BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUSAU-MOSINEE PAPER CORPORATION

and

LOCAL 1260, PAPERWORKERS, ATOMIC AND CHEMICAL EMPLOYEES INTERNATIONAL UNION (PACE)

Case 1
No. 57682
A-5777

Appearances:

Mr. Timothy G. Costello, and **Mr. Gene M. Linkmeyer**, Attorneys at Law, Krukowski and Costello, S.C., 7111 West Edgerton Avenue, Milwaukee, Wisconsin 53220, appeared on behalf of the Company.

Mr. John A. Peeters, International Representative, Paper, Allied-Industrial, and Energy Workers International Union, AFL-CIO, 2023 East Mohawk Drive, P.O. Box 381, Tomahawk, Wisconsin 54487-0381, appeared on behalf of the Union.

ARBITRATION AWARD

On June 30, 1999, the Wausau-Mosinee Paper Corporation and Local 1260 of the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) requested that the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Hearing on the matter was conducted on September 22, 1999, in Wausau, Wisconsin. Post-hearing briefs were submitted and exchanged by October 25, 1999.

This Award addresses the right of maintenance employes to hold spare jobs.

BACKGROUND AND FACTS

This grievance arbitration arises out of grievances filed by Reuben Schaper and Dan Koehler, each of whom are maintenance men with the Company who applied for and secured spare jobs outside their department. Neither man was allowed to hold their spare job while continuing as a maintenance employe, and so dropped their spare jobs under protest, and filed these grievances.

At its Brokaw, Wisconsin plant, the Company manufactures paper for printing and writing. It maintains a large physical plant which employs 575 hourly employes and 130 salaried. The hourly employes are represented by two locals of PACE. Local 1260 represents the maintenance, wood room and pulp operation. The larger local, 1381, represents employes in the manufacturing and finishing unit. Both locals are covered by the terms of a single collective bargaining agreement. At times, employes may bid for the same jobs. This grievance is brought by Local 1260 on behalf of maintenance employes.

Maintenance employes are a highly-paid, high-skills group. There are 63 maintenance mechanics. Additionally, there are 25 Electrical and Instrumentation Technicians in the maintenance department. All but four employes from each of these classifications works on the first shift. These employes work a 40-hour workweek and every third Saturday or Sunday, averaging 45.3 hours per week. On an average day, there are 10 maintenance employes who are not on the job due to vacation, sick leave or other absences.

Maintenance employes are scheduled in their own areas on Mondays and Fridays. Tuesdays, Wednesdays and Thursdays are days in which substantial preventative maintenance is performed. On a typical Tuesday, one paper machine is shut down. 40 maintenance employes and additional electrical technicians are assigned to service the machine. If the machine is not back online by quitting time, the employes work overtime, which occurs more than half the time. There is no production work while the machine is down. On Wednesdays, 30 mechanical and additional electrical employes perform a similar function on finishing equipment. On Thursdays, 35 mechanical employes perform similar tasks on pulp mill recovery and wood room equipment.

Entry into the maintenance classification is through an apprenticeship program. There are a limited number of slots, filled by a combination of seniority and test scores. The program involves both on-the-job training and formal classroom instruction. The apprenticeship is both expensive and time-consuming, and requires six years to achieve journeyman status.

There are three kinds of jobs in the plant. A permanent position, is one whose occupant is regularly scheduled to perform certain assigned work tasks. The occupant has rights to the job, and the right to bid for another job. A spare position is one whose occupant, a permanent employe, is used to fill in for an employe who is absent, on vacation, sick, etc. There are approximately 100 spare jobs in the plant. Some jobs have multiple spares, some jobs have none. The relief pool consists of a group of employes (typically new hires) who are trained to do a variety of jobs. Those individuals have no permanent assignment and work where they are needed.

Spare jobs are regulated by certain provisions found within Section 12 of the labor agreement, and set forth below. An employe who bids on a spare job is subject to a 30-day trial period. Successful completion allows the employe to have the spare job, along with his or her permanent job. The entitlement is essentially to access of hours which open up due to vacation, sick leave, etc., and ultimately to be positioned to fill the "spare job", if and when that job becomes permanently vacated. (See Sec. 12, "Scheduling of Spare Jobs", paragraph 3, below.)

The Company has historically refused to allow maintenance employes to hold spare jobs outside their department. The Company views the maintenance employes as critical to the operation of the plant and does not want those employes leaving maintenance work to perform other jobs. Maintenance employes are free to bid for spare jobs. Following the 30-day trial period, the maintenance employe is required to choose to retain either his permanent maintenance position or the spare job successfully bid upon, but not both. That is precisely the fate of the grievants in this proceeding, each of whom abandoned their spare jobs, under protest. If a spare job arises under circumstances where the spare position will not be vacated imminently, which is common, a bidding maintenance employe is, as a practical matter, precluded from holding his current job and that spare. The consequence of this is that maintenance employes lose the opportunity to position themselves to fill vacancies when those vacancies arise. The Company will allow maintenance employes to hold spare jobs within the same department. What this amounts to is performing the same work on a different shift.

The Company's treatment of maintenance employes mirrors its treatment of electrical technicians, for purposes of holding spare jobs. Employes in a job progression series are explicitly contractually regulated relative to their holding spare jobs. A job progression series is a job family where one job prepares an individual for the next in a progression. Such employes are required to treat the next job in their progression as their job spare. If a vacancy arises, the individual must move up, or out of the progression series. Job progression series employes are not permitted to have spare jobs other than the next step in their progression. Subject to these exceptions, permanent employes are eligible to hold spare jobs, for which they are qualified.

The Company has never allowed maintenance mechanics to hold spare jobs. The matter first arose as an issue in 1981. At that time, Terry Locaman, an electrical apprentice, got a spare job in the boiler house. The Employer opposed his holding the spare job, and negotiations with the Union ensued. The following sentence, which continues to date, was inserted in the apprenticeship agreement: "Apprentices will only be able to hold spare jobs within the maintenance department." There is no parallel language applicable to journeymen.

In 1981, Herman Gast sought to hold a spare job outside maintenance. The Company refused to allow Gast to do so and a grievance was filed. That grievance was denied by the following memo, addressed to the Union president, Cliff Woller:

> "The issue of maintenance people holding spare jobs outside of maintenance is one of a very serious nature. During the summer, when people would be going on to their spare jobs because of vacations, we also have a heavy vacation schedule. By allowing maintenance people to hold spare jobs outside of maintenance, we would be putting an even greater burden on everyone else in maintenance. Plus, from a business perspective, it is not wise to spend years developing an expert crafts person and then lose that person to a position where anything less than one hundred percent of his or her talents would be utilized. Therefore, with great respect for Herman, I must deny his request to be allowed on a spare job."

A Company witness testified that the grievance was then withdrawn. A Union witness testified that the Gast matter involved Mr. Gast wanting off the call-in list.

Later in 1981, Charles Jansen sought a spare job. Jansen was denied that opportunity and filed a grievance. Charles St. Pierre, Company Director of Industrial Relations, wrote Mr. Michael Hudzinski, the Union's International Representative, as follows:

> Subsequent to the initial fourth-step grievance answer on October 8, 1981, the Company met with Local 1260 on two separate occasions to discuss the problem of maintenance employes holding spare jobs outside maintenance.
>
> During these meetings, we explained to the Union committee the many serious problems the Company would face if we were to allow this to occur. The Union committee, at our meetings, brought up an additional point that occasionally there is a maintenance employe who desires to bid out of maintenance for physical problems, or simply because that employe no longer wishes to work in the maintenance department.

> We agree that there will be occasions when this will occur, and to settle this grievance, the Company would be willing to allow a journeyman maintenance employe to bid onto a spare job, as his/her seniority dictates; however, to avoid the shuffling back and forth in and out of the maintenance department, the Company would only allow the employe to move into the job he posted for, when this job becomes a permanent one. As is customary, the employe will have the normal 30-day trial period in his new job with return rights to his former position. We feel, Mike, that the result of this would be that the Company would still be able to maintain its maintenance work force and at the same time allow a maintenance employe to exercise his right to bid out of the Department if he/she feels maintenance work is no longer an acceptable trade for them, for physical, emotional or health reasons.

The proposed compromise was not agreed upon, and the grievance was subsequently dropped.

The matter came up in the parties' 1991 contract negotiations. The Company produced a transcript of a portion of that discussion, occurring on April 10, 1991 which provides as follows:

. . .

Union: Can journeymen maintenance hold spare jobs?

Company: No. That was resolved in a grievance a long time ago.

. . .

The matter arose again in December of 1994. At that time, employe Ken Gorski filed a grievance, which alleged the following:

> Violation of labor agreement . . .spare jobs. The Company maintains that maintenance workers cannot hold spare jobs. . .Follow contract and allow journeymen to hold spare jobs.

The Company responded as follows:

> The attached grievance filed by Ken Gorski is being returned to you. As you know, we have decided not to fill this second spare job in the storeroom because it is not needed.
>
> The grievance is moot, and therefore the specific incident is not grievable.

This matter came up once again in the parties' 1996 negotiations. The Union raised the matter through the following proposal:

. . .

20. Section 12, page 19, clarify all spare jobs/maint./supervisor.

. . .

According to a Union witness, the Union sought clarification on this matter, which prompted discussion. The Employer took the position that through past practice maintenance employes could not hold spare jobs. The Union believed there was nothing in writing to this effect, nor anything in the contract leading to this result. It was the Union's view that access to spare jobs was available to all production employes. A Company witness testified that this proposal was discussed. The Company's view is that it refused to allow maintenance employes to hold spare jobs; that proposal was rejected, and dropped.

ISSUE

The Union believes the issue to be:

Did the Company violate the labor agreement, and if so, what is the appropriate remedy?

The Company believes the issue to be:

Does the language concerning spare jobs in Section 12 of the collective bargaining agreement prohibit the Employer from requiring that grievants Reuben Schaper and Dan Koehler, to decide after their thirty (30) day trial periods whether they wish to stay in their bid-on spare jobs outside the maintenance area and give up their maintenance job, or to return to their maintenance job? If so, what is the appropriate remedy?

I regard the issue as:

Does the Company violate the collective bargaining agreement by refusing to allow maintenance employes to hold spare jobs outside their Department, beyond the 30-day trial period?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

SECTION 12

. . .

RELIEF POOL: The Company may maintain a relief pool for use in providing relief for temporary vacancies in departments throughout the Mill and for stabilizing crews as opposed to reducing normal manning levels. Employees of the pool shall be classified as plant laborers. The objective of the relief pool is to fill such vacancies at straight time if possible, however, employees with spare job rights will be scheduled for vacancies of one week or more prior to utilizing relief pool personnel. "Vacancies" as used herein means any vacancy caused by:

. . .

2. Vacations
3. Temporary increases in departmental workloads or extra work of a temporary nature.

. . .

DEPARTMENTAL, UNION AND PLANT-WIDE SENIORITY POSTING AND SELECTION: Whenever a vacancy arises or a new position is created, it shall be posted within five (5) days of the opening on the bulletin boards unless the vacancy is temporary in nature.

. . .

Selection of applicants for all posted vacancies and new positions will be based on seniority with ability and qualifications. Department seniority will govern in the department posting, and Local seniority in the plant-wide posting.

. . .

SENIORITY UPON RETURN FROM TRANSFER OR PROMOTION: An employee who is transferred or promoted within the bargaining units shall be given a trial period of thirty (30) working days for determination as to whether or not they can meet the job requirements. . . During this trial period, the

employee may at their request, upon giving the supervisor notice prior to the posting of the next week's schedule, return to their old job without loss of seniority.

. . .

SPARE JOBS: An employee may normally hold only one spare job. However, that employee may temporarily hold claim to two (2) spare jobs for a thirty (30) actual working day period, during which time the employee must decide which spare job to keep. An employee who voluntarily relinquishes a spare job will not be allowed to reapply for that spare job for a period of one (1) year following the time that he relinquishes it. . .

SPARE JOBS – FINISHING: To minimize the substantial problems involved in scheduling and training, and to help ensure more efficient use of manpower in the Finishing area, the following guidelines are adopted:

Most spare jobs in the Finishing area will eventually be eliminated, with the exception of jobs that require substantial training, like Trimmer Operator, Cutter Operator, Rewinder Operator, Embosser Operator, and Head Sealing Machine Operator. All spare jobs, other than those listed above, held prior to June 1, 1978, will be honored by seniority until the job termination form is signed or the job becomes permanent.

SCHEDULING OF SPARE JOBS:

1. Employees with spare jobs will be required to work on those spare jobs, irrespective of shift, for periods of one week or more for replacement of absentees.
2. The Company has the right to assign employees with spare jobs to those spare jobs on shift. If the Company determines that it is unnecessary to move a spare to fill a vacancy of less than one week duration, employees with spare job rights will still have the option to move their spare jobs on shift.
3. The employee holding a spare job will take the first permanent job opening in that job. If there is more than one employee holding spare job rights to a single job, they will move into the job in order of job seniority.

PAPER MACHINE JOB PROGRESSION: Unions and Management agree that it is extremely important to recognize the necessity of upgrading new papermakers. It is recommended that present crew members exhaust every possibility to qualify for promotions within the machine room crew when open, or seriously consider transferring to posted openings which better suite (sic) their qualifications.

. . .

SECTION 20

Grievances and Arbitration

. . .

STEP 4 – ARBITRATION:

. . .It is understood that the function of the arbitrator shall be to interpret and apply this Agreement. However, the arbitrator shall have no power to arbitrate general wage adjustments, nor add to or subtract from, or to modify and extend any of the terms of this Agreement, or any Agreement made supplementary hereto, except by mutual consent of the Company and the Unions. Further interpretation of this Agreement may be made by mutual consent of the parties hereto.

. . .

POSITIONS OF THE PARTIES

The Union contends that the Maintenance Journeyman position is the only classification where employes who bid on a spare hand position are forced to relinquish their right to their permanent position. No other job classification is forced out of the permanent position as a result of bidding and holding spare hand positions. The Union acknowledges the Company's argument that it has invested six years of training in these Maintenance Journeymen. However, most top job classifications in lines of progression take years of experience and training and company investment. The company must rely upon these employes to produce a quality product safely. The Maintenance Journeyman classification is no more important than are other classifications in the plant.

The Union contends that there is a severe economic loss to the employe who is forced out of his permanent classification. A Maintenance Journeyman forced out of his classification and into a spare crew position would be subject to a pay loss of as much as $5.00 per hour.

The Union contends that the clear language of the contract must be applied. All employes are entitled to hold spare jobs. The Union points to Section 12 – Spare Jobs, and argues that the clause contains no exemptions. No employe in any job classification is exempt from being allowed to hold one spare job. The only employe that cannot hold a spare job is the Journeyman Apprentice. This is so due to the provision in the apprenticeship agreement which contains this explicit restriction.

It is the Union's view that the task of the arbitrator is to interpret and apply the agreement pursuant to Section 20 – Step 4 of the parties' grievance procedure. The Union contends that nothing in the record indicates that the Union has agreed to exclude Maintenance Journeymen from the contractual right to hold a spare job. These are the first grievances ever pursued to arbitration. The grievance answers involving Gast and Jansen should not be used as evidence that the Union has somehow waived bargaining members' rights contained in the agreement. Nothing in the record suggests that the Union has agreed to the answers provided by the company in those two matters.

The collective bargaining agreement permits changes in the language of the agreement through the collective bargaining process or by mutual consent. There was no collective bargaining, contends the Union. Furthermore, there is no indication that the Union has ever consented to allow the company to exempt Journeyman Maintenance employes from holding spare jobs.

The Company contends that the grievances should be denied because the Union has not carried its burden of proof to establish the violation of a specific contract provision. The Company argues that the contract does not specifically prohibit it from requiring journey level Maintenance employes to give up their regular positions, should they take on a spare job. The Company contends that where the Union alleges a contract violation, it bears the burden of establishing a violation of a specific provision of the Agreement. That cannot be done in this instance, argues the Company, because the contract does not contain any language prohibiting the complained-of conduct. Absent any such prohibition, the employer is left with discretion, based on good business judgment, to run the operations and direct the workforce.

The Company contends that its Management Reserved rights allow it the authority to determine detailed operational matters such as where and when maintenance employes can hold a spare job outside their department. Nothing in this record suggests that the Company has yielded its specific right to determine the detailed procedural questions of where, when, and if

at all employes may hold spare jobs. The Company goes on to note that the contract does not define "spare job", nor does the contract grant employes the right to determine the procedure for distributing spare jobs. Employes "may" however, hold one. Nowhere does the contract require the Company to provide spare jobs. It is the Company's claim that all of these matters fall within the sweep of its residual management's rights.

The Company contends that these grievances fail because they seek to overturn 20 years of joint practice. The Company cites authority for the premise that a past practice will bind the parties as if it were a fixed and written contractual obligation, where the activity is (1): joint; (2), unequivocal; (3) clearly enunciated and acted upon; and (4) readily ascertainable over a reasonable period of time. The Company argues that a past practice analysis is appropriate because the spare jobs language does not address the practice that has prompted these grievances. Furthermore, the Company contends that the spare jobs language is ambiguous in at least one respect, the use of the word "normally". The Company points to the Locaman apprenticeship, the Gast and Jansen grievances, the 1991 and 1996 negotiations, and the answer to the Gorski grievance. Taken together, it is the view of the Company that these incidents satisfy the criteria for the establishment of a past practice.

Finally, the Company contends that the existence of an explicit provision in the apprenticeship agreement prohibiting apprentices from holding spare job positions should not be construed in any fashion to imply a contrary view relative to journeymen maintenance employes. The apprenticeship agreement was modified following the Locaman incident, and to provide notice to those going into the apprenticeship program. In the view of the Company, no implication to the contrary as regards journeymen maintenance mechanics, is reasonable in light of the parties' actions, or subsequent behavior.

DISCUSSION

The contract provision key to the resolution of this dispute is Article 12 - Spare Jobs. I read that provision to be ambiguous relative to this dispute. The key sentence provides: "An employe may normally hold only one spare job. . ." The use of the term "normally" permits a deviation from the norm. Arguably, that norm would be the holding of one spare job. However, the provision is silent as to how, when or why such a deviation would be brought about. More to the point, this sentence does not declare that an (or any particular) employe is entitled to hold a spare job. The sentence, and the paragraph, do not set forth criteria (i.e. seniority) by which employes hold spare jobs. This contrasts with the job posting for vacancies or new positions language which is quite explicit in how such positions are to be filled. Read literally, the sentence appears to provide that an employe who has a spare job may only have one.

The Union is accurate that the sentence draws no distinction between journeymen maintenance mechanics and all others. However, entitlement to a spare job is not addressed. The fact is that 100 spare jobs exist in a bargaining unit which exceeds 500 employes. Not all employes are entitled to a spare job.

In this context, it is appropriate to turn to the parties' practice in order to see how these parties have construed these words. I agree with the Company, that in order to be binding, a practice must be joint, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. This standard is long-standing, commonly applied, and non-controversial.

I believe that the Company has established that a practice does exist. The Locaman, Gast and Jansen matters arose wherein bargaining unit members sought spare job positions. The Company refused to permit that. The Union did not pursue the right of any of these employes to hold spare jobs. It is noteworthy that an offer of compromise was rejected. This left the parties with a stark disagreement as to whether or not journeymen maintenance mechanics could hold spare jobs. The Company thereafter continued to refuse to allow journeyman maintenance mechanics to do so. It is in that context that the matter came up in the 1991 and the 1996 contract negotiations. The exchanges in those negotiations erased whatever ambiguity might possibly have lingered.

I believe the practice was joint. The Union and the Company participated in the grievance procedure and in the contract talks that created and reinforced the existing practice. I believe the practice was unequivocal. There is nothing in the record to suggest that a journeyman maintenance mechanic has ever been allowed to hold an out-of-department spare job, beyond the 30-day trial period, and thereafter remain in a maintenance mechanic position. I regard the practice as clearly enunciated and acted upon. There has been no ambiguity in the Company's refusal to permit journeymen maintenance mechanics to hold spare jobs. The grievance answers are in writing, addressed to the union, and not only articulate the Company's refusal, but the grounds for that refusal. This practice has spanned at least the period 1981 through the date of the hearing, nearly two decades. The practice has survived numerous negotiations, and turnover on the part of both Company and Union representatives. In summary, the criteria for the establishment of a past practice have been satisfied.

The Union argues that no other group of employes are affected. Most employes are not so regulated. However, the Company has offered a rational basis for their exclusion. Maintenance mechanics undergo a long and expensive apprenticeship program. The record establishes that they are critical to the operation of the facility. Most importantly, the Company's decision in this regard offends no provision of the collective bargaining agreement.

The Union notes that employes suffer significant potential economic loss, if forced into the relief pool as a consequence of taking a spare job. This is true, however, it is a byproduct of a promotional system that promotes a senior spare employe. An employe who leaves a journeyman maintenance mechanic position in order to secure a desired spare position does so knowingly. The economic consequence of that decision is a result of the provisions of the collective bargaining agreement.

The Union argues that the clear language of the collective bargaining agreement entitles all employes to hold spare jobs. I disagree. As noted above, I do not read the language to bring about that result. Similarly, the Union argues that the incidents constituting a practice should not be considered. In light of my view that the contract provision is ambiguous, this argument is not persuasive.

Finally, the Union contends that the past contract provisions, under which these grievances arose and were disposed of, is not in the record. There is no indication that the language then existent is different from that under consideration in this proceeding.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 16th day of June, 2000.

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

WCH/gjc
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