BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| DARLEY EMPLOYEES' ASSOCIATION | Case 1 No. 44445 A-4678 |
| and | |
| W.S. DARLEY & COMPANY | |

Appearances:

Mr. Robert W. McKinley, McKinley & Anderson, Attorneys at Law, 821 North Bridge Street, Chippewa Falls, Wisconsin 54729, appearing on behalf of the Darley Employees' Association, referred to below as the Association.

Mr. Charles G. Norseng, Wiley, Rasmus, Wahl, Colbert, Norseng and Cray, S.C., Attorneys at Law, 119 1/2 North Bridge Street, P.O. Box 370, Chippewa Falls, Wisconsin 54729-0370, appearing on behalf of W.S. Darley & Company, referred to below as the Employer.

## ARBITRATION AWARD

The Association and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the arbitration of certain disputes. The Association requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolved a dispute reflected in a grievance originally filed by Lyle Worthington. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held in Chippewa Falls, Wisconsin, on December 17, 1990. The hearing was not transcribed and the parties filed briefs by January 2, 1991.

## ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the Employer's implementation, on February 17, 1989, of continuous operation on the CNC machines through the use of Backup Operators, violate the collective bargaining agreement?
>
> If so, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

. . .

> WITNESSETH, that in consideration of the mutual performance in good faith by both parties to this agreement, individually and collectively, said parties agree to and with each other, as follows:
>
> ARTICLE I
>
> 1. That the Employer shall and will recognize a committee of the Darley Employees' Association as the bargaining agent in all matters pertaining to wages and hours and working conditions in the plants.
>
> . . .
>
> 4. That the settlement of any dispute or misunderstanding between the Employer and an employee shall be subject to negotiation with the Employer and the Committee of the Association.
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> . . .
>
> ARTICLE II
> REGULAR HOURS AND OVERTIME
>
> 1. Work days shall be 5, eight (8) hours each, from Monday to Friday, inclusive working hours from 7:00 A.M. to 3:30 P.M. 1/2 hour out for lunch and two ten minute breaks daily.

A. The night shift will work four (4) 10 hour days, 40 hours per week Monday thru Thursday. A night shift premium of .20 per hour shall be paid on all regular rates plus a bonus of $200.00 per year per employee after one year of night shift worked after June 1, 1985. From 3:30 P.M. to 2:00 A.M. 1/2 hour out for lunch (8:30 P.M. - 9:00 P.M.) and two ten minute breaks (6:00 P.M. & 12:00 midnite.)

. . .

ARTICLE XI

Strict compliance with posted Company Rules shall be condition of this agreement.

. . .

COMPANY RULES

. . .

2. The Company shall set and maintain approved standards of working conditions and safety, giving special consideration to all factors affecting the comfort and well being of all employees. Safety is a shared responsibility of the employees and the company.

. . .

5. All employees shall start work immediately at the autocall starting signal for morning and afternoon work period, and shall remain on their jobs until the autocall signal for work stoppage at the end of each work period. If autocall is not working properly employees will begin work at their normal working hours.

. . .

13. Employees responsible for spoilage of material, and for loss of or destruction of Company property through gross carelessness or negligence, shall be subject to penalties with possible loss of pay.

BACKGROUND

The grievances posed here concern the Employer's use of Backup Operators to operate a lathe known as the CNC. The Employer announced its intent to use Backup Operators on the CNC in a memo to "CNC Operators & Backup Operators" dated February 17, 1989, which reads thus:

> Starting Monday February 20, the backup operators will run the CNC machines during the breaks and lunch period of the regular operators. The backup operators will take their breaks and lunch periods immediately after the regular operators take theirs.
>
> Time will be allowed for the backup operator to be briefed by the regular operator.
>
> Take enough time to communicate so you can be productive.
>
> If the regular operator is setting up the machine, the backup operator is not required to step in.
>
> Please be certain you know how to run the job - none of us wants a crash!!
>
> Please let Bob, George, and myself know how things are going.

Lyle Worthington responded with a grievance dated February 21, 1989, and the Association submitted a subsequent written clarification of that grievance. In those documents, the Association alleged that the Employer's use of Backup Operators on the CNC violated the labor agreement at "Paragraph 2, page 1;

Article I item I; Article II, paragraph I, item A; Article XI; Company Rule #2; (and) Company Rule #5."

The Employer responded in a memo dated February 27, 1989, which reads thus:

> I acknowledged the receipt of a grievance from Lyle Worthington and also a grievance from James Rose. I believe the resolution of Lyle's grievance will also resolve James Rose's so I'll only address Lyle's.
>
> Lyle's grievance is the result of a move by the Company to reschedule the breaks of the CNC backup operators and then assign them to run the CNC machines while the regular operators are taking their breaks.
>
> This move was made to increase the production from those machines, allowing us to fill more orders. This move was also made to alleviate an imbalance in the production of parts run on CNC machines versus parts run on manual machines. We need an increase of production of CNC produced parts and we can tolerate a reduction in the parts run on the manual machines. For example, we've yet to hire a replacement for Steve Mueller and none of the manual machines are scheduled for overtime. This move should increase the productivity of our people in the machine shop, the productivity of the pump division, and the Darley Company as a whole.
>
> This move should be viewed as an advancement by the Association and the Company because it was done with no cost to either party. We have taken nothing away from our employees. The violations Lyle alleges we've made, particularly his number 3, was discussed at a meeting between the Association and the Company on February 14, 1989. At that time James Rose said "We won't condone it, but we don't have a leg to stand on".
>
> If you didn't have grounds to contest it then, how does Lyle have grounds to file a grievance now? Furthermore, if you were unable to take action, because there is no violation of contract, then isn't the matter resolved?
>
> If you've suddenly come up with grounds for this grievance, then by all means we'll meet with you. Otherwise, please meet with Lyle and take care of this matter yourselves.

The Association responded by resubmitting the grievance on March 10, 1989.

The Employer responded in a memo from W.J. Darley dated March 13, 1989, which reads thus:

> First of all I want you to know I view grievances as a potential way to improve the Darley company - every one of our employees are entitled to make suggestions where things possibly could be improved or where confusion exists as to policies, etc.
>
> All of us recognize that when we prepared our most recent contract we provided for communication and a procedure to be followed regarding grievances.
>
> I have recently been informed there are some "grievances" that the committee hasn't been able to resolve.
>
> I don't know what the grievances are so the first step is to have them clearly written out so that they may be reviewed by me if necessary.
>
> If they are verbal grievances given to you as a committee, that's okay but I don't want to hear four or five people trying to interpret to me what the grievance is - it has to be prepared and presented by the individual so that I understand what the issues are.
>
> I trust that you as a committee will be able to handle most such situations as that is your responsibility.

> You are to keep me informed in writing with complete details and specifics regarding unsettled grievances which cannot be resolved per the procedure in our contract which we all worked so hard on during the past year.

Ultimately, the Association stated its position on the Worthington grievance in a memo issued by Ed Wannish, the Association's President, which is dated May 3, 1990, and which reads thus:

> This will confirm that W.S. Darley has refused to negotiate the grievance of Lyle Worthington filed on February 29, 1989 concerning the use of back-up operators and that the company has refused to comply with Article I(5)(E) of the labor contract. Further, W.S. Darley & Company has refused to provide any written response to this grievance.

The Employer responded to this memo in a memo dated May 4, 1990, which reads thus:

> The grievance we have on file from Lyle Worthington is dated February 21, 1989.
>
> The company responded to this grievance in a letter to the association dated February 27, 1989.
>
> The notes taken at the association meeting on April 17, 1989 indicate you were seeking advice from an attorney before going any further with the grievance.

Worthington, Wannish and Frank Buheger, the Employer's Vice President of Manufacturing for the Pump Division, testified regarding the grievance.

Worthington has worked for the Employer for about twenty-two years. He testified that after February of 1989, a machine operator and a Backup Operator would discuss the machine's operation roughly five minutes prior to lunch or any regular break period. The Backup Operator would then assume operation of the machine over the lunch or break period. Prior to February of 1989, the machine operator would put the machine into a pause phase for break periods, and would shut the machine down for lunch periods. Worthington noted that prior to February of 1989, machine operators took breaks at the same time, often away from the machines. As a result of the February, 1989, changes, employes did not have the opportunity to socialize or to get a respite from the noise of the machinery, according to Worthington. Beyond this, Worthington noted that Backup Operators receive the same pay as the employe responsible for the machine, but have no set-up responsibilities. Worthington testified that he was not aware of any damages caused by the machine operation of Backup Operators.

Wannish testified that he has been trained, and has functioned as a Backup Operator. He noted that the February 17, 1989, memo was the first notice the Association received of the use of Backup Operators to run the CNC machine. He stated that the Association and the Employer have yet to bargain regarding the use of Backup Operators. The Association has not requested such bargaining, according to Wannish, because the Employer never approached the Association on the point. Such an approach is necessary, Wannish stated, because the contract makes no reference to Backup Operators.

Buheger testified that the use of Backup Operators dates back at least to 1977. Such operators were used to cover the absence of other employes. In February of 1989, Buheger decided to extend the use of Backup Operators to cover lunch and scheduled breaks. The Employer did not bargain the February, 1989, change in policy primarily because it could foresee no harm resulting to any employe, and foresaw a substantial potential increase in productivity. In fact, the February, 1989, changes increased the productivity of the machines by 10%, according to Buheger. Beyond this, Buheger stated that the Employer could see no reason to bargain with the Association since it met with each machine operator who would be affected by the change, and had the agreement of each operator except Worthington. One of the affected employes was an Association Committeeman. Buheger also noted that there has been no damage to any work in process or to any machine by a Backup Operator. Beyond this, Buheger testified that machine operators have worked overtime both before and after the February, 1989, changes, and that any loss of overtime was attributable to a fall-off in orders.

Further facts will be set forth in the DISCUSSION section below.

THE ASSOCIATION'S POSITION

The Association notes that Article II, Section 1 and Section 1, A, grant employes two ten minute breaks per shift, and that the Employer unilaterally established the Backup Operator position to keep production machinery running during break periods. This change was, the Association contends, a violation of the Employer's duty to bargain. That the change may have increased productivity is, according to the Association, irrelevant to this violation. Beyond this, the Association contends that "the employees are affected by the use of back-up operators." Specifically, the Association notes that "(b)y the use of back-up operators, the employees ability to work overtime would clearly be affected." The Association also argues that employes are affected "(i)n a more subjective way," because "by the use of back-up operators . . . (an employe's) assigned work station is 'invaded' three times per day by the back-up operators." Asserting that Company Rule 13 makes a regular operator responsible for his assigned work station, the Association asserts that "it seems unfair that the individual employees do not have some control over the operation of their assigned machines during each given shift." The Association concludes the record supports the following conclusions:

> 1. That the use of back-up operators is not contained in the existing labor contract.
>
> 2. That the use of back-up operators affects working conditions and is the subject, therefore, for mandatory bargaining.
>
> 3. That said bargaining has not taken place.
>
> 4. That the use of back-up operators be stopped pending the bargaining process.

While acknowledging that the use of Backup Operators is not contrary to the labor agreement, the Association asserts that it is not provided for in the agreement and must not be implemented until bargaining has taken place.

THE EMPLOYER'S POSITION

The Employer notes that the responses of February 27, and March 13, 1989, set forth the basis of the Employer's position. In a supplemental written response dated September 17, 1990, the Employer argues:

> To insure continuous operation of the W.S. Darley CNC machines, to avoid shutdown, avoid any unnecessary restart-up time, and increase safety and efficiency, the Company on, 2/20/89, went to a procedure of staggered break times (10 minutes each) and staggered lunch times (30 minutes) for CNC machine operators. This resulted in no loss of time for any individual worker, no loss of wages, no alteration of working conditions and is in accordance with Article II, Rule 14. The Company specifically denies that it violated any provisions of the contract.

It follows, according to the Employer, that the grievance must be denied.

DISCUSSION

The issue for decision focuses on the contractual propriety of the Employer's implementation of continuous operation for the CNC machines. Of the contract provisions alleged in the grievance to have been violated, only Article I requires extensive discussion.

"Paragraph 2, page 1" of the labor agreement notes the "good faith by both parties to this agreement," and has no bearing on the grievance. The record will support no other conclusion than that the Employer implemented the February, 1989, changes in the good faith belief that productivity would be enhanced and that the employes would not be harmed by the changes.

"Article II paragraph I item A" of the labor agreement states the work week and also notes that the work day shall include "1/2 hour out for lunch and two ten minute breaks." The record establishes that none of the February, 1989, changes eliminated or restricted the lunch or break periods.

"Article XI" mandates "(s)trict compliance with posted Company Rules." "Company rule #2" and "Company rule #5" have no demonstrated bearing on the grievance. There is no evidence to support a conclusion that the February, 1989, changes have adversely impacted workplace safety. Rule 5 mandates that work shall start and stop with "the autocall starting signal," except when that

signal is "not working properly." None of the February, 1989, changes affect the operation of this rule. It can be noted that Backup Operators work through lunch and break periods, but the autocall signal presumably notes the start and stop of those work periods.

Thus, of the allegations of the grievance, only those involving Article I remain. "Article I, item I" recognizes the Association's committee, but grants no rights relevant to this grievance. Section 4 of Article I, which Section 1 prefaces, does note that "the settlement of any dispute or misunderstanding between the Employer and an employee shall be subject to negotiation" between the Employer and the committee. This is the contract provision implicated by the Association's contention that the contract, although silent on the use of Backup Operators, requires bargaining in advance of those changes.

As preface to this point, it is necessary to note that there is no dispute that the procedures of Article I have been complied with in this case. The grievance has been discussed at each step. The issue posed here is whether the Employer had the right to implement the February, 1989, changes prior to bargaining with the Association.

Section 4 of Article I offers no express guidance on which changes can not be made prior to negotiation between the parties, and can not reasonably be read to require that any contemplated change in operation be subject to negotiation. The terms "any dispute" are unquestionably broad, but it can not be reasonably concluded that any matter affecting an employe must be negotiated before implementation. Under such an interpretation, the Employer's compensation of non-unit employes, or its marketing decisions could be made subject to prior negotiation with the Association.

In my opinion, Article I, Section 4, requires that an operational change, to be subject to bargaining with the Association prior to its implementation, must reflect a change in working conditions. Put another way, a change must be examined to determine if it reflects a change in working conditions or a change in methods of operation. The former changes are subject to negotiation prior to implementation under Article I, Section 4, while the latter are not.

The distinction between these types of changes is easier to state than to apply. The distinction must necessarily be applied on a case by case basis. Each application requires determining whether the change primarily affects wages, hours and conditions of employment, or management policy concerning methods of operation. This determination requires balancing the impact of the changes on the Association and on the Employer.

On the facts posed here, the February, 1989, changes did not primarily affect wages, hours and conditions of employment. Rather, the changes primarily affected the implementation of a management policy to change the method of operation. The wages and benefits of the machine operators have not been affected. Worthington speculated that the change would reduce overtime opportunities, and noted that he had more overtime prior to February, 1989. Worthington could not, however, link the possible drop in overtime to the February, 1989, changes. More significantly, Buheger noted, without rebuttal, that employes had worked overtime both before and after the February, 1989, changes. He also noted that certain employes might have experienced a drop in overtime as a result of a drop in certain orders. In addition to the issue of overtime, Worthington noted that Backup Operators received the same pay as a regular operator, but did not have set-up responsibilities. The record on this point is, however, less than clear, and affords no basis for a reliable conclusion on the affect of Backup Operator compensation on unit employes. It is not clear if Backup Operator compensation has been set by the parties' labor agreement, past practice, mutual agreement or unilateral Employer action. It is, however, clear that the use of Backup Operators has not lessened the wage rate of any machine operator.

Worthington noted that the changes had affected working conditions by disrupting the break and lunch pattern by which all employees took their breaks together, and by increasing the background noise level during breaks. Beyond this, Worthington noted that Backup Operators may damage the machines or disrupt work in progress. No testifying witness identified any instance of damage to machines or work in progress by a Backup Operator. Beyond this, the Association has questioned whether Rule 13 can operate to make a machine operator responsible for the acts of a Backup Operator. No testifying witness could relate the occurrence of any such instance, and the record affords no basis to believe Rule 13 would be applied as the Association fears. That the operation of the CNC machines during break periods would increase background noise is apparent, but the record is unclear on how significant an increase this is. Beyond this, the Employer does not now, and apparently never has required employes to take their break at their machine. The impact of staggering the breaks of regular and Backup Operators is difficult to assess, but does not appear to be major. Worthington noted he used to take breaks at his machine, which would indicate break times were not viewed as an opportunity for the entire shop to socialize together.

Viewing the record as a whole, the impact of the February, 1989, changes on working conditions was minimal. Worthington best summarized this point by his testimony that the use of Backup Operators had "somewhat" affected his job.

The record is clear on the impact of the February, 1989, changes on the Employer's method of operations. Buheger testified, without rebuttal, that the changes increased the productivity of the CNC machines by 10%.

On balance, the record establishes that the changes at issue here primarily affected management policy on its methods of operation, and thus that the Employer was not required to negotiate with the Association prior to the implementation of those changes. Arbitrator Whitley McCoy, in Goodyear Tire & Rubber Co. of Alabama, 6 LA 681, 687 (1947), underscored the basis of this conclusion thus:

> The decision as to whether or not to run a particular operation as continuous is a function of management -- just as much so as the decision whether or not to replace an old machine . . . Such changes are not the sort of changes in working conditions as require negotiation. As long as such decisions are made in good faith, in the interest of efficiency of operation, and do not involve the imposing on employees of conditions different from those already existing with respect to other employees on similar machines or operations, no injustice is done the employees. No employee has a vested right in the use of a particular old machine that would preclude the company from installing a new one nor a vested right in a particular method of operation that would preclude the company from changing that method. If the new machine, or the new method on the old, results in too heavy a work load, too low pay, or any other hardship, the employee has his remedy in the grievance machinery. But he does not have the right to delay the exercise of managerial functions by insisting on prior negotiations.

Arbitral authority on this point is not necessarily uniform, see Pope & Talbot, Inc., 87 LA 57 (Hales, 1986). In that case Arbitrator Hales concluded an employer's implementation of continuous operation violated an established past practice on breaks. In that case, however, Hales noted that the employer had failed to demonstrate any increase in productivity, and had failed to demonstrate that employe job duties had not changed. The record, in that case, established that "on occasion, some employees were not able to take breaks because there was no one present to relieve them." 1/ Pope & Talbot, Inc., is, then, distinguishable from the facts posed here, which demonstrate that the changes involved primarily impact the Employer's methods of operation, not the conditions of employment of Association represented employes.

The conclusion reached above concerns the provisions of Article I. The Association has urged that the Employer's actions violate Wisconsin or federal labor laws. The Employer has asserted it would be improper to consider the impact of outside law. In my opinion, an arbitrator should consider the impact of external law only when the parties mutually request it, or that law is explicitly incorporated in their collective bargaining agreement. I do not believe the parties' labor agreement can be read to expressly incorporate outside labor law. If it can, I would note that the Wisconsin Peace Act could be applied to this interstate employer only if the employer does not meet the National Labor Relations Board's jurisdictional standards on the requisite volume of business. Under either Wisconsin or federal law, however, a demand to bargain is necessary to trigger the employer's duty to bargain. 2/ In this case, the Association acknowledges it did not demand bargaining because it felt the Employer must initiate such bargaining. This view prompted an almost one year delay in the processing of the grievance, and precludes the remedy the Association seeks here.

This grievance reflects less the Association's desire to bargain than the Association's desire to restore the old system of CNC machine operation. This result is, in my opinion, required neither as a matter of law or of contract.

## AWARD

The Employer's implementation, on February 17, 1989, of continuous

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1/ 87 LA at 59.

2/ See United States Lingerie Corp., 170 NLRB 750, 67 LRRM 1482 (1968); see alos Morris, The Developing Labor Law (BNA, 1989) at Chapter 13; and Misericordia Hospital, Dec. No. 6931 (WERC, 11/64).

operation on the CNC machines, through the use of Backup Operators, did not violate the collective bargaining agreement.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 18th day of March, 1991.

By _____
Richard B. McLaughlin, Arbitrator