BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL UNION NO. 140

and

SPARTA MANUFACTURING COMPANY

Case 31
No. 52410
A-5347

Appearances:
Arnold & Kadjan, Attorneys at Law, by Mr. Donald D. Schwartz, on behalf of Laborers' Local Union No. 140.
Gleiss, Locante & Gleiss, Attorneys at Law, by Ms. Shari LaPage Locante, on behalf of Sparta Manufacturing Company.

ARBITRATION AWARD

Laborers' International Union of North America, Local Union No. 140, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Sparta Manufacturing Company, hereinafter the Company, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Company subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on May 16, 1995, in Sparta, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by July 19, 1995. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated at hearing to the following statement of the issue:

> Did the Company violate Article IX, Section 5, of the Agreement by failing to post a permanent vacancy in the Muller Operator position on December 20, 1994, in a manner which aggrieved Dennis Schaller? If so, what is the remedy? 1/

1/ It is noted that the parties' statements of the issue set forth in their briefs differ from the above statement, but are substantively similar.

The Union stated the issue as follows:

> Did the Company violate Article IX Section 5 of the

agreement by failing to post a third shift Muller Operator position in a manner that aggrieved Dennis Schaller? If so, what is the remedy?

The Company states the issue as:

> Did the Company violate the collective bargaining agreement by temporarily placing a light-duty employee in a new position before posting the position for bidding?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE IX

GENERAL PROVISIONS

Section 1. Management

Subject to the provisions of this Agreement, the management of the plant, property and business of the Company, the direction of the working force, including the right to determine who shall be hired, promoted, demoted, transferred and/or assigned to jobs, to suspend, discipline and discharge employees for cause, to increase or decrease the working force, and to determine the products to be handled, produced or manufactured and the methods, processes and means of production or handling shall be vested exclusively in the Company. Suspensions, discipline and discharge shall be subject to the grievance and arbitration procedures provided in Article III hereof. Any employee who is promoted, demoted or transferred by the Company contrary to his own desires shall not suffer any loss of seniority as a result of such promotion, demotion or transfer.

. . .

Section 5. Promotions

(a) The Company agrees that when a job opening occurs, employees shall have an opportunity to bid on such job openings. When qualifications and ability are equal, then seniority will be the consideration. All job openings shall be posted for one week. Jobs posted for one week with no employees bidding, such jobs shall be filled with the youngest man on the seniority list or a new man. When employees bid job openings and are awarded the job, he shall undergo a two (2) week probationary period, the job getting reposted if his performance is not satisfactory. The employee shall be allowed one week to reconsider the bidding of the job and return to his previous job. When an employee bids a job and is awarded that job, he must be placed on that job within ten (10) working days. After a satisfactory probationary period, he shall remain on that job for a period of at least three (3) months or the job no longer exists.

(b) When the Company needs to transfer employees to fill another job classification, absentees, or extra help in another area or department, they shall use employees that are not on bid jobs first. No employee shall be replaced on a bid job while being transferred to another job classification, unless there are no employees available who have the skill and ability to perform such work. When employees on layoff are recalled, they shall be placed on their bid job and shift, when possible.

(c) Temporary job openings shall not be posted and shall not exceed a period of three (3) weeks duration then they must be posted. Openings as a result of vacation periods shall be considered temporary openings and shall not have to be posted.

BACKGROUND

The Company decided that business demand required that its molding operations be expanded to the third shift and on December 20, 1994, posted openings on the third shift for two Molding Machine Operators, but did not post a third shift Muller Operator position. The Muller Operator mixes the sand and water used in the molding operation and releases it from the hopper onto the conveyor belt which moves it to the molding machine. The Molders do not operate without a Muller Operator.

At the time that the third shift Molding Operator positions were posted, the Company had a third shift employe who was on light duty due to an injury, Steven Stalsberg. Stalsberg had been working in the core room on third shift, where employes on light duty on third shift are usually assigned, but with his medical restrictions, he could not do that work for eight hours per day.

The Foundry Superintendent, Greg Herold, was aware at the time that he posted the third shift Molding Operator positions that a permanent Muller Operator position was needed as well. Because of Stalsberg's restriction to light duty and the nature of the work on the muller, Herold decided to place Stalsberg on the muller for the third shift until he was sufficiently healed. Herold had discussed his intention to place Stalsberg on the muller and post the position later with the Union Shop Steward before the Muller Operator position was posted. Herold had Stalsberg start coming in on the second shift in late December to be trained on the muller by second shift Muller Operator Dennis Schaller. Schaller is also the Union's steward on second shift and he questioned Herold about not posting a third shift Muller Operator position. Herold informed Schaller that he had to place Stalsberg on the muller because he was restricted to light duty. Schaller had been working some overtime on the muller before the molding operation was expanded to the third shift. It is a practice in the plant to use employes from the prior shift to work overtime on the next shift or to take other employes on that shift off their regular job to fill in.

The molding operation began on the third shift on January 9, 1995, with Stalsberg working in the Muller Operator position forty hours per week. Schaller asked Herold every week or so when he was going to post the Muller Operator position and on February 2, 1995, filed the instant grievance when the position had not yet been posted.

On February 6, 1995, the third shift Muller Operator position was posted and three employes, including Stalsberg, signed the posting. The position was initially offered to one of the employes who subsequently turned down the position. Stalsberg, as the next most senior bidder, was then awarded the permanent position. Stalsberg worked in the position on a temporary basis for a week after it was posted until he was awarded the position on a permanent basis. Schaller worked approximately the same amount of overtime during the time Stalsberg was in the third shift Muller Operator position on a temporary basis as before the third shift molding operation began. It was stipulated that Schaller's pay rate at the time was $9.81 per hour.

The parties attempted to resolve their dispute, but were unable to do so, and proceeded to arbitration on the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the Company violated Article IX, Section 5, of the Agreement by failing to post the third shift Muller Operator position on December 20, 1994, when it posted the two Molding Machine Operator positions on the third shift. The Union asserts that the Muller Operator and Molder Operator positions go hand in hand and that the Company's witness, Greg Herold, conceded that point. That the permanent Muller Operator position should have been posted at the same time as the two Molding Machine Operator positions was tacitly admitted by the Company when it posted the position in February of 1995. The Union also asserts that the Company cannot rely on Article IX, Section 5(c), of the Agreement, as both the Union and management witnesses testified that temporary job openings refer only to short-term positions which generally involve new equipment being introduced in the plant. The positions being introduced on the third shift were doing work identical to that already being performed on the first two shifts and Herold admitted that the Muller Operator position was not temporary. While management has the right to determine when a new job is created, the Agreement specifies the procedure to follow when such a new position is added, and the Company failed to post the new position in compliance with the Agreement.

With regard to remedy, the Union asserts that there is a past practice of assigning employes on the prior shift overtime when work is to be done on the next shift in an open position. The Grievant, Schaller, testified he occasionally works double shifts, and regularly works some

overtime. There is also evidence that at least three employes regularly work the equivalent of double shifts due to unfilled vacant positions. The Union cites Topp's Chewing Gum, 94 LA 357 (Arbitrator DiLauro, 1990). In that case, the Company had assigned overtime to maintenance mechanics without also assigning overtime to mechanics' group leaders. The latter grieved, and the Arbitrator held that there was a past practice of assigning group leaders to work when mechanics worked, even in overtime situations. Despite the absence of contract language requiring the overtime assignments, the Arbitrator held that, based on the practice, the grievants were entitled to the overtime assignment. Similarly, here the Company failed to post and fill the permanent third shift Muller Operator position to work alongside the third shift Molding Operators, thus requiring overtime work, and based on the practice of offering overtime to prior shift employes in the same position, the overtime on the third shift should have been offered to the second shift Muller Operator, Schaller. The Company does not have the discretion to place any employe in the overtime position that it wishes.

The Union also cites arbitral precedent in support of its assertion that the Company was required to offer the overtime in the third shift muller position to Schaller, since it knew it had to have a third shift Muller Operator to accompany the Molding Machine Operators, it was not an emergency situation or due to employe unavailability, and the work to be performed was not de minimis. Instead, the Company sought to avoid paying overtime to the employe entitled to the assignment and to play favorites.

As a measure of damages, the Union asserts that when an employer knowingly makes a job assignment in violation of the established overtime practice, the employe wrongfully deprived of the overtime is entitled to all of the hours he would have worked but for the improper assignment. Citing, Dundee Cement Company, 77 LA 884 (Arbitrator Ross, 1981). In this case, Schaller was deprived of overtime for three and a half to four weeks, and the proper measure of damages is the number of hours worked by the third shift Muller Operator, less the number of overtime hours worked by Schaller in that period, paid at the overtime rate.

Company

The Company takes the position that Article IX, Section 1, gives the Company the right to determine who shall be transferred or assigned to jobs, subject to the terms of the Agreement. In this case, the special circumstances presented by an employe requiring light duty justified the temporary assignment of that employe to a new position, thereby delaying the posting of the new position. No one was aggrieved by the short delay in posting the position, the lack of any wage advantage denied by reason of the delay, or the award of the bid position to the employe who had been temporarily placed in the position.

In support of its position, the Company first asserts that it has the right to direct the work force, including the right to transfer or assign jobs, under Article IX, Section 1, of the Agreement. Further, it is the Company's responsibility to determine how an injured employe's limitations are to be accommodated. Section 111.34(1)(b), Stats., requires the Company to, "reasonably accommodate an employe's handicap, unless the (Company) can demonstrate that the accommodation would pose a hardship on the (Company's) program, enterprise or business." The Company cites decisions of the Wisconsin Court of Appeals indicating that it is the Legislature's intent to encourage and foster to the fullest extent practicable, the employment of all properly qualified individuals, regardless of any handicap, and that the Fair Employment Act be liberally construed to effectuate its policies and purposes. Citing, Ray-O-Vac v. DILHR, 70 Wis. 2d. 919, 931 (1975); McMullen v. LIRC, 148 Wis. 2d. 270 (Ct.App. 1980). In McMullen, it was held that it is not per se unreasonable to require an employer to transfer an employe to another job in order to accommodate his needs. In this case, the Company transferred Stalsberg from the core cleaning job, which was too strenuous for him, to the newly-created Muller Operator position on the third shift, which matched his physical limitations. This was a reasonable accommodation and was possible because the Company was able to put Stalsberg in the position without violating the Agreement. Article IX, Section 5(a), of the Agreement requires that job openings be posted for bidding, however, that provision does not set forth a time period within which the posting must occur. Section 5(c), of that provision also provides that temporary job openings need not be posted. While both the Company and Union agree that the third shift Muller Operator position was not a temporary position, there was the temporary circumstance of an employe's handicap while his injury was healing. The Agreement does not preclude the Company from meeting this temporary need as it did. The position was posted for bidding after a delay of a little over a month in compliance with Article IX, Section 5(a). As it was not a temporary job opening, the three-week limitation in Section 5(c), is inapplicable.

The Company cites the testimony of Herold, the Foundry Superintendent, that it is a daily necessity and routine occurrence to transfer employes from one job to another, preferably within the same work shift. This need is recognized by Article IX, Section 5(b), of the Agreement, which recognizes a preference to keep employes on their bid jobs, and departing from that practice only when other employes are not available or qualified to do the needed work. As authorized by that subsection, the Company placed Stalsberg in the third shift Muller Operator position to meet

his and the Company's temporary needs without taking away another employe's bid job.

The Company asserts that even if it is found that it violated the Agreement, no employe was harmed by its actions. No one was denied the opportunity to bid on the third shift Muller Operator position, and the position was posted and subsequently awarded to the most senior qualified employe who bid. The basis for Schaller's grievance is that the position should have been posted for bidding, and the relief for the failure on the part of the employer is to require the Company to post the job. As that had already been done by the time of the arbitration hearing, no damages existed and the delay on the posting caused no harm. The job was posted and eventually awarded to Stalsberg, even though a more senior employe had bid on the position and rejected it after having been awarded it. Stalsberg was the next most senior bidder, and was awarded the position. There is no evidence that another employe would have bid on and been awarded the job had there been no delay. Further, no employes suffered any wage disadvantage by the Company's action. Stalsberg was paid the regular wage for the hours he worked before being awarded the job. Schaller's claim that he is entitled to eight hours of overtime for every day that Stalsberg worked the third shift Muller Operator position is not supported by the Agreement or the evidence. Schaller's time sheets indicated that he averaged the same number of overtime hours while Stalsberg worked in the position on a temporary basis, as he did before the position was created and after Stalsberg was awarded the position. There is also nothing in the record to establish the number of hours Stalsberg actually worked in the position, nor to establish whether Schaller would have received all of the overtime hours he did work, in addition to the hours he would have worked in Stalsberg's place.

The Company also asserts that there is nothing in the Agreement that entitles a particular employe to particular overtime work, except in cases of special classifications or weekend work. The Muller Operator position is not within the "special classifications" defined in Article V, Section 2, of the Agreement, and weekend overtime is not an issue in this case. The examples of other employes who work up to eight hours of overtime offered by the Union as evidence of a "common practice" do not establish such a practice, as only four employes out of a total of 120 are in that situation. All of the employes cited as examples, have circumstances distinguishable from those in this case. Two of the employes, Trones and Esser, work in "special classification" jobs as Cupula Tender and Cupula Repairman. The other two, Donskey and Middleton, work as Iron Core and BMM Operator, respectively, jobs requiring special skill or tolerance of extreme conditions. The Company notes that neither of those examples cited have been grieved by the Union and that the Union has not failed to accommodate the needs of the Company through the assignments of employes in any of those circumstances cited by the Union. The Company assumes that is because no one was harmed by the Company's actions in those cases. Similarly, in this case, the needs of the Company required that an injured employe on light duty be placed on a lighter work assignment. No one was injured by the Company's actions and in fact an employe and Union member was accommodated through those actions. Thus, it would not be just or equitable for the Grievant to prevail on the grievance or to recover the damages he requests.

DISCUSSION

It is initially noted that both the Union and the Company agree that the third shift Muller Operator position was a permanent job opening, as opposed to a temporary job opening, and that therefore Article IX, Section 5(c), of the Agreement does not apply in this case.

The Company essentially has asserted that it had the right under Article IX, Section 5(b), of the Agreement to "transfer" Stalsberg to the third shift Muller Operator position based upon its need to accommodate his restriction to light duty. Herold, the Foundry Superintendent, is the Company official who was responsible for posting the Molding Machine Operator positions in December of 1994, and for the decision to temporarily assign Stalsberg to the third shift Muller Operator position. Herold testified that he often has transferred employes from one job to cover another job and that he tries to use another employe from the same shift when he does that. However, he also testified that those transfers have been for minutes, hours, a day or for a week, and that it is usually done when an employe is absent due to illness or injury, or is on vacation. Herold conceded on cross-examination that he knew at the time he posted the third shift Molding Machine Operator positions that he had a permanent third shift Muller Operator position open as well, which is unlike a temporary situation where an employe is out ill or on vacation.

Article IX, Section 5(a) provides, that, "when a job opening occurs, employees shall have an opportunity to bid on such job openings." Herold conceded that a permanent job opening must either be posted, or filled by giving overtime hours. Herold also conceded that he knew at the time the Molding Machine Operator positions were posted that he had a permanent job opening in the third shift Muller Operator position. That opening was not temporary in nature, and it was not a matter of transferring an employe to a temporary vacancy in an existing position. Under the clear language of Article IX, Section 5(a), the Company was required to post the third shift Muller Operator position when the job opening occurred, i.e., at the same time the Molding Machine Operator positions were posted. That being the case, the Company violated Article IX, Section 5(a), of the Agreement when it failed to post the third shift Muller Operator position and instead filled it by temporarily assigning Stalsberg to the position. 2/

With regard to the appropriate remedy in this case, the Company has asserted that even if it violated the Agreement by placing Stalsberg in the position without having posted it, the Grievant was not injured by its actions, since he continued to work approximately the same amount of overtime hours during the period Stalsberg was in the position as he did prior to that time, as well as subsequent to the position being posted. The Company's argument ignores the fact that if the position had not been filled by Stalsberg and had not been posted, it presumably would have been filled by giving another employe overtime work hours. Both Schaller and

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2/ The fact that the Company was attempting to accommodate Stalsberg's work restrictions does not excuse it from having to comply with the requirements of the Agreement.

Herold testified that it is the practice to either transfer employes from another job to cover the vacancy in the position where the work is needed or to have employes from the prior shift in that job work overtime. It is noted that the Agreement itself does not address how overtime work is to be offered or assigned, other than specifically addressing Saturday and Sunday overtime work (Article X, Section 4). Under the existing practice, however, it appears that the Grievant would have been offered the overtime hours for the work on the third shift had not Stalsberg been placed in the position temporarily without it being posted, from January 9 until February 6, 1995.

While it may appear at first blush to be a windfall for Schaller, in that it is payment for hours that he did not in fact work, it is a situation created by the Company's failure to post and bid the job as required by Article IX, Section 5(a), of the Agreement. The evidence indicates that absent posting and bidding the permanent job opening, the position is filled by utilizing prior shift employes on an overtime basis. Further, this is not a situation where the opportunity to work the overtime can be re-created, as perhaps it might be where an employe was improperly denied an overtime opportunity where those opportunities are rotated amongst the staff. But for the Company's violation, Schaller would have had the opportunity to work the hours as overtime that were in fact worked by Stalsberg in the third shift Muller Operator position. Thus, the appropriate remedy is to award Schaller overtime pay for the hours that Stalsberg worked in the third shift muller position from the day he started in that position until the day it was posted, less the overtime hours that Schaller did work during that same period. Any other remedy would neither adequately remedy the violation of Schaller's rights, nor serve to deter the Company from similarly violating the Agreement in the future.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The grievance is sustained.

2. That the Company is directed to immediately pay to the Grievant, Dennis Schaller, the monies he would have received had he worked the hours that were in fact worked by Stalsberg in the third shift Muller Operator position from January 9 to February 6, 1995 at Schaller's hourly rate x 1 1/2 and less the amount he received for the overtime hours that he worked during that same period.

Dated at Madison, Wisconsin, this 1st day of November, 1995.

By David E. Shaw /s/
David E. Shaw, Arbitrator