

BEFORE THE ARBITRATOR

- - - - -  
In the Matter of the Arbitration :  
of a Dispute Between :  
LABORERS' INTERNATIONAL UNION OF :  
NORTH AMERICA LOCAL UNION NO. 140 :  
and : Case 13  
: No. 42791  
: A-4499  
SPARTA MANUFACTURING COMPANY :  
:  
- - - - -

Appearances:  
Arnold and Kadjan, 19 West Jackson Boulevard, Chicago, Illinois by  
Donald G. Schwartz, Attorney at Law, on behalf of the Union.  
Geiss, Goodman and McAlpine, 111 South Court Street, Sparta, Wisconsin by  
Michael J. McAlpine, Attorney at Law, on behalf of the Company.

ARBITRATION AWARD

Laborers' International Union of North America, Local Union No. 140, hereafter the Union, and Sparta Manufacturing Company, hereafter the Company, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the Company concurred, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance concerning the meaning and interpretation of the terms of the agreement. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Sparta, Wisconsin, on November 13, 1989. It was not transcribed. Briefs were submitted by December 13, 1989. The Company filed a reply brief on January 10, 1990; the Union, by letter received January 24, 1990, waived its right to file same.

ISSUE

The Union states the issue as follows:

"Whether the Company violated the contract, as interpreted in the Gratz award, by failing to offer Overdahl overtime work on Sunday, July 16, 1989." The remedy requested is five hours of double-time pay.

The Company states the issue as follows:

"Did the Company violate the arbitration award that provided 'the Company shall offer Overdahl the opportunity to perform the next available Sunday overtime work for which he is qualified until Overdahl has been offered at least eight (8) hours of such work . . .?'" If so, what is the appropriate remedy?

The Arbitrator states the issue as follows:

"Did the Employer violate the collective bargaining agreement, as interpreted in the Gratz award of November 3, 1988, by failing to offer Gary Overdahl overtime work on July 16, 1989? If so, what is the remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE X

WAGES

Section 4.

Overtime shall be distributed equally among the employees according to seniority to create better

working relations between the employees and the Company. Overtime shall be distributed by starting at the top of the seniority list and working to the last man on the seniority list recognizing qualifications and ability. If an employee is asked to work and refuses to work, he shall not be asked again until a complete rotation occurs. A list of the employees working overtime shall be given to the shift stewards. The Company shall maintain a separate seniority list for Sunday overtime work starting at the top of the seniority list. All lists developed by the company will be considered accurate and indisputable by the union unless specific written notification of the inaccuracy is given to the company by the union within a reasonable time after being presented a list. Employees agreeing to work overtime and their name appears on the overtime list but do not report to work for the scheduled overtime period shall automatically not be asked again to work overtime until two (2) complete rotations occur.

#### BACKGROUND

This case is a successor, of sorts, to a grievance filed by Gary Overdahl concerning the Company's failure to offer certain Sunday overtime work. In that case (No. 40623, MA-4287), Arbitrator Marshall Gratz held as follows:

1. The Company did violate the Agreement when it failed to offer employee Gary Overdahl overtime on Sunday, March 20, 1988.
2. As the remedy for the violation noted in 1, above, the Company shall offer Overdahl the opportunity to perform the next available Sunday overtime for which he is qualified until Overdahl has been offered at least eight hours of such work in addition to the Sunday overtime that he would otherwise have been offered in the normal operation of the Sunday overtime list rotation system.

On Saturday, July 15, 1989, the Company arranged for three employees to work the following day. Bob Vian and Sid Helgerson, maintenance employees, were to install a cupola blower motor; Wayne Hagen, a former maintenance worker since reassigned as a molding machine operator, was to work on a newly-installed British Molding Machine. At some time prior to the start of the work day (6:00 A.M.), however, Helgerson called to inform his supervisor, Robert Murphy, that he would not be reporting. Thereafter, Vian and Murphy worked on the cupola blower motor by themselves until Murphy, believing further assistance was needed, called in Hagen, primarily to operate a forklift needed in the installation process. Hagen worked a total of five hours that day, with 1-1/2 to 2 hours devoted to the cupola blower motor and the rest spent on the British Molding Machine. The Company did not offer any overtime work on July 16, 1989 to Overdahl, the act of omission grieved and brought to arbitration.

#### POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

In declining to assign the grievant certain overtime maintenance work, the Company violated a previous arbitration award mandating such assignment.

Pursuant to an award by Arbitrator Marshall Gratz (No. 40623, November 3, 1988), the Company was obligated to offer Gary Overdahl eight hours of Sunday overtime whenever such overtime was available to non-maintenance personnel. The Company had such work on Sunday, July 16, 1989, but failed to offer it to Overdahl.

On the day in question, the Company scheduled two maintenance personnel, Bob Vian and Sid Helgerson, to install a new motor in the cupola machine. Prior to the start of the work day, however, Maintenance Supervisor Bob Murphy was aware that Helgerson would not be reporting. At that time, Murphy was also aware that there were no other maintenance personnel available for work. It was then that Murphy, pursuant to the Gratz award, should have called in Overdahl.

Instead, Murphy assigned Wayne Hagen to assist Vian. Hagen had formerly been a maintenance worker but had been officially assigned to a different classification (machine operator) in early June, 1989. Thus, as of the day in question, he, like Overdahl, was not a maintenance worker.

In assisting Vian, Hagen operated a forklift. This was work which Overdahl, whose daily duties included forklift operation, was well qualified to perform. Murphy, however, made no effort to determine whether Overdahl was qualified to do this work, but simply refused to consider him for this overtime. Arbitral authority holds that little weight is to be given to such subjective supervisory opinions which lack any objective or factual support. Having no opinion as to Overdahl's skill or familiarity with the work involved, Murphy's unsubstantiated overtime work is precipitous and baseless.

By simply ignoring the Gratz award and making Sunday overtime assignments without regard to the seniority list or objective criteria measuring ability, the Company had violated the contract and again denied overtime opportunity to Overdahl. Overdahl should be made whole by receiving five hours of overtime pay (the number of hours Hagen worked on July 16, 1989), at the contractual double-time rate.

In support of its position that the grievance should be denied, the Company asserts and avers as follows:

The Gratz award provides that Gary Overdahl is to be offered the opportunity to perform the next available Sunday overtime work for which he is qualified. The work which was assigned on Sunday, July 16, 1989, the installation of the cupola blower motor, was not work for which he was qualified.

Initially, the Company determined that this important task should be assigned to two maintenance personnel. However, of the two maintenance personnel who accepted the assignment, only one reported for work that Sunday. Fortunately, a former member of the maintenance staff was present that morning, engaged in operations relating to the British Molding Machine. As this employee, Wayne Hagen, was not only qualified to assist in the installation of the blower motor, but was also immediately available, he was thus requested to assist in this process, an involvement of about 90 minutes to two hours.

While Overdahl may have been technically qualified to perform selected portions of the work necessary in the blower motor installation (e.g., laying out tools), he did not have the qualifications necessary to perform the maintenance function and was therefore not called for assistance. The Company, exercising its contractual right to assign individuals, deemed it necessary to assign maintenance personnel to this task.

In so doing, the Company not only acted reasonably but with reason as well. The assignment (at overtime rates) of the unqualified Overdahl would have been too costly, and potentially disruptive to the rest of the work force and the Company's clients, had the blower motor not been installed properly and in time for the Monday morning shift.

The Company, with the exclusive right to manage its plant and property, and to assign jobs, necessarily also has the right to determine which employees are necessary to perform which jobs. In this instance, the Company appropriately determined that a maintenance function was to be performed by qualified maintenance employees.

Accordingly, as the work of July 16, 1989, was work for which Overdahl was not qualified, the Company's assignment of maintenance qualified personnel to install the cupola blower motor violated neither the letter nor the spirit of the Gratz award. The grievance should be dismissed.

The Union did not file a reply brief. In its reply brief, the Company posits further as follows:

The Union errs in asserting that the grievant, a general laborer, was qualified to perform all the functions performed by Wayne Hagen, a former maintenance worker. Moreover, Hagen was not on duty July 16, 1989, for the purpose of assisting maintenance personnel, but rather to work on the BMM machine; his assistance with the installation of the cupola blower machine -- which occupied no more than two (2) hours of his five (5)-hour work day -- was only due to the failure of a previously scheduled maintenance worker to report.

The Union further errs in asserting that the maintenance supervisor "knew that a non-maintenance worker would be required to assist" the maintenance employee who did report on July 16. Rather, the Company had already determined that the duties at hand required maintenance workers.

Indeed, had the Company determined that the duties required both a maintenance and a non-maintenance worker, it could have called in the grievant, at a lesser wage than that due maintenance personnel. The contract gives the Company the right to assign jobs and otherwise manage its plant, property and business.

Robert Murphy, the supervisor present on the day in question, is the supervisor of maintenance personnel; as such, he knew of the abilities of Hagen, but certainly did not know of the qualifications of Overdahl. The Union apparently is suggesting that Murphy should have contacted someone knowledgeable of Overdahl's qualifications and then have attempted to determine if Overdahl was qualified to perform the work at issue. The Union errs in describing Murphy's opinion as to Overdahl's qualifications as arbitrary and capricious, when in fact he had no opinion at all of his qualifications. Murphy simply chose to deploy a former maintenance employee whose abilities have not been questioned.

The number of opportunities non-maintenance employees have had for overtime is not relevant. Here, the Company acted with reason and within its management rights in utilizing an employee, previously classified as a maintenance employee, who was immediately available. Such action did not violate the Gratz award.

#### DISCUSSION

In its initial assignment of Vian and Helgersen to work on the cupola blower motor, the Company was acting within its rights under the contract and the Gratz award, in that it designated maintenance workers to perform work considered to be maintenance duty.

However, once the Company knew that it would need a replacement worker for Helgersen, it had three options -- it could schedule another maintenance worker; it could offer the work to Overdahl; or, after making a legitimate determination that Overdahl was not qualified to perform the tasks at hand, it could offer the

work to someone else. But the Company followed a fourth course, namely offering the work to a different non-maintenance worker (Hagen), without first making a legitimate determination that Overdahl was not qualified. In so doing, the Company violated the collective bargaining agreement and the express terms of the Gratz award.

The Company seeks to dismiss as a fanciful suggestion the Union's contention that the supervisor, Robert Murphy, should have investigated Overdahl's qualifications before making a decision as to whether he was or was not able to do the work at hand. Yet this is precisely what the Company should have done. For, as the Union asserts, the Gratz award presents an explicit "sufficient ability" test, under which the employer must have an objective basis for establishing the employee's lack of qualifications for the job.

Certainly, the Company does have the basic management right to make an

initial determination as to qualifications, subject to challenge as being arbitrary, capricious, or erroneous. Yet in order to enjoy any presumptive validity at all, such determination must have some objective basis. The bona fide determinations by management are due significant weight, provided they are supported by factual evidence. A supervisor's conclusion, however, is not conclusive if lacking in specific and understandable evidence. See, City of Traverse City, 72 LA 1061, 1064 (Roumell, 1979); Pacific Gas & Electric Co., 23 LA 556 (Ross, 1954); Ford Motor Company, 2 LA 374 (Schulman, 1945).

Here, as the record demonstrates, and the Company acknowledges in its brief, such objective foundation was lacking. The supervisor testified that he was "basically sure that Overdahl was not qualified to do the work," but that he had never seen Overdahl drive a forklift, he had never asked Overdahl if he had driven a forklift, and that he didn't know if Overdahl could drive a forklift. "I can't render an opinion one way or the other" on the question of Overdahl's experience and fitness in this area, he testified. The Company acknowledges as much in its brief, stating, "(t)here is no question that Robert Murphy did not know the qualifications of Gary Overdahl, as in fact he was not a member of his staff as Wayne Hagen had formerly been."

Prior to 6:00 A.M. on Sunday, July 16, 1989, such lack of awareness was no problem. The problem arose once Murphy knew he would need a partial replacement for Helgerson, but he took no steps to investigate Overdahl's possible fitness for duty. The automatic conclusion that the Company reached, that Overdahl was not qualified because he was a general laborer, was not sufficient. Moreover, the Union presented testimony affirmatively attesting to Overdahl's forklift driving ability, which testimony the Company did not convincingly rebut.

Certainly, Overdahl was not qualified to replace Hagen on the British Molding Machine. However, even the Company concedes that Overdahl "may have been technically qualified to perform selected portions of the work" on the cupola blower motor, such as the laying out of tools. Perhaps such assignment might have been so minimal that, by itself, it might have justified a decision not to call in Overdahl. I do not reach that question, however, because the record establishes that the Company was remiss in its decision to bypass Overdahl for the full period of time that Hagen worked on the cupola blower motor.

In his well-considered award, Arbitrator Gratz declined to order any back pay, finding that Overdahl could be made entirely whole by an order for a make-up work opportunity. Under the present circumstances, however, a further make-up work opportunity is inadequate; the Company has already been given such an order and has failed to comply therewith.

As noted above, Overdahl was not qualified to replace Hagen on the British Molding Machine work. Thus, he is not due any wages for the time Hagen spent on such assignment. He is due, however, overtime pay for the time Hagen spent assisting with the installation of the cupola blower motor, with the hours such pay reflects deducted from the make-up work bank established by Arbitrator Gratz.

Accordingly, on the basis of the collective bargaining agreement, the Gratz award, and the record evidence, it is my

AWARD

1. That this grievance is sustained.
2. That the Company shall pay Gary Overdahl the sum reflecting two hours of overtime pay, based on his wage as of July 16, 1989. The hours such pay reflects are to be deducted from the make-up work bank established in the Gratz award.
3. That I shall retain jurisdiction for sixty days from the date of this award.

Dated at Madison, Wisconsin this 21st day of February, 1990.

By \_\_\_\_\_  
Stuart Levitan, Arbitrator