BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL LODGE 487, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS	Case 22 No. 48002 A-4974
and	
THE KEWAUNEE ENGINEERING CORPORATION	

Appearances:
Mr. James Lutzen, Union Representative, International Brotherhood of Boiler
Mr. Dennis W. Rader, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street

ARBITRATION AWARD

On August 31, 1992, Local Lodge 487 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint a member of its staff to hear and decide a grievance pending between that Union and the Kewaunee Engineering Corporation. Following jurisdictional concurrence from the Company, the Commission, on December 28, 1992 appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on January 21, 1993, in Kewaunee, Wisconsin. A transcript was taken and distributed by January 29, 1993. Post-hearing briefs were filed and exchanged by February 23, 1993.

This arbitration involves the layoff of Allen Ferron, a Sweeper.

BACKGROUND AND FACTS

The Company operates a plant in Kewaunee, Wisconsin. During times of full employment it employs approximately 200 bargaining unit employes. Those employes are represented by Local 287, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers. There are a number of classifications, including Machinist, Fabricator, Truck Driver, and Sweeper, found within the bargaining unit.

During 1992 the Company laid a number of employes off for economic reasons. As of the date of the hearing, the work force was at approximately 142. On or about July 10, 1992, the Company laid off Allen Ferron, a Sweeper. Mr. Ferron, along with Walter Berkovitz are the two full-time Sweepers employed by Kewaunee Engineering. Mr. Ferron was recalled on November 25 and laid off again on November 30, 1992. He was recalled on December 14 and laid off on December 29, 1992. In each of the latter instances, Ferron was recalled to cover for Berkovitz who was on vacation. On July 28, 1992, Walter Berkovitz filed a grievance over the layoff of Allen Ferron. The essence of Mr. Berkovitz' grievance is that employes in classifications other than Sweeper were performing Sweeper duties while Ferron was on layoff. Berkovitz alleged a violation of Article X, Section 10. The grievance was denied by an August 6, 1992 letter from Robert Papke, Human Resource Manager, which letter indicated that the Company was not using "loaners" and was following past practice relative to the use of employes to sweep.

When the Company has a full complement of workers, it employs two sweepers during the first shift. There are no Sweepers employed during the second shift. The record establishes that during the first shift, it is common

for Fabricators and Machinists to clean up, including sweep, in their immediate work area. The record also establishes that Fabricators and Machinists on second shift do most, if not all of the clean up around their respective work areas, including operating the sweeper equipment that Berkovitz and Ferron would normally use. There was also testimony relative to maintenance of the rest rooms. It appears that the Sweepers were charged with that task on first shift, and that a storeroom employe, classified as a Fabricator, was responsible for that assignment on second shift.

There was somewhat conflicting testimony with respect to certain consequences of the layoff. The testimony of Mr. Berkovitz indicated that a considerable amount of the Sweeper work was being performed by Fabricators. Testimony of Company witness Papke was to the effect that a good deal of the work described by Berkovitz was simply not being performed. Harold Ebert, a Fabricator and member of the union's bargaining and grievance committee, testified and indicated that he had received numerous complaints about the status of the housekeeping, about the trash barrels, the cleanliness of toilets and urinals, causing Ebert to conclude that there was a very poor job of clean-up being done. Berkovitz also indicated that the place was filthy.

The Company introduced production records from August and December of the years 1989, 1990, 1991 and 1992 (August only). What those records show is that production workers engaged in janitorial work for no less than 293 hours nor more than 930 1/2 hours per month.

It appears to me that when the Company laid Mr. Ferron off, the result was that Mr. Berkovitz was required to clean the entire plant. This is a task that is beyond Mr. Berkovitz' capacity. One result is that production workers have more or less pitched in to clean up a little more than they had when there were two Sweepers present. A second result is that the plant is simply not as clean as it once was.

There was a previous layoff, in 1982. At that time, the work force was reduced to approximately 100 employes and Mr. Ferron was laid off. At that time, the same phenomenon developed with Berkovitz assigned to clean the entire facility and the entire facility was left somewhat dirty. No grievance was filed in 1982.

There is language in the contract, set forth below, relative to a loaner program. There was also testimony with respect to the existence or non-existence of a loaner program. Suffice it to say that there was never a meeting between the Company and the Union to establish a loaner program involving the Sweeping classification.

ISSUE

The parties stipulated to the following issue:

> Has the Company violated Article X, Section 10, or any other contract provision by allowing employes in classifications other than Sweepers, to continue performing certain clean-up duties when one of the two Sweepers has been laid off?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

SENIORITY AND LOANERS
ARTICLE X

> **Section 1.** Seniority shall be established for all employees in the following classifications and shall be cumulative for all employees from date of

hiring and shall include all time worked, all time off during vacation, sickness, leave of absence or lay off, except that new and former employees shall accumulate no seniority during their probationary period. If retained by the Company after their probationary period, their seniority shall accumulate from the date hired.

1. FABRICATION: includes: FITTER, WELDER, MACHINE OPERATOR, ELECTRICIAN, CRANE OPERATOR, CARPENTER, STOCKCLERK, TOOLROOM, SHIPPING AND RECEIVING, MAINTENANCE, HAND-MACHINE BURNER, TEMPLATE-MAKER, ASSEMBLER, HOOKER-ON, FAIRING-UP AND STRAIGHTENING, DRILLING BY PORTABLE MACHINE, GRINDING, SCALING, CLEANING, CHIPPING, TOWMOTOR, POWER WIRE BRUSHING, TAPPING, REAMING, PAINTING AND SANDBLASTING.
2. MACHINIST: includes: TURNING, MILLING, DRILLING, BORING, PRECISION GRINDING, SAWING, PUNCHING, AND SHEARING.
3. TRUCK DRIVER
4. SWEEPER

All work in the above classifications shall become the work of the mechanics and the learners within their classification except the sweeper classification.

Any new or present classification not listed above shall be added by agreement between the Company and the Union Committee.

. . .

Section 10. When additional employees are needed temporarily in another classification, and there are no employees laid off in the classification, loaners may be employed. Loaners may be obtained from other classifications by agreement of the employee, the Company and the Union Committee. Employees accepting these jobs must have seniority to be working in their own classification while working as a loaner.

. . .

SAFETY, SANITATION AND MISCELLANEOUS
ARTICLE XIII

Section 1. The Company shall provide all safety devices as required by the health and safety regulations of the State of Wisconsin and the United States Department of Labor. The Company and the Union shall cooperate to instruct employees in the use of Safety Devices.

Section 2. The Company shall provide and maintain such safety and sanitary needs as are necessary to protect and preserve the health and welfare of the employees. All toilets and wash rooms shall be kept in a clean and sanitary condition, properly heated and ventilated, and suitable quarters with heat shall be provided for the employees to change and dry their clothes and eat their lunch.

POSITIONS OF THE PARTIES

The Union, pointing to the testimony of various witnesses that the place was not being cleaned as well as previously, points to Article XIII, Section 2, and believes a violation of that provision occurred.

Union witnesses testified as to circumstances that had previously lead to people being loaned from one classification to another. Those circumstances involved a situation where the machine shop had more work than it could do with a full complement of employes and the fabrication department had people who would otherwise have been laid off. In order to avert a layoff, Fabricators were transferred or loaned to the machine department and performed Machinists' work. That, unlike the circumstance in this case, involved a situation where there were no Machinists on layoff. In this circumstance, there was a Sweeper on layoff. The Union contends that because of the existence of a layoff there did not exist a situation where a loaner could be used. In the Machinists/Fabricator incident the Company and the Union sat down and executed a formal agreement to create the loaners.

It is the Union's position that when Fabrication employes clean up and sweep in their area, they have been transformed into loaners. According to the Union's theory, when they engage in Sweeping work, they are working as Sweepers, which is a classification separate and apart from that of Fabricator. The Union's claim is that loaners are not warranted because there has been no agreement by the Union and because Ferron, a Sweeper, is on layoff.

The Union contends that the Sweeper classification was negotiated into the agreement to permit the Company to have Sweeper work performed by employes whose wage rate was less than that of other classifications. The Union takes issue with the Company's contention that its layoff was economically motivated. In the Union's view, it is inherently incredible for the Company to claim that it is saving money by having employes in a higher pay classification perform the work of an employe in a lower pay classification who has been laid off. In the Union's view, the Company is paying more money to have the same job done.

It is the position of the Company that the past practice of allowing non-sweepers to spend small amounts of time each day performing clean-up duties is enforceable as an implied part of the contract. The past practice involved in this dispute is the practice of allowing Machinists and Fabricators to spend small amounts of time each day performing clean-up duties. In the view of the Company, this practice has existed for 25 years; it has been open, notorious, all employes (or virtually all employes) have been involved. The practice has existed without challenge. In fact, the Union has admitted that this has been a long-standing practice. In 1982, when the same Sweeper was laid off due to the same type of job cutbacks, the Union did not think the then-existing practice was offended.

In the view of the Company, Article X, Section 10 does not control the past practice at issue. The section does not control the situation in this case for the following reasons: "Additional employees" are not needed temporarily in the Sweeper classification. There were no additional employes needed in the Sweeper classification. The same employes who had always spent small amounts of their time performing clean-up continued to do so. The Company points to the testimony of all witnesses and to the records it submitted in support of this position. Additionally, the Company argues that the Union presented no evidence indicating that other employes had spent more time than usual doing Sweeper work.

The Company submits that neither the Union nor any employee(s) entered into any agreements with the Company to work as loaned employes in the Sweeper classification. The Company points out that there is no evidence before this arbitrator which even suggests the possibility that such an agreement was

entered into with even one employe.

In the past, argues the Company, Article X, Section 10 has not been applied when employes have performed work outside of their classifications for short periods of time each day. Further, the Company argues that the Union has not met its burden of proof that the contract intends to classify employes who work outside of their classifications for a few minutes each day as loaned employes. The Company points to the practice of employes performing cleaning incidental to their work and argues that this practice ought properly to be used as an interpretive aid with respect to this language. The Company concludes that Article X, Section 10 obviously refers to a situation much different than sweeping. Both the Company and Union witness testimony and the language itself obviously refers to situations where work is slack in one area and where people were able to work in another department. The words "additional employees" refers to a group of employes, not additional work. The language refers to a "temporary need" in another classification. Over the course of 25 years, the Sweeper work incidental to the fabrication and machinist work has become a part and parcel of the ordinary job duties of almost every job in the plant.

The Company believes that this case was brought due to Mr. Berkovitz' fear of losing his job, and that is not an appropriate basis upon which to sustain this grievance.

DISCUSSION

The circumstance underlying this dispute does not involve a 'loaner' under Article X, Section 10. None of the elements called for in that provision are present. There are no "additional employees" involved. The cleaning that goes on incidental to the production work is not temporary. The economic circumstances giving rise to the layoff of Mr. Ferron may or may not be temporary. Obviously, Ferron is on layoff. There are no agreements involved. The previous experience of these parties is that a loaner situation arose following the execution of a formal agreement. That was not done in this instance. However, there is no claim by the Company that the authority for the cleaning that goes on is derived from Article X, Section 10.

The Company's claim here is that there has been established a practice of Fabricators and Machinists cleaning incidentally to their production work. I agree. By all accounts, Fabricators and Machinists have performed incidental cleaning for years. It occurs on all shifts. There is no Sweeper on the second shift. All Sweeping classification work is performed by non-Sweepers on the second shift. In 1982 there was a layoff which gave rise to circumstances strongly paralleling those involved here with no objection from the Union.

Cleaning incidental to production work appears to satisfy all the requirements commonly applied to determine the existence of a practice. The practice is unequivocal. All production workers, both Fabricators and Machinists, appear to do incidental cleaning. There is no evidence to the contrary. The Union seeks to draw a sharp line between sweeping and non-sweeping work. Historically, no such sharp demarcation has existed. Fabricators and Machinists have traditionally done sweeping and other ancillary tasks normally assigned to the Sweeper classification.

The practice must be "clearly enunciated and acted upon". In this circumstance, there was no declaration or pronouncement that all production workers will sweep. The parties have simply run the shop that way. This work has always been performed surrounding production work. I believe that satisfies the requirement that the practice be "enunciated and acted upon".

The practice must be "readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties". This

method of performing work has existed in excess of 25 years. All workers do the work. Certainly all are aware of the fact that they do the work. That includes both the Union as an institution and the Company.

In my mind, there is no question that a practice exists. The real question is whether or not some other provision of the contract overrides this practice.

In essence, the Union argues that Article X, Section 10 does so. I disagree. This practice can be, and has been, harmonized with the article. As a practical matter, Fabricators and Machinists have always done sweeping work. Similarly, all the sweeper work performed on the second shift has been performed by non-sweepers. The article appears to address the situation where work in one department is up and work in another department is down. It appears to be an effort to allow an orderly transfer of workers from one jurisdiction to another to avoid layoff where both the Company and the workers can be accommodated. That describes the way this article was applied previously. It is simply not the circumstance that exists currently. Here, the Company faces economic layoff. There is no effort to loan an individual or group of individuals from one department to another. What there most likely is is an effort to have employes who have historically done some amount of clean-up do a little more. Company records show that the amount of incidental clean-up has varied significantly over the course of the years. That being the case, it is difficult to identify some fixed amount of time committed to such work by production workers and hold the Company to that standard. The numbers suggest to the contrary.

The Union claims that Article XIII, Section 2 has been violated. There was considerable testimony that the premises were not being maintained to a suitable level of cleanliness. However, there is no evidence that the "health and welfare of employees" is compromised. Similarly, there was no evidence suggesting that the facility was not "properly heated and ventilated". What the testimony seemed to suggest was that the contractual provisions requiring that "toilets and washrooms shall be kept in a clean and sanitary condition" was being violated. There was considerable evidence that the care of the washrooms was significantly inadequate. However, I do not believe this constitutes a basis, standing alone, to force a recall of Mr. Ferron. On the second shift, there has not been a sweeper responsible for this work at all. Perhaps the most extreme criticism levied by the employe witnesses was that toilets were not being flushed. If that is the source of the problem, the Company should not be expected to increase its workforce as a remedy. Adults know how to flush a toilet. It is my reading, however, that the Company is directed in Article XIII, Section 2 to maintain toilets and washrooms in a clean and sanitary condition. The Company is hereby directed to do just that.

The Union disputes the cost effectiveness of having production workers perform Sweeper work. The Union contends that having more expensive employes do the work of less expensive employes is hardly cost effective. While the Union may or may not be correct in this contention, that is not a question for my consideration. My task is to determine whether or not the Company violated the terms of the collective bargaining agreement. The wisdom of work assignments and/or the underlying economic rationale of decisions made are beyond my role.

Mr. Berkovitz' job status is not presented by this grievance. It is not my task to comment one way or another on the consequences of this decision or other Company actions on Mr. Berkovitz' employment stability.

AWARD

The grievance is denied; except for that portion of the Award which goes

to the cleanliness of the washrooms. As noted, the Company is directed to keep the toilets and washrooms in a clean and sanitary condition.

Dated at Madison, Wisconsin this 18th day of May, 1993.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator

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