

**UMASS MEMORIAL MEDICAL CENTER**

**and**

**UFCW, LOCAL 1445**

**ARBITRATION OPINION & AWARD  
Susan R. Brown, Arbitrator**

**LRC #573-20, Sushi service**

**Date of Award: 17 May 2021**

The undersigned Arbitrator, selected by the parties in accordance with their 2019-22 collective bargaining agreement, held an electronic hearing on 3 March 2021 under the auspices of the Labor Relations Connection to consider the provision of sushi services at the university campus cafeteria. The Company was represented by Robert H. Morsilli, Esq. of JacksonLewis; Terence E. Coles, Esq. of PyleRome appeared for the Union. Both parties filed post-hearing briefs.

### **ISSUES**

At the parties' request, the Arbitrator sets forth the following issues:

Did the Employer violate Article 2 and/or 12 of the parties' collective bargaining agreement with respect to sushi service at the Employer's university campus cafeteria starting in July 2020?

If so, what shall be the remedy?

## **PERTINENT CONTRACT PROVISIONS**

### **ARTICLE 2 – BARGAINING UNIT WORK**

Except for emergencies and open positions that are actively recruiting candidates, UMMMC will not use managerial, temporary or voluntary staff to perform work covered by this Agreement unless bargaining unit employees are not available. Volunteers will be used in hospice as required by the Code of Federal Regulations. Lead Medical Technologists in the laboratory will continue with the work currently performed.

### **ARTICLE 12 – CONTRACTING OUT**

- A) If UMMMC is considering contracting out any work normally performed by a UFCW bargaining unit member, UMMMC shall notify the union once UMass Memorial even decides to consider or is made aware of a potential feasibility study.
  
- B) Once the feasibility study is decided upon and completed and all options are being considered, management will discuss the feasibility study and explore possible alternatives with the Union/Management Committee. The Committee will receive a copy of the feasibility study, conduct its own investigation, and report its findings directly to the Senior Vice President or his/her supervisor.  
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- G) Notwithstanding the above,<sup>1</sup> UMMMC agrees that it will not subcontract bargaining unit work within the housekeeping or food service departments during the term of the current contract (June 8, 2019 through June 8, 2022).
  
- H) In addition, UMMMC affirms its commitment as of ratification of this contract that it will make best efforts not to subcontract any work performed by bargaining unit members. This provision is not subject to the grievance and arbitration procedure.

(JX 1)

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<sup>1</sup> Sections C through F address subcontracting issues regarding rights of laid-off employees, including transfers, hiring preferences, re-training, and severance payments, none of which are pertinent here.

## **BACKGROUND**

Most of the facts here are undisputed. UMass Memorial Medical Center (UMMMC) comprises a medical school and a medical facility in Worcester, Massachusetts. The Union represents about 1000 UMMC employees in a variety of categories, both technical and service/maintenance; this grievance concerns only food service titles in the service category, including Cook; Food Service Worker – Cafeteria; Food Service Worker – Patient Service; Catering Associate; and Production Assistant.

There are two full-service cafeterias on the grounds – one on the University campus and one on the Memorial campus – plus a smaller facility located in the Hahnemann building. Bargaining unit workers perform required food service duties in the cafeterias – they prepare and serve food – and some employees deliver food to patients in their rooms. The Employer contracts out the management of all food service operations to Sodexo, an international company that offers what it calls “quality of life services” to many industries; thirty Sodexo employees hold food service management positions at UMMC.

Some food service functions are also performed by non-employees. The record reveals the following examples:

- Two Starbucks locations on the grounds, one down the hall from the University cafeteria, serve both food and beverages to any customer. They have been open for approximately seven years; the workers are Sodexo employees. About three years ago, UFCW Local 1445 organized them into a bargaining unit which then entered into a collective bargaining agreement with Sodexo.
- Some brand-name beverages in vending machines scattered around the campus are restocked by beverage company employees

or contractors; those workers also replenish stocks in the cafeteria.

- About 150 snack vending machines, located campus-wide, are restocked by an outside vending-machine company; bargaining unit employees restock the same items in the cafeteria.
- Gerardo's Bakery in Worcester provides holiday cakes and pies and other specialty items for patients' lines. These are prepared at the bakery and delivered to UMMMC.
- For one year, in 2014-15, Indian cuisine was served in the cafeteria one day a week by two employees of Gourmet India, contracted with Sodexo. The food was produced off-site by Gourmet India.
- In 2014, sushi began to be served one day a week in both main cafeterias. The food was prepared off-site then assembled and served in the University cafeteria by two employees of Sushi-Sushi, the company engaged by Sodexo to provide the service. Some sushi was delivered to the Memorial cafeteria but no Sushi-Sushi workers were located there. This continued until March 2020, when the cafeterias closed as a result of the Covid-19 pandemic. When the facilities re-opened in June 2020, Sodexo had, because of food safety concerns, changed its sushi sourcing to Advanced Fresh Concepts (AFC). Since then, sushi has been served in the University cafeteria five days a week, a practice continuing into the present.<sup>2</sup> Sushi is delivered by a bargaining unit employee one day a week to the Memorial location.<sup>3</sup>

In order to accommodate the expanded sushi service, the University cafeteria panini station was discontinued and dismantled and replaced by a sushi station; the two bargaining unit employees who had made and served paninis were reassigned to other duties in the same facility. A total of three AFC employees currently prepare and serve sushi; one works in the large

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<sup>2</sup> This arrangement is the subject of the instant grievance and is addressed in more detail below.

<sup>3</sup> The record does not reflect whether the delivery is performed by a food service worker or an employee in another category.

kitchen beneath the University cafeteria where bargaining unit members also prepare food, and two AFC employees work at the sushi station. All three non-UMMMC employees work a full-day schedule on weekdays and one or more may come in on weekends to do food preparation. Prepared sushi items are sent to the Memorial cafeteria, where they are presented for sale in a refrigerated case.

Because sushi requires storage, handling and preparation of raw fish, sushi workers require specific training. No evidence in the record established the number of training hours, if any, required by law nor the availability or cost of training. According to UMMMC Food and Nutrition Director Steven Guerin, a Sodexo employee, Sodexo itself does not have sushi preparation expertise, which is why it uses contractors. He testified that he did not explore the possibility of training bargaining unit employees to do the sushi-related work in a manner that conforms with regulatory requirements.

### **CONTENTIONS OF THE UNION**

According to the Union, the Arbitrator should find that the Employer's expansion of subcontracted sushi food service violated the clear and unambiguous terms of Article 12, that is, that UMMMC will not subcontract bargaining unit work that falls within the food service department. The Union argues that the Employer's defenses in this matter contradict that language and would render the prohibition meaningless. The plain meaning of subcontracting does not depend on who – UMMMC or Sodexo - hires non-

bargaining unit workers to do bargaining unit work as defined by the collective bargaining agreement. Nor does the contract exempt the so-called expansion of the prohibited practice from one day to five. Nor does the plain language of Article 12G permit sub-contracting as long as no employees lose work nor when current employees are not already capable of performing the work in question. The Arbitrator should issue a cease-and-desist order and require the Employer to reimburse the Union for dues it lost as a result of the prohibited practice. The Union also requests that the Arbitrator retain jurisdiction for 90 days to resolve remedial issues.

#### **CONTENTIONS OF THE COMPANY**

The Employer maintains that the Union has failed to prove any violation of Articles 2 or 12. According to the Employer, sushi service is not work normally performed by a bargaining unit member and therefore the use of AFC employees, contracted by Sodexo, does not violate the collective bargaining agreement. Moreover, the work does not fall under the recognition clause because it has never been performed by “employees employed by the Medical Center”. The fact that AFC employees work alongside bargaining unit members does not affect this conclusion. Moreover, the fact that outside workers have done sushi work in the cafeteria for seven years undermines the Union’s position; the more recent expansion of hours for sushi workers is in accordance with that practice. The Arbitrator should deny the grievance in its entirety.

## OPINION

The place to begin when considering a contract interpretation dispute, of which this case is a prime example, is with the contract language itself. The pertinent question here is what constitutes bargaining unit work within the meaning of the contract.

Article 2 does not enlighten us; although entitled “Bargaining Unit Work”, it refers solely to “work covered by this agreement”, requiring us to look elsewhere in the contract for a definition of that work. Which brings us to Article 12.<sup>4</sup>

The Employer maintains the relevant language that governs the definition of bargaining unit work resides in Section 12A: “any work normally performed by a UFCW bargaining unit member”. That’s a good start. And how do we establish the contractual perspective on what work is normally performed by a bargaining unit member? The best place to look is in the job descriptions of the Food Service positions.

The relevant job descriptions, written by the Employer presumably in accordance with a Union-management consultation process set forth in Article 28, are all quite general. With respect to preparing and serving food, generalized terms such as prepares, slices, chops, mixes, seasons, assembles, portions, serves, etc. dominate the descriptions; no specifications or exceptions

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<sup>4</sup> Although Article 2 is cited in the issues to be decided by the Arbitrator, the Union presented no evidence or argument that it was violated.

are made for particular foods or cuisines. These terms define the tasks “normally performed” by the bargaining unit members in question.

This analysis dismantles the Employer’s argument that because bargaining unit members have never prepared sushi, sushi preparation is not bargaining unit work within the intention of the collective bargaining agreement. Sushi service requires workers to prepare, slice, chop, mix, season, assemble, portion and serve food. If the Employer could carve out innovative preparation of particular foods, cuisines or other meal characteristics as non-bargaining unit work because they are innovative, the contract language “normally performed”, when read in conjunction with duly-adopted job descriptions, would be rendered meaningless.<sup>5</sup> Under such an interpretation, management could designate sub-contractors at any time to provide Chinese food, Thai food, Mediterranean cuisine, Mexican food, etc., merely because bargaining unit members had not “normally performed” the preparation of that particular food in the past.

The Employer further contends that the presence of sushi workers does not constitute sub-contracting by UMMC because the arrangement was undertaken by Sodexo. This argument too would eviscerate the sub-contracting language of Article 12. Sodexo acts as the Employer’s agent for directing food service bargaining unit employees and as such, must act in accordance with the Employer’s negotiated collective bargaining agreement

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<sup>5</sup> This conclusion is further supported by Article 50, which recognizes the Union as the exclusive representative of persons performing “similar functions” to those described in these job classifications.



with those workers. When Sodexo brings outside workers into the workplace, it does so on behalf of UMMMC.

The existence of other sub-contractors performing certain food service duties at UMMC does not alter this reading of the contract. Most of Article 12 sets forth detailed procedures for how management may sub-contract certain work. Absent any evidence to the contrary, we must presume that these sub-contracting arrangements were undertaken either before Article 12 was negotiated or, if afterwards, in accordance with its language. Moreover, specific language bars sub-contracting food-service duties during the life of the current contract.

Even if the one-day sushi arrangement began after Article 12 G was negotiated,<sup>6</sup> it does not constitute a past-practice that over-rides clear language. When a provision is ambiguous, a past practice can serve to interpret the language; when the language is clear, either party may opt to revert to the contract at any time, with appropriate notice to the other party. When taken together, contract language and the job descriptions establish without question that the work “normally performed” by food service employees is the preparation and serving of food in the cafeterias, no matter the cuisine. Ergo, the use of non-bargaining unit members to prepare and serve sushi in the cafeteria is a contract violation.

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<sup>6</sup> The date that Article 12 G, or indeed any part of Article 12, first appeared in the contract is not in evidence.

**Remedy**

As a result of this contract violation, the Employer must end its use of non-bargaining unit personnel to perform food preparation and serving in the cafeteria, to wit, the sushi service. There are several possible options for the Employer to consider: it can discontinue the service altogether; it can hire trained sushi handlers to provide the service, persons who will then be part of the bargaining unit; it can train current bargaining unit employees to prepare and handle sushi; it can negotiate yet a different resolution of the matter with the Union, as it has apparently done in the past in other situations. Whatever option is used, some implementation time will be required; this circumstance has been factored into the remedy below. The Union's request for claimed lost dues is denied.

**AWARD**

The Employer violated Article 12 G of the parties' collective bargaining agreement by using non-bargaining unit personnel to perform bargaining unit work, to wit, sushi service, in the UMMC university cafeteria.

Within 90 days of the date of this award, the Employer shall cease the prohibited practice.

Dated: 17 May 2021

  
Susan R. Brown, Arbitrator