the classified employees also has ceased. There may still be coal stockpiled on the surface which may have to be processed and/or moved, reclamation work may still have to be done, equipment may still have to be maintained, and the employer may be legally required to take certain steps to close the mine. All that work grows out of the coal production which formerly took place at the mine, and in that sense is related to production work.
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> (*Arch on the Green, Inc., Powderly Mine v. United Mine Workers of America, District 23, Local Union 1605* (Phalen, Arb., 1989).

The production of coal is not an instantaneous process, involving only the moment during which coal is removed from the ground. The Arbitrator concludes that the term "coal production," as used in the labor agreement, is intended to mean something more than a process which "commences, continues, and ends." (*McNamee Resources, Inc. v. United Mine Workers of America, District 17, Local 1990*, (Murphy, Arb., 1985). See also, *United Mine Workers of America, District 14, Local 1122 vs. Peabody Coal Company (Power Mine)*, (Nelson, Arb. 1989); *Eastern Associated Coal Corp./-Peabody Coal Co. (Wharton #2 Mine) vs. United Mine Workers of America, District 17, Local Union 9177*, (Klein, Arb. 1989). Furthermore, the Arbitrator does not conclude that the "end" of the process occurs the moment the last bit of coal is extracted from the ground.

In addition, the Arbitrator concludes that the addition of the language protecting work "of the type" customarily performed by classified employees strengthens the Union's position here. This phrase suggests that the Parties intended to reinforce or adopt stronger protection for the Union's work jurisdiction than had existed in the past.

Of course, at some point the Union's work jurisdiction does end. This Arbitrator concurs with those who hold that jurisdiction in these cases requires an examination of the facts of each case, and that the relevant issue is whether the disputed work grew out of the coal extraction which formerly took place at the mine. (See *Drummond Co., supra).*

There are some differences between the instant case and the cases introduced by the Company. In *Drummond Co.*, the work in question occurred after all of the bargaining unit employees had been laid off. In contrast, in the current case there were still bargaining unit employees working at the mine on the process of closing it down. In the instant dispute there is a stronger argument that the disputed work was a part of the closure process.

Furthermore, there is no dispute here that the vehicles on which the disputed work was performed were used consistently in the production of coal prior to the closing of the mine. In contrast, in another case cited by the Company, the disputed work, cutting and trimming grass, was not necessary to the production of coal. *Consolidation Coal Co. (Wheeler Creek Mine) vs. United Mine Workers of America, Local Union 2414*, (Judah, Arb. 1988). There the Arbitrator held that the work did not fall under the Union's jurisdiction because it was related to the production of coal, but rather because of past practice, and that practice was essentially changed because of the closure of the mine.

The Company also has relied upon other decisions which hold that a closure of the mine so changes the circumstances under which a past practice has occurred that the practice is no longer binding. *Drummond Co., supra; Arch of West Virginia, supra; Consolidation Coal Company (Four States Mine No. 20) v. United Mine Workers of America, District 31, Local No. 9909*, (Dissen, Arb. 1987). The Undersigned Arbitrator concludes, however, that the moment at which the extraction of coal ceases does not precipitate the automatic destruction of all past practices at a mine.

In the instant dispute, there is no dispute that the classified employees had a past practice extending back many years of painting the vehicles in question when they needed painting. This type of painting was primarily for maintenance and repair purposes.

This is distinctly different from the "like-new restoration" at issue here.

The Company presented testimony that the classified employees performed only "spot" painting, i.e. painting vehicles so that the metal would not rust and deteriorate. According to the Company this is very different than the work which was required here, i.e. a very professional-looking paint job which would help the Company achieve good prices for the equipment at the auction.

However, one Union witness testified that bargaining unit employees or classified employees had resurrected a piece of mobile equipment out of the scrap pile and had totally restored it. The undisputed evidence indicated that management had been so pleased with the restoration of the equipment that they had displayed it during an anniversary celebration for the Company, and management personnel had had their pictures taken with the vehicle. Notwithstanding, the Arbitrator notes that the painting or total restoration of this equipment was a one time event and hardly constitutes a past practice or a finding that this type of work was "customarily" done by classified employees.

The Company states that it is obvious that a painting contractor could perform the work better than the classified employees. In addition to the evidence regarding the restoration of the scrapped vehicle, the Union has pointed out that painting is not a highly-rated skill at the mine, and that certain members of the bargaining unit had quite a bit of experience with painting, including sandblasting and spray-painting, before they came to mine. The Company's representative admitted, at Step 3 and again in the arbitration hearing, that there were probably employees in the bargaining unit who had the skill to perform the work in question. (Nor was there any question of availability in this case, since "available" employees includes those laid off).

It is possible that the contractor here may have been able to do the work faster or in some sense better than the classified employees. However, the contract does not require that the classified employees be better skilled than the contractors' employees, only that they have the necessary skills to perform the work. *Midland Coal Company Elm Mine vs. United Mine Workers of America, District 12, Local Union 1523,* (Goldberg, Arb. 1973). In the instant dispute, the Company never gave the employees, who had painted the same equipment in the past, the opportunity to demonstrate whether they could paint it to the standards required for its sale. This factor distinguishes this case from another one decided by the Undersigned Arbitrator, in which the Company had given the classified employees the opportunity to do the disputed work, but the work had not been performed satisfactorily. *Monterey Coal Company, No. 1 Mine vs. United Mine Workers of America, District 12, Local Union No. 1613,* (Stallworth, Arb., 1984).

However, even if members of the bargaining unit had the necessary skills to perform the work in question, the Company argues that it did not possess the equipment to perform the work, i.e. sandblasters and mobile compressors. Under Article II, Section (g)(2) the Company may subcontract work when it does not have the necessary equipment available to perform the work.

The Union argued, however, that the painting work always had been performed satisfactorily in the past without the use of sandblasters or compressors. However, the Company argued convincingly that the standard of quality which it established for this project was different from the standard which had been applied in the past to painting this equipment. According to the Company, the painting standard in the past had been established in order to keep the equipment from rusting through. Drips or other painting irregularities on the surface were not important. However, in this case the Company determined that it needed a different standard of quality in order to achieve a high-quality finished look which would enhance the auction price of the equipment.

The Union has not challenged the Company's right to determine the standard of quality for this project. As the Arbitrator has concluded, the bargaining unit probably had the work skills to perform the job satisfactorily. However, the Company presented convincing evidence that the equipment which is owned by the Company and would have been used by classified employees to prepare the surface for painting, would probably make small dents in the surface, which would not be acceptable for this project. In contrast, the sandblaster would not make such dents, the Company averred.

The standard of quality required of this project, and the scope of it, (twenty-seven vehicles) convinces the Arbitrator that the Company did not act unreasonably in deciding that it needed a sandblaster to perform the preparation work. This sets this case apart from a very similar one decided by Arbitrator Stephen Goldberg. In *Midland Coal Company (Elm Mine) vs. United*

Mine Workers of America, District 12, Local Union 1523, (Goldberg, Arb. 1973), where he found that the employees who had painted trucks in the past with no special equipment had jurisdiction over the work even though the Employer claimed that it did not have sandblasters and other equipment. In *Midland Coal Company* Arbitrator Goldberg found that "the Employer introduced no evidence that the painting to be done on this occasion was of such a different nature that specialized equipment or personnel, not possessed by the Employer or utilized in the past was necessary." In contrast, in the instant dispute the Company has established that the painting to be done was sufficiently different that such equipment was necessary.

Section (g)(2) specifically permits an employer to subcontract work when it does not have the equipment to perform the work. Here, the Company has carried its burden of demonstrating that the standard of quality established for this project could not be accomplished with the equipment which the Company owned.

The outcome in this case might have been different if the equipment owned by the contractor resulted only in a difference of speed in performing the work. In many cases a subcontractor may be able to perform work more efficiently and/or more cheaply than the Employer, and the language of Section (g)(2) would be stripped of meaning if the Employer could rely solely on such speed or efficiency, provided by different equipment, to circumvent the subcontracting language. *United Mine Workers of America, District 11, Local Union No. 1216 vs. Amax Coal Company (Chinook Mine)*, (Phelan, Arb. 1989). However, where the equipment results in achieving a different standard of quality, as is the case here, subcontracting may be permissible. *Amax Coal Company, supra.*

The Union also presented evidence that the Company may have been able to purchase, rent or lease the equipment used by the subcontractor in order to perform this work. Generally, the Employer is not required to purchase or lease equipment for repair or maintenance work, because otherwise the Parties would not have made the lack of such equipment an exception to the Section (g)(2) ban on contracting out work. *United Mine Workers of America, Local Union 9909, District 31 vs. Consolidation Coal Company (Fairmont Operations, Loveridge No. 22 Mine*, (Selby, Arb. 1991). Although there is some precedent requiring the Employer to provide the necessary equipment to perform work which is under the Union's jurisdiction under Section IA, most arbitrators hold that Section (g) (2) makes an exception for equipment necessary to perform repair and maintenance work. *Freeman United Coal Company vs. United Mine Workers of America, Local Union 1969, District 12*, (Nicholas, Arb. 1993).

Some arbitrators have noted that the Employer generally is not required to obtain equipment to perform repair and maintenance work "unless the cost and the burden of obtaining them are so insignificant as to fall with(in) the *de minimis* rule." *Freeman United Coal Mining Co. vs. United Mine Workers of America, District 12, Local Union 1591*, (Joseph, Arb. 1992, quoting Arbitrator Volz). There is no evidence in this case that the cost of purchasing or leasing the equipment here was so insignificant as to form an exception to the rule permitting the Employer to subcontract the due to a lack of equipment.

In conclusion the Company has persuasively demonstrated a sufficient distinction between the "like new paint restoration" work involved here versus the customary "spot painting" or repair and maintenance work done by classified employees. The Company has also shown that as a matter of past practice that only on special or rare occasions have classified employees done the "high quality" of painting as required here. Lastly, the Company has established that it did not own the equipment necessary to perform the work to the standard it required, and therefore was permitted to subcontract the work.

For all of the above reasons, the instant grievance is denied.

AWARD

The grievance is denied.

CITY OF SAPULPA —

Decision of Arbitrator

In re CITY OF SAPULPA, OKLAHOMA and INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 194, FMCS Case No. 94/02990, March 4, 1994

Arbitrator: Russell C. Neas, selected by parties through procedures of the Federal Mediation and Conciliation Service

EMPLOYEE BENEFITS

— Golf course fees — Prevailing rights ▸100.51

City violated prevailing rights clause of collective-bargaining agreement with fire-