

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 140

and

SPARTA MANUFACTURING COMPANY, INC.

Case 43
No. 58555
A-5827

(Donald Wagner Grievance)

Appearances:

Mr. Kevin Lee, Business Manager, Laborers' International Union, Local 140, appearing on behalf of the Union

Mr. Jeffrey Kilpin, Plant Superintendent, Sparta Manufacturing Company, Inc., appearing on behalf of the Company.

ARBITRATION AWARD

The Laborers' International Union of North America, Local 140 (herein the Union) and Sparta Manufacturing Company, Inc. (herein the Company) are parties to a collective bargaining agreement covering the period March 1, 1998, to February 28, 2001, and providing for binding arbitration of certain disputes between the parties. On February 15, 2000, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a denial of overtime pay allegedly due to Donald Wagner (herein the Grievant) and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on May 17, 2000. The proceedings were not transcribed and the parties did not file briefs.

ISSUE

The parties stipulated to the following statement of the issue:

Did the Company violate the contract when it failed to pay the Grievant for lost overtime while on suspension pursuant to the Company's drug testing policy?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

ARTICLE IV
HOURS OF WORK

Section 1.

(a) The workday shall consist of eight (8) hours. The work week shall consist of forty (40) hours.

Section 2. Overtime Provision

(a) Time and one-half (1) shall be paid for all time worked in excess of eight (8) hours in any one day or shift.

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OTHER RELEVANT LANGUAGE

DRUG AND/OR ALCOHOL TESTS REQUIRED

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B. REASONABLE SUSPICION

SPARTA MFG. CO. INC. WILL REQUIRE A URINE TEST AND/OR BREATH ALCOHOL TEST FOR AN EMPLOYEE WHEN THERE IS REASONABLE SUSPICION TO BELIEVE THAT AN EMPLOYEE IS USING A PROHIBITED DRUG AND/OR ALCOHOL IN VIOLATION OF THIS POLICY. HOWEVER, THE DECISION TO TEST WILL BE BASED ON A REASONABLE BELIEF FROM SPECIFIC PHYSICAL, BEHAVIORAL, OR PERFORMANCE INDICATORS OF PROBABLE USE. IF AN EMPLOYEE APPEARS TO BE UNDER THE INFLUENCE OF DRUGS AND/OR ALCOHOL, THE SUPERVISOR SHOULD, IF POSSIBLE, SECURE THE ASSISTANCE OF ANOTHER SUPERVISOR AND/OR UNION STEWARD OR A SENIOR BARGAINING UNIT EMPLOYEE IF UNION STEWARD NOT AVAILABLE, IN OBSERVING THE EMPLOYEE'S ACTION'S AND ESCORTING THE EMPLOYEE TO AN APPROPRIATE OFFICE OR AREA FOR FURTHER INVESTIGATION. IF, AS A RESULT OF THE INVESTIGATION, THE SUPERVISOR HAS REASONABLE CAUSE TO BELIEVE THAT THE EMPLOYEE IS IN A CONDITION THAT IS JEOPARDIZING WORKPLACE SAFETY OR CANNOT PERFORM HIS OR HER JOB BECAUSE OF ON THE JOB IMPAIRMENT, THE EMPLOYEE WILL BE REQUIRED TO SUBMIT TO A

URINE DRUG TEST AND/OR BREATH ALCOHOL TEST. THE SUPERVISOR AND/OR EMPLOYEE MAY REQUEST A UNION REPRESENTATIVE ACCOMPANY THE EMPLOYEE TO THE TEST SITE. HOWEVER, NEITHER SHALL BE PERMITTED TO IMPEDE THE TESTING PROCESS.

THE UNION REPRESENTATIVE WILL CONTINUE TO BE PAID DURING THE TIME REQUIRED TO ACCOMPANY THE EMPLOYEE, WAIT AT THE TEST SITE, AND RETURN TO WORK, IF HE WOULD OTHERWISE BE SCHEDULED TO WORK DURING THIS TIME.

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RANGE OF CONSEQUENCES

DISCIPLINARY ACTION TAKEN AGAINST AN EMPLOYEE FOUND TO USE ALCOHOL OR ILLEGAL DRUGS MAY INCLUDE THE FULL RANGE OF DISCIPLINARY ACTIONS INCLUDING TERMINATION. THE SEVERITY OF THE ACTION CHOSEN WILL DEPEND OF THE CIRCUMSTANCES OF EACH CASE AS FOLLOWS.

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2. REASONABLE SUSPICION

AN EMPLOYEE ASKED TO SUBMIT TO A URINE DRUG TEST AND/OR A BREATH ALCOHOL TEST AS A RESULT OF REASONABLE SUSPICION, WILL BE SUSPENDED UNTIL RESULTS ARE RECEIVED FROM MRO.

A. AN EMPLOYEE WITH A VERIFIED POSITIVE DRUG TEST WILL BE TERMINATED FROM EMPLOYMENT AT SPARTA MFG. CO. INC.

B. A EMPLOYEE WITH A BREATH ALCOHOL TEST THAT MEASURES 0.02 OR GREATER WILL BE GUILTY OF MISCONDUCT AND IS SUBJECT TO DISCIPLINE UP TO AND INCLUDING TERMINATION OF EMPLOYMENT AT SPARTA MFG. CO. INC. UNLESS THIS IS EMPLOYEE'S FIRST OR SECOND POSITIVE FOR ALCOHOL AND EMPLOYEE AGREES TO REHABILITATION PROGRAM ON PAGE 11 OR 12 OF THIS POLICY.

C. FAILURE TO APPEAR FOR TEST AND/OR FAILURE TO PROVIDE A SAMPLE, EMPLOYEE WILL BE TERMINATED FROM EMPLOYMENT AT SPARTA MFG. CO. INC. FAILURE TO RESPOND TO THE MRO'S INQUIRY TO CLARIFY TEST RESULTS WITHIN 72 HOURS OF THE MRO'S INITIAL CONTACT, EMPLOYEE MAY BE TERMINATED FROM EMPLOYMENT AT SPARTA MFG. CO. INC.

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BACKGROUND

Sparta Manufacturing Company has for some time instituted a Drug and Alcohol Free Workplace Policy designed to eliminate drug and alcohol use in the workplace. Under the policy, the Company may require an employe to submit to urine testing when it has reasonable suspicion that the employe is under the influence of alcohol or any prohibited drugs while at work.

The Grievant is a full-time employe at Sparta Manufacturing Company, Inc. and is a member of the bargaining unit. His regular shift is from 1:45 p.m. until 9:45 p.m., Monday through Friday, however, he also regularly works overtime during the week and on weekends. During the week he is instructed by his supervisor to work until production ends, which is typically around 10:30 p.m.

On January 11, 2000, at approximately 3:00 p.m., the Grievant was instructed to change the bags in the bag room. He did so and after about five minutes had to leave due to the amount of dust in the air. He went to the restroom and upon returning was told to report to his supervisor. His supervisor told him someone reported smelling marijuana smoke in the bag room shortly after the Grievant was there, that this constituted reasonable suspicion under the Company's drug and alcohol policy and that he would be required to submit to a test of his urine. The supervisor also told him that, pursuant to the policy, he would be suspended from work until the Company received test results, but if the results were negative he would be reimbursed for pay lost during the suspension.

On Saturday, January 15, the test results were returned, indicating that the Grievant had tested negative for drugs and he was immediately reinstated. Subsequently, he was paid eight hours of straight time for January 12, 13 and 14 and overtime for January 15, representing the time missed from work. He then filed a grievance based on his contention that he should also have been paid for overtime lost on January 12-14. The Company denied the grievance and the matter moved to arbitration. Additional facts will be included, as needed, in the Discussion section below.

POSITIONS OF THE PARTIES

The Union

The Union's position is that the Grievant is entitled to be compensated for all time lost from work while was suspended under the Employer's drug testing policy. The intent of the policy is that the employe should be made whole in cases where the drug test is negative. Here, the Grievant regularly worked overtime, yet was only compensated for eight hours per day of straight time when he returned. He is entitled to compensation for lost overtime, as well, at one and one half times his regular hourly rate.

The Company

The Company maintains that it followed the drug and alcohol policy as written. It further maintains that its practice in the past has been that employees are compensated for eight hours of straight time for days missed, whether for vacation, holidays or any other absence for which pay is allowed. The Company has never paid overtime for time missed and should not be required to do so here.

DISCUSSION

This case focuses on the implications of being tested under the Company's drug and alcohol free workplace policy. The policy gives the Company the authority to require an employee to undergo a urine screen whenever there is reasonable cause to believe the employee has been under the influence of alcohol or prohibited drugs while at work. The Union and the Grievant do not challenge the existence of reasonable cause to require the Grievant to submit to the test, therefore, I do not address that question. Rather, the question is to what extent must an employee be recompensed for time lost at work during the mandatory suspension awaiting the test results when the results are negative. All parties agree that the employee is entitled to back pay for lost work time. The question is whether that includes regular overtime.

As a starting point, it should be noted that the fact that the Grievant does work overtime on a daily basis is not seriously disputed. The Grievant testified that he worked 13.5 hours of overtime two weeks prior to the event, 8.75 hours of overtime the week prior to the event, 14.5 hours of overtime the week after the event and 13.5 hours of overtime two weeks after the event, averaging approximately 12.5 hours of overtime per week. He also testified that he has continued to work approximately the same amount of overtime since that time. The Company does not dispute these figures. The Company did compensate the Grievant for time missed on an overtime shift on Saturday, January 15, 2000, and he did work a full shift on January 10th.

There is a certain logic to the Company's position that daily overtime should not be compensable. Under the contract, whenever an employee misses a day of work, whether it be due to vacation, a holiday, a death in the family or any other reason for which leave is granted, the employee is paid eight hours of straight time for each missed day. When time is missed under the drug policy rules, the argument runs, assuming the employee has a favorable test result, the compensation for the missed day(s) should be the same. The Company points out that it has never paid other than straight time for missed work days for any reason and, therefore, it only followed a long standing practice when it did so here. Nevertheless, I find the circumstances of this case to be distinct from the cited examples.

When an employee misses work to go on vacation, or due to a holiday, or to attend the funeral of a loved one, those absences are to some degree a matter of choice. The employee has, for one reason or another, either bargained for a scheduled day off or elected to miss one or more days of work. A mandatory suspension pending the outcome of drug test results,

however, is initiated by the employer. The existing policy was apparently adopted unilaterally

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by the Company and was not bargained over. It gives the Company the discretion to determine if reasonable suspicion of drug or alcohol abuse exists and permits the Company, on that basis alone, to suspend an employe and require him to submit to a drug test. Whether or not an employe is suspended for an indeterminate period, therefore, is entirely up to the Company and is in no sense a choice by the employe.

Certainly, that is the case here. The record indicates that on the day in question, the Grievant went into the bag room at approximately 3:00 p.m. because he was instructed to do so. Later, he was told to report to the supervisor and was instructed to undergo a drug test because a foreman had smelled what he believed to be marijuana smoke in the vicinity of the bag house and assumed the Grievant had been smoking it. On that basis alone, the Grievant was suspended and was told that if the test was negative he would be compensated for any lost time. The drug test proved negative. Therefore, in no sense can it be said that the Grievant initiated the suspension or brought it about through any act or omission of his own.

Thus, while the Company's blanket policy of paying only eight hours of straight time regardless of the reason for the absence may appear on the surface to be even handed and reasonable, it is not so under the facts presented here. I am satisfied that if the Grievant had not been suspended he would have worked at least his average of 12.5 hours of overtime during the week of January 10, 2000. He was prevented from doing so only due to the suspension pending the results of the drug test. Given that the Company concedes that under its policy employes with negative drug tests are to be reinstated and compensated for lost time, and given that this representation was also made to the Grievant at the time, he should be made whole for all time lost while on suspension.

For all the foregoing reasons, therefore, and based upon the record as a whole, I hereby make the following:

AWARD

The Company violated the contract when it failed to compensate the Grievant for overtime which he would have worked, but for a suspension pending the results of a Company ordered drug test. The Company shall, therefore, subtract the number of hours of overtime for which the Grievant was paid during the week of January 10, 2000, from his weekly average overtime of 12.5 hours and shall pay to the Grievant the remaining hours at one and one-half times his regular hourly rate at the time.

Dated at Eau Claire, Wisconsin, this 7th day of September, 2000.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/ans

