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 32
No. 52949
A-5386

Appearances:

Mr. Kevin D. Lee, Business Manager, Laborers' International Union of North America, Local Union No. 140, appearing on behalf of the Union.

Gleiss, Locante & Gleiss, Attorneys at Law, by Ms. Shari LePage Locante, appearing on behalf of the Company.

ARBITRATION AWARD

Laborers' International Union of North America, Local Union No. 140, hereinafter referred to as the Union, and Sparta Manufacturing Company, hereinafter referred to as the Company, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Company, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a verbal/written warning. The undersigned was so designated. Hearing was held in Sparta, Wisconsin, on October 6, 1995. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on November 6, 1995.

BACKGROUND:

The basic facts underlying the grievance are not in dispute. On May 22, 1995, the grievant was given a verbal warning for absenteeism. 1/ Between September 19, 1994 and May 22, 1995, the grievant had five unexcused absences, four excused absences and ten partial shift absences. 2/ The grievant was scheduled to work mandatory overtime on Saturday May 20, 1995. Sometime prior to the second shift on Thursday, May 18, 1995, the grievant informed his supervisor that he could not work Saturday, May 20, 1995, because he had visitation with his

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1/ Ex. 3.

2/ Ex. 4.

daughter that day. The supervisor did not excuse the grievant from working overtime. The grievant did not work overtime on that Saturday, May 20, 1995, and it was considered an unexcused absence by the Company and the grievant was given the verbal warning. The Union filed a grievance over the warning and it was processed through the grievance procedure to the instant arbitration.

ISSUE:

The parties could not agree on a statement of the issue. The Union states the issue as:

> Should the Company have excused the grievant and was his write up warranted?

The Company frames the issue as follows:

> Did the Company violate the agreement by disciplining the grievant for an unexcused absence on May 20, 1995, combined with his record of prior absences? If so, what is the remedy?

The undersigned frames the issue as follows:

> Did the Company violate the parties' collective bargaining agreement by its verbal/written warning dated May 22, 1995, to the grievant for his absenteeism record including an absence on May 20, 1995?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE IV

HOURS OF WORK

. . .

Section 2. Overtime Provision

. . .

(b) If a complete shift is scheduled to work overtime, then such notice should be posted at least two (2) days in advance, when possible. All employees so scheduled to work are expected to report to work on time for the total period designated. Any employee not adhering to this rule who does not have an approved excuse for work on Saturday by the start of the second shift on Thursday will be considered absent without excuse.

. . .

Section 4. Absences

. . .

(b) When an employee (sic) absences become excessive, said employee will be subject to the disciplinary procedure of this Agreement.

. . .

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 11. Disciplinary Procedure

(a) In the event of the issuance of any form of disciplinary action against any member of the bargaining unit for a violation of a posted work rule or excessive absenteeism, the following progressive disciplinary procedure shall be followed:

1st step - verbal warning, with written confirmation to the shift steward
2nd step - written warning
3rd step - 3 day layoff
4th step - subject to discharge

(b) After a period of six (6) months from the last step of discipline as outlined above, and if the employee has no further discipline issued, he shall revert to the prior step of discipline. However, if no further discipline is issued to an employee for a period of one (1) year from the last step, his record shall be clean.

(c) Any employee determined to be using, possessing, or under the influence of alcohol or illegal drugs on Company property will be terminated from employment immediately, and not subject to any progressive disciplinary procedure.

. . .

COMPANY'S POSITION:

The Company contends it has the right to discipline employes under Article IX, Sections 1 and 11 as well as Article IV, Section 4 which expressly identifies excessive absenteeism as a basis for employe discipline. It notes that the agreement does not define excessive absenteeism and the Company has utilized a discretionary, unwritten policy over the past several years.

The Company asserts that the grievant was properly disciplined for unexcused absences on full-shift Saturdays. The Company points out that it occasionally schedules a full shift on Saturday and because it must pay time and one half, it does so as infrequently as possible. It refers to Article IV, Section 2. (b) of the agreement which requires employes scheduled to work a full shift on a Saturday to work the full shift and those who do not work as scheduled without an approved excuse by the start of the second shift on Thursday are considered absent without an excuse. The Company claims that the Union's argument, that prior to the current policy which has been in effect for four years, any excuse given before the second shift on Thursday was considered approved and the Company is now attempting to change this, is not supported on the record. It

observes that Article IV, 2. (b) dictates an opposite conclusion in that a Company decision is needed to determine whether an excuse is approved or not. It does not dispute that the grievant informed his foreman prior to the second shift on Thursday that he would not be at work on Saturday because he had visitation with his daughter that day. It submits that simply giving timely notice of the absence does not make the absence excused or approved, otherwise Article IV, 2. (b) would not need to state "approved excuse," as any simple excuse would allow the absence to be approved. The Company recognizes that very few employes want to work on Saturdays and while it does allow absences for very special occasions, it requires employes to work to meet production demands and avoid a labor shortage at a pressing time. The Company states there is little in the agreement which sets policy for employe absences and what does exist, "approved excuse" for full-shift Saturday, dictates some policy on absences and does not prohibit the Company's present policy and thus, the policy does not violate the agreement.

The Company insists that there was no discrimination against the grievant based on his status as a shift steward. The Company observes that evidence of other employes' records showed that some were disciplined who had fewer absences and fewer unexcused absences than the grievant. It rejects the Union's reliance on Les Hanson who had a 2-11-16 (unexcused, excused, partial shift) record because he had doctor's excuses for most of his excused absences. It insists that the evidence failed to support the Union's claim of discrimination. The Company contends that the nine-month review for discipline does not violate the contract as asserted by the grievant. It points out that the contract has a six-month time limit applied between disciplinary steps but not to consideration of an employe who has not yet entered the disciplinary process. It argues that as the grievant was given a first-step discipline, the six-month provision does not apply.

The Company requests that the grievance be denied.

UNION'S POSITION:

The Union contends that the Company did not follow the past practice in applying Article IV, Section 2. (b) by not excusing the grievant from work on Saturdays. It submits that the past practice was that employes were excused for any reason as long as they notified the Company before the second shift on Thursday of that Saturday. It argues that the grievant followed this past practice but the Company refused to excuse him for a reason that was always accepted in the past. It asserts that the grievant followed the contract and the Company never informed him that the past practice had been unilaterally changed so he did not know that his Saturdays were being recorded as unexcused. It claims that the grievant has always been a good employe with a good work record and was unjustly given the verbal/written warning. It insists that the grievant's excuse should have been honored and the verbal/written warning should be expunged. It requests that the grievance be granted.

DISCUSSION:

Article IV, Section 2. (b) provides as follows:

> (b) If a complete shift is scheduled to work overtime, then such notice should be posted at least two (2) days in advance, when possible. All employees so scheduled to work are expected to report to work on time for the total period designated. Any employee not adhering to this rule who does not have an approved excuse for work on Saturday by the start of the second shift on Thursday will be considered absent without excuse.

A plain reading of this section requires that an employe must have an "approved" excuse or the employe will be considered absent without excuse. It is also clear that the Company does the "approving," otherwise there would be no need for the language. The Union has argued that a past practice has evolved whereby any excuse, as long as it is made by the second shift on Thursday before the Saturday, is an excused absence. If this argument is carried to its logical extreme, every employe could offer an excuse before the Thursday second shift and no one would be required to work overtime and everyone would be excused from working Saturday. The Company has the right to require overtime on Saturday and Article IV, Section 2. (b) provides that employes scheduled to work are expected to report on time and work the total period expected. The past practice cannot be used to negate the clear contract provisions.

Furthermore, some past practices are binding and others are not. Here, the Company could have accepted any excuse and approved it but this is not a binding past practice. As Arbitrator Shulman stated in Ford Motor Co., 19 LA 237 (1952):

> But there are other practices which are not the result of joint determination at all. They may be more happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion. The law

> and the policy of collective bargaining may well require that the employer inform the Union and that he be ready to discuss the matter with it on request. But there is no requirement of mutual agreement as a condition precedent to a change of practice of this character.

Here, the mere fact the Company in the past exercised its discretion in approving absences for almost any excuse does not create a binding past practice and the Company is free to exercise its discretion differently from the past and require more compelling excuses before approving an absence. Thus, past practice does not prevent the Company from rejecting the grievant's excuse. As far as notifying the Union of a change in the exercise of the Company's discretion on approving excuses, the record established that the Company had changed its discretion approximately four years ago so surely the Union was aware of it.

Although the Company could refuse to approve an excuse, it must act reasonably in denying approval. The grievant's excuse for not working Saturday overtime was visitation with his daughter. The Company did not approve this excuse. Was that reasonable? The undersigned concludes the Company's actions were reasonable. If this were a child's graduation, an appearance in a championship game of sports or some other honor that is out of the ordinary, then these circumstances might dictate a different result. Visitation is not enough as every employe may very well desire to spend Saturday with his/her children. The Company does not require overtime every Saturday and in the first five months of 1995, there were six such Saturdays and none since. A certain amount of overtime must be anticipated by employes and the amount here is not excessive, and under the circumstances, the denial of the excuse of visitation with one's child is reasonable.

The next issue is whether the grievant's record as a whole was such that discipline was unfair. Article IV, Section 4. (b) provides as follows:

> (b) When an employee (sic) absences become excessive, said employee will be subject to the disciplinary procedure of this Agreement.

The Company determined that the grievant's absences were excessive. The grievant's absenteeism record indicated five unexcused absences, four excused absences and ten part-shift absences in a nine-month period. Other employes have been disciplined for relatively the same amount of absences over this time period, for example:

Tom Schindler 6-8-3

David Stalsberg	5-5-4
Jon Woodworth	5-5-17
Les Hanson	2-11-16 3/

This evidence establishes that the grievant's record of absences was similar and was excessive. Thus, the Company properly disciplined him.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The Company did not violate the parties' collective bargaining agreement by its verbal/ written warning dated May 22, 1995, to the grievant for his absenteeism record, including an absence on May 20, 1995, which was unexcused, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin, this 17th day of November, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

3/ Ex. 6.