BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**COUNCIL OF THE UNITED TEXTILE WORKERS OF AMERICA, LOCAL UNION NO. 78T, UFCW INTERNATIONAL UNION**

and

**VOITH FABRICS**

Case 3
No. 60803
A-5994

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Appearances:

**Mr. Mark McGinnis**, Attorney, Herrling, Clark, Hartzheim & Siddall, appearing on behalf of the Union.

**Mr. John Patzke**, Attorney, Brigden & Petajan, appearing on behalf of the Company.

## ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Union and the Company, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing was held in Appleton, Wisconsin on April 25 and May 30, 2002. A transcript was made of the hearing. The parties filed briefs on July 12, 2002, whereupon the record closed. Based on the entire record, the undersigned issues the following Award.

## ISSUE(S)

The parties were unable to stipulate to the issue(s) to be decided in this case. The Union frames the issues as follows:

1. Can the Company require or allow overtime hours for employees in a department when the department had positions eliminated within the last year and employees have recall rights based on realignment pursuant to Section 26(b) of the Agreement?

2. Is the Company required to provide employees in a different position based on a realignment as defined in Section 26(b) of the Agreement an opportunity to work overtime when offered in the employee's former position?

3. If the Company eliminates two weaving positions pursuant to Section 26(b) of the Agreement, can the Company have employees in a different position perform the job duties and job responsibilities of the two weaving positions that were eliminated?

The Company frames the issue as follows:

> Did Voith Fabrics violate the collective bargaining agreement on or about October 8, 2001 by assigning weaving duties to weave department utility operators while two weavers were on layoff pursuant to a realignment, and if so, what is the appropriate remedy?

Having reviewed the record and arguments in this case, the undersigned finds that the Company's wording of the issue is appropriate for purposes of deciding this grievance. Accordingly, the undersigned hereby adopts the Company's wording of the issue. The rationale for this decision is addressed in the Discussion section.

## PERTINENT CONTRACT PROVISIONS

The parties' 1999-2001 collective bargaining agreement contained the following pertinent provisions:

> ARTICLE II – MANAGEMENT FUNCTIONS
>
> Section 3. The management of the plant and the direction of the working force and of the affairs of the Company shall be vested exclusively in the Company as functions of management. Such functions of management include among others the following:
>
> (a) The rights to hire, transfer from one job to another, promote, and demote.

(b) The rights to suspend, discharge and lay off employees for legitimate reasons.

(c) The right to supervise the work of each employee, including the right to determine production schedules, and to assign individual jobs in each department.

(d) The right to establish reasonable rules and conditions for operating the plant and covering the conduct of employees in the plant, and to determine the times when shifts shall begin and end.

(e) The right to determine the product to be manufactured, the materials to be used, and the methods, processes, and equipment to be employed.

(f) The right to train Voith Group employees who are employed by a Voith Group company outside the United States, whose training may include actual operations within any department, provided that such employees do not displace employees of the Company.

(g) The right to select Company employees, at is sole discretion, for training, teaching, or other work-related activities, at other factories, schools or training centers, provided participation in such activities shall be voluntary for any employees selected.

The performance of such functions shall be subject to the terms and conditions of this contract.

. . .

ARTICLE VI – WAGES AND HOURS

. . .

Section 11(d) Overtime Distribution. It will be the policy of the Company to record, post, and equitably distribute overtime opportunities within each job classification in each department, during a calendar year, to trained employees, as determined by the Company, regardless of seniority, except as provided in the following paragraph.

Work on Sundays for departments normally scheduled to work eight (8) hour shifts will be on a voluntary basis, except for maintenance employees. For such employees Sunday voluntary overtime opportunities will be equitably distributed by job classification within each shift. For work to be performed on Sunday by maintenance department employees normally scheduled to work eight (8) hour shifts, the Company, when it deems it feasible, within its discretion, shall seek volunteers for such work before scheduling such employees for such work. Scheduling or allocation of work on Sunday for maintenance department employees shall not be subject to the grievance procedure.

. . .

ARTICLE XI – SENIORITY

Section 26. As to layoff or recall, seniority shall prevail. Seniority is defined as a person's length of service during any period of continuous employment with the Company. In the event that there is a reduction in the workforce or rehiring in any department and the Company lays off or fills a job based on other than seniority, the Union may, if it believes such determination to be erroneous, file a grievance thereon in accordance with the grievance procedure established under this contract. In the event that two people have an identical amount of seniority, a representative of the Company shall flip a coin in the presence of an officer of the Union to determine seniority as between the two people.

(a) Layoff – In the event of a reduction in the workforce, the person or persons with the least seniority in the bargaining unit will be placed on layoff. The person or persons, whose positions were eliminated by the reduction, will choose, by seniority, from the available positions vacated by the people laid off. A person, who has been forced into a position because of a layoff, shall be restored to his pervious position if open within one (1) year. After one (1) year, his new position shall be permanent.

Employees who are on layoff shall be called back, by seniority, before new employees, including summer help, are hire for such work.

Under no circumstances will people from outside the Maintenance Department be permitted to bump into Maintenance positions of grade "C" or above.

(b) Realignment – In the event positions are eliminated while the workforce remains the same, open positions will be posted and eliminated positions notified. Unfilled postings will be filled by seniority by those employees affected by the realignment.

A person, who has been forced into a position by a realignment, shall be restored to his previous position if open within one (1) year. After one (1) year, his new position shall be considered permanent.

(c) Re-organization - In the event shift assignments within a job classification are adjusted without any change in the total number of positions within that job classification, all positions in that job classification are to be considered vacant and such positions will be offered by seniority to those within that job classification until reorganization is complete.

. . .

ARTICLE XII – JOB POSTING

Section 33. Whenever a vacancy occurs or is about to occur in any job, the Company will post a notice of the vacancy on the main bulletin board from noon Monday until 4:30 p.m. on the following Friday. Any employee desiring to have the vacant job shall personally or through a union representative make a written application, in a form acceptable to the Company, to a supervisor or to the Human Resources Department prior to the expiration of the posting.

. . .

## BACKGROUND

A. Introduction

The Company manufactures press felts for the paper industry. The Union is the exclusive collective bargaining representative for the Company's production and maintenance employees at the Appleton plant. The employees involved here, LuAnn DeGroot and Rosemary LaCroix, are members of that bargaining unit.

B. Bargaining History

The following bargaining history is pertinent to this case.

The parties' 1994-99 collective bargaining agreement had a provision, Section 26, which dealt with layoffs. That section had six separate paragraphs. The paragraph pertinent here was the fourth paragraph which provided thus:

> A person who has bumped into a position in his department shall be restored to his previous position if the position is open within one year. After one year, his new position shall become permanent.

In 1997, the parties supplemented Section 26 of the aforementioned agreement with a two-page document entitled "Amendment 1 to Letter of Understanding dated 05/30/97." The paragraph pertinent here was the one which stated at the bottom of the first page and continued to the top of the second page. It provided thus:

> **A person who is laid off due to a lack of work in his occupation**, or a person who has bumped into a position as provided under this Section, shall be restored to their former position if the position becomes open within one (1) year. . .
>
> (Emphasis in original)

The next paragraph in that document provided thus:

> After one year, the person's new position shall be considered permanent.

. . .

In April, 1999, the Company laid off 15 employees. That layoff, and the resulting bumping, caused considerable disruption in the workplace.

. . .

In the fall of 1999, the parties negotiated a successor collective bargaining agreement. In doing so, they modified Section 26 (the layoff provision). The new language modified paragraphs 2, 3 and 4 of the previous layoff provision. The new language provided thus:

> (a) Layoff – In the event of a reduction in the workforce, the person or persons with the least seniority in the bargaining unit will be placed on layoff. The person or persons, whose positions were eliminated by the reduction, will choose, by seniority, from the available positions vacated by the people laid off. A person, who has been forced into a position because of a layoff, shall be restored to his previous position if open within one (1) year. After one (1) year, his new position shall be permanent.

> Employees who are on layoff shall be called back, by seniority, before new employees, including summer help, are hire for such work.
>
> Under no circumstances will people from outside the Maintenance Department be permitted to bump into Maintenance positions of grade "C" or above.
>
> (b) Realignment – In the event positions are eliminated while the workforce remains the same, open positions will be posted and eliminated positions notified. Unfilled postings will be filled by seniority by those employees affected by the realignment.
>
> A person, who has been forced into a position by a realignment, shall be restored to his previous position if open within one (1) year. After one (1) year, his new position shall be considered permanent.
>
> (c) Re-organization – In the event shift assignments within a job classification are adjusted without any change in the total number of positions within that job classification, all positions within that job classification are to be considered vacant and such positions will be offered by seniority to those within that job classification until reorganization is complete.

Sections 26(a) and (b) both specify, in pertinent part, that "a person, who has been forced into a position" (either by a layoff or a realignment), "shall be restored to his previous position if open within one (1) year." This language, specifically the reference to an "open" "position", was not new language. Instead, this language was contained in both the 1994 collective bargaining agreement and the document entitled "Amendment 1 to Letter of Understanding dated 5-30-97." Additional facts about the 1999 negotiations are set forth in the Discussion section.

In October, 2001, the parties negotiated a successor collective bargaining agreement to their 1999-2001 agreement. In those negotiations, neither side proposed any changes to Section 26.

C. Weave Department Operations

One of the departments in the plant is the weave department. There are seven classifications in that department: weaver, weave department utility operator, mechanic, loom technician, floor worker, warper, and draw and reed. The two positions involved in this case are the weaver and the weave department utility operator. Prior to June, 2001, there were 26 weavers in the department, with about one-third of them on each shift. There were four weave department utility operators, with about one on each shift.

The weaver position is considered one of the top bargaining unit positions. Most bargaining unit employees would prefer to be a weaver rather than a weave department utility operator because the weaver can earn more money. The weaver is paid on an incentive basis, while the weave department utility operator is not.

The basic job of the weaver is to weave. The Company tries to have weavers weave all the time. The weave department utility operators also have weaving in their job description, but it is not their only job duty. Weave department utility operators perform weaver, warper, and startup/floorworker duties. Thus, while weave department utility operators weave, they do not weave all of the time (the way weavers do). The amount of time that the weave department utility operators spend weaving varies from employee to employee and from month to month. Traditionally, though, weave department utility operators perform weaving duties about one-third of the time. Weaving work has traditionally been assigned to weavers ahead of the weave department utility operators.

D. Elimination of Two Weaver Positions

In June, 2001, Company officials decided that there was an overcapacity in the weave department due to lack of work. They further decided that this overcapacity was not temporary in duration. To remedy same, Company officials decided to eliminate two weaver positions. The two weavers who had their positions eliminated were LuAnn DeGroot and Rosemary LaCroix. They were the least senior weavers. Both employees subsequently received verbal and written notification from the Company that their weaver positions were being eliminated. Their written notification indicated that this action would occur on or before July 1, 2001. Their written notification further recited Sec. 26(b) of the collective bargaining agreement (the realignment provision), and indicated that there were two posted positions for which they could apply. This action was officially implemented on June 18, 2001. On that date, DeGroot and LaCroix moved into different jobs in the plant, namely the two posted positions: DeGroot was moved into a general services utility position and LaCroix was moved into a winder operator position in the needling department. This realignment was not grieved.

DeGroot and LaCroix lost income as a result of being forced out of their weaver positions. Both earn about $8.00 an hour less in their current positions than they earned when they were weavers.

Since the June, 2001 realignment occurred, neither DeGroot nor LaCroix has performed any work as a weaver (either during their regular work hours or when working overtime). Additionally, since the realignment occurred, no weaver positions have been posted or filled in the plant.

This was not the first time that the Company moved DeGroot out of the weave department into another department. One time when this happened previously, she was officially moved into the needling department. While she was in the needling department, she was sometimes temporarily assigned to work in the weave department as a weaver. When that happened, it was because there was no work for her to perform in the needling department, whereas there was in the weave department.

## FACTS

In the week ending June 18, 2001, DeGroot kept track of the number of hours that weave department utility operators spent weaving on her shift, and she recorded 52 such hours on her shift. In her view, the weave department utility operators were improperly performing her (weaving) job by doing that much weaving. Thereafter, she talked with Union's chief steward about her concerns.

The chief steward subsequently talked to the production superintendent about the amount of weaving work being done by the weave department utility operators. Union Exhibit 19 shows that in the month of June, 2001, the four weave department utility operators spent 240 total hours weaving.

In July, 2001, the Company laid off a weave department utility operator. This brought the number of weave department utility operators down to three.

Union Exhibit 19 shows that after that layoff occurred, the amount of hours that weave department utility operators spent weaving dropped. In August, 2001, they spent 204 total hours weaving. In September, 2001, they spent 87 total hours weaving. In October, 2001, they spent 53 total hours weaving.

On October 8, 2001, the Union filed the instant grievance. The grievance alleged that weave department utility operators were weaving at least 50% of the time. Building on that premise, the grievance contended that if there was that much weaving work for the weave department utility operators to perform, then the Company should bring "back one if not two" of the "weavers that are presently on layoff." The reference in the previous sentence to the two weavers "presently on layoff" was to DeGroot and LaCroix. This grievance essentially contended that the Company was using weave department utility operators as weavers. This grievance was not filed as an individual grievance by either DeGroot or LaCroix. Instead, it was filed by the Union as a union grievance.

After the grievance was filed, the weavers and weave department utility operators began working overtime. Prior to this, the weavers and weave department utility operators were not working overtime. Much of the overtime was worked on Saturdays. In the time

period between December, 2001 and April, 2002, they worked 15 or 16 of the 20 Saturdays. Twelve of those Saturdays were mandatory overtime and the other three or four were voluntary overtime. Each time overtime was worked on a Saturday, the employees worked six hour shifts, for a total of 18 hours between all three shifts. Since there were 24 weavers during this time period, with each one working six hours of overtime on Saturdays, the 24 weavers collectively worked 144 hours of overtime per week. At no time did the Company offer any of this overtime work to DeGroot or LaCroix.

## POSITIONS OF THE PARTIES

### Union

The Union contends that the Company violated the collective bargaining agreement by its actions herein. It elaborates on this contention with the following arguments.

The Union's case is premised on the position that while DeGroot and LaCroix worked in non-weaver jobs following the June, 2001 realignment, they were still officially weavers for one full year. According to the Union, Sec. 26(b) mandates that result. The Union interprets that provision to say that the Company should have treated DeGroot and LaCroix as weavers for one year following the realignment for all purposes, including overtime opportunities. That did not happen. Building on the premise just noted, the Union argues that the Company violated the collective bargaining agreement when it 1) assigned weaving work to weave department utility operators ahead of weavers DeGroot and LaCroix; 2) failed to recall DeGroot and LaCroix to open weaver positions in the weave department; and 3) failed to equitably distribute overtime opportunities in the weave department to weavers DeGroot and LaCroix. It makes the following arguments to support these contentions.

First, the Union responds to the Company's contention that it improperly expanded the scope of this grievance at the hearing. It avers it did not. In its view, the grievance which it filed on October 8, 2001 consisted of the following three parts: 1) the Company's failure to recall two weavers, DeGroot and LaCroix, back into the weave department; 2) the Company's failure to equitably distribute overtime to DeGroot and LaCroix following the realignment; and 3) the Company's assignment of work in the weave department to the weave department utility operators ahead of weavers DeGroot and LaCroix. It implies that a reading of the grievance makes this point self-evident. Building on this notion, the Union notes that at the hearing, it proposed three separate issues for determination by the arbitrator. It acknowledges that issues 1 and 2 both reference overtime. While the arbitrator's decision at the hearing was to not address those two issues (i.e. issues 1 and 2), the Union invites the arbitrator to do otherwise. It asserts that the arbitrator should address those overtime issues as part of his decision here "for purposes of efficiency, equity and to achieve a final decision." In the Union view, those issues (i.e. issues 1 and 2) "are ripe for decision, and it is in both parties' interest to fully and completely resolve all issues."

Second, the Union sees this case, in part, as a past practice case. Consequently, it makes the argument traditionally made in such cases, namely that a binding past practice exists which the Employer unilaterally changed. According to the Union, the Company's longstanding custom and past practice involved here has two parts. The first part is that weavers weave all the time and weave department utility operators weave only a portion of the time. The second part is that weavers have priority and preference over weave department utility operators in performing weaving work. As the Union sees it, this practice is clear and undisputed. Additionally, the Union maintains that this practice deals with working conditions, as opposed to a management function. The Union avers that the Company unilaterally changed that working condition when it had the weave department utility operators perform weaving work ahead of weavers DeGroot and LaCroix between June and October, 2001, and when it did not give weavers DeGroot and LaCroix preference and priority for that weaving work. The Union maintains that this action violated the parties' past practice, which in turn violated the collective bargaining agreement. To support that premise, it cites arbitral authority for the proposition that when practices are clear, undisputed and detailed, they are enforced by arbitrators. It asks this arbitrator to do that here.

Third, the Union contends that after DeGroot and LaCroix moved into different jobs following the June, 2001 realignment, their old weaver positions became "open" within the meaning of Sec. 26(b). The Union interprets the word "open" in that section to mean whenever work becomes available in the former position. According to the Union, the realigned weaver position became "open" in the fall of 2001 when there was no longer a shortage of weaving work. As the Union sees it, since the weaving work increased, that should have been sufficient to make at least one of the realigned weaver positions "open", and then either DeGroot or LaCroix should have been recalled to it.

The Union submits that the meaning just identified should be applied here for several reasons. First, the Union relies on the bargaining history for the parties' 1999 collective bargaining agreement. According to the Union, when the parties negotiated that agreement, they mutually intended the word "open" to mean whenever work was available. It cites the testimony of union negotiators to support that proposition. Second, the Union asserts that this is the meaning that has been applied in the past. To support that assertion, it notes that DeGroot was, on occasion, temporarily assigned to be a weaver in the weave department when she officially worked in another department. Third, the Union cites several arbitrators for the proposition that an employee with recall rights has the right to be recalled even when there is only temporary work in the position previously held by the employee.

Next, the Union contends that the Company violated Sec. 11(d) which requires the Company to equitably distribute overtime opportunities. According to the Union, the Company failed to do that here (i.e. equitably distribute overtime opportunities) because it did not offer DeGroot and LaCroix any of the overtime opportunities which were available in the weave department from December, 2001 to April, 2002.

Finally, the Union contends that what the Company is attempting to do here is get a result that it failed to obtain at the bargaining table. It asks the arbitrator to not allow that to happen.

The Union therefore asks that the grievance be sustained. In order to remedy the Company's contractual violation, the Union asks for the following economic damages for DeGroot and LaCroix. First, the Company should be required to provide them the same opportunities to work overtime as the employees still working in the department. Second, DeGroot and LaCroix should be compensated for the overtime opportunities between June, 2001 and June, 2002 which they missed. Third, DeGroot and/or LaCroix should be transferred back into their old weaver position(s) and be compensated for lost wages from June, 2001 to the date that they are reinstated as weaver(s). In addition, the Union asks the arbitrator to prohibit the Company from making unilateral changes to established working conditions and past practices.

**Company**

The Company contends its actions herein did not violate the collective bargaining agreement. It elaborates on this contention with the following arguments.

The Company initially addresses the issues which it believes are properly before the arbitrator for resolution. In its view, its wording of the issue accurately reflects the issue which is properly before the arbitrator for resolution. To support that premise, it notes that the instant grievance alleged that as of the week of October 8, 2001, the weave department utility operators were spending 50% of their time weaving; building on that premise, the Union asserted that if they were spending that much time weaving, then the Company should return one or both of the realigned weavers to the weave department to do that work. The Company submits that when the grievance was processed through the grievance procedure, that is how the issue was framed by the Union. The Company argues that at the hearing though, the Union improperly expanded the grievance to three other areas.

The first new area involved overtime work in the weaving department. According to the Company, overtime work in the weaving department was never raised as an issue in the processing of the instant grievance prior to arbitration, nor was it (i.e. overtime work) ever discussed by the parties as part of the grievance process. The Company asserts that the first time the Union raised an overtime work issue, in the context of this case, was on the first day of the arbitration hearing. The Company maintains that was inappropriate, and that the arbitrator was correct to disallow the overtime issue to be decided as part of this case. To support this notion, the Company notes that arbitrators routinely thwart efforts to expand arbitration issues beyond those addressed in the earlier steps of the grievance procedure.

The Company asserts that the Union's efforts to improperly expand the scope of this grievance were not limited to just its efforts to include the overtime issue. As the Company sees it, the Union also attempted to transform the grievance from objecting to the Company's failure in not ". . .bringing back 1 if not 2 weavers that are presently on lay off", to an assertion that the realigned personnel actually remained weavers after the realignment and should have been and should be entitled to perform all weaving work performed by weave department utility operators. The Company avers that just as it was improper for the Union to bring up a new issue regarding overtime, it was also improper and inappropriate for the Union to make this new allegation regarding the status of realigned weavers for the first time at the arbitration hearing.

Third, the Company argues that during the course of the hearing, the Union improperly attempted to incorporate individual grievances of DeGroot and LaCroix into the instant Union grievance. To support this notion, it notes that during the arbitration proceedings, the Union solicited testimony from LaCroix and DeGroot as to how the instant Union grievance incorporates their individual grievances, as well as personal monetary remedies to which they believe they are entitled. The Company avers that if either employee had wanted, they could have filed an individual grievance. However, they did not. In the Company's view, whether it was their choice not to file an individual grievance or on advice of the Union is irrelevant. The Company submits that their individual claims are not properly before the arbitrator for disposition, and therefore any remedy which the arbitrator may order should not include individual relief. The Company therefore asks the arbitrator to limit his decision to the issue it identified, and not to address and/or decide all the issues which the Union asks the arbitrator to decide.

Next, building on the notion just identified, the Company avers that the arbitrator need not consider much of the record evidence in this case because it is not relevant to the issue which is before him. In the Company's view, substantially all of LaCroix's and DeGroot's testimony has no relevance to this issue. The Company contends that the same point applies to the record evidence concerning overtime work, and comparisons between work performed at the time of the June, 2001 realignment and work performed sometime between January and April, 2002. According to the Company, all that evidence involves matters outside the scope of the arbitrator's ruling. The Company therefore maintains that what has transpired since November, 2001 is not relevant to disposition of this grievance.

Having expressed the views just noted about the issues and evidence which the arbitrator should address, the Company next offers the following summary of this case. The Company sees this case as being an effort by the Union to infringe on its management right to control staffing. It asks the arbitrator to not infringe on that right. Additionally, it emphasizes that this is not a case of removing work from the bargaining unit; all of the work at issue has been and continues to be performed by bargaining unit personnel (specifically, the 24 persons

in the position of weaver and three persons in the position of weave department utility operator). It elaborates as follows.

First, the Company responds to the Union's contention that LaCroix and DeGroot were still weavers when the grievance was filed. The Company's position is that the Union's proposition that the two realigned weavers remained weavers for the year period following realignment for all purposes, including overtime opportunities, is without merit. As the Company sees it, it is clear from the first phrase in Section 26(b) that realignment occurs only when a position is eliminated. The Company cites a dictionary definition of "eliminate" for the proposition that it means to get rid of, remove or eradicate. The Company asks rhetorically if one's job no longer exists, how can one continue to hold that job? The Company answers that rhetorical question by saying they cannot. Additionally, the Company submits that the Union presented no evidence that the Company has ever recognized any person as having continued to hold a particular job after that job has been eliminated.

Next, the Company avers that Section 26(b) does not have the meaning given it by the Union. The Company first contends that if it did, the Union's interpretation would limit management's right to determine staffing. The Company submits that if that was the parties' intent (i.e. that they intended to compromise the Company's management right to determine staffing), it would, at a minimum, have been aware of same, and it was not. Second, the Company argues that the Union's suggestion that Section 26(b), particularly due to the phrase "open position", creates some obligation on the part of management to restaff positions which were realigned when certain conditions exist, such as increase of work or retirement of personnel, defies logic. According to the Company, it defies logic because the labor agreement does not establish any parameters as to what conditions must exist which would require restaffing. The Company asserts that it is impossible to believe that the parties would have negotiated such a serious limitation to management rights in such an open-ended manner, without any implementing language whatsoever. Third, the Company maintains that the lack of parameters to the Union's proposed interpretation of "open position" is evident by its own inability to articulate when a position becomes "open". Given the foregoing, the Company asserts that the more logical explanation is what it offered at the hearing: namely, that an open position is a position which the Company has decided to create or fill. Applying that definition of the word "open" to the instant facts, the Company avers that there have been no open weaver positions since the June, 2001 realignment, and there certainly was no "open" position at the time of the grievance.

To support the contention just noted that there was no "open" position at the time of the grievance, the Company cites the following statistics. It notes that while the grievance alleged that the weave department utility operators were weaving 50% of the time, the Company maintains they were actually weaving less than 25% of the time. According to the Company, weave department utility operators spent an average of 26% of their time in September, 2001

weaving and 16% in October, 2001. The Company maintains that assuming a 170 hour work-month, such is not full-time for even one person.

Finally, the Company believes that the Union's position in this case is not supported by past practice either. In the Company's view, there is no evidence as to past practice in the application of Section 26(b) or any of the terms or phrases used in that section which might limit the Company's actions related to this grievance. It elaborates on this contention as follows. First, it notes that since the Union is only arguing that weaving duties done by weave department utility operators were not properly reassigned to LaCroix or DeGroot, its argument that past practice dictates that weavers get weaving work before weave department utility operators is without merit simply on the basis that LaCroix and DeGroot were not weavers at the time in question. Second, the Company asserts that the Union's argument regarding past practice also fails on more fundamental levels. It asserts that factually, it is impossible to establish with any precision what the relationship has been between weaving work assigned to weavers and that assigned to weave department utility operators. To support that premise, it submits that a review of weaving hours worked by weavers and weave department utility operators just for the short time between October, 2000 and June, 2001 reveals that the number of weaving hours has varied greatly in each job. For example, in some months, weave department utility operators spent half of their time weaving, while in other months, weave department utility operators spent just a third of their time weaving. According to the Company, this is hardly an indicator of any clear past practice. Third, the Company calls attention to the fact that both weave department utility operators and weavers have weaving work in their job description, and that both have performed weaving work on a greater or lesser basis through the years. The Company asserts that as long as employees are paid in accordance with the terms of the labor agreement, it is free to assign weaving duties to whomever it wishes – either weave department utility operators or weavers – regardless of what it has done in the past.

Given the foregoing, the Company believes it did not violate the collective bargaining agreement by its actions herein. It therefore asks that the grievance be denied.

## DISCUSSION

### A. Structure of this Discussion

I begin with a description of how this discussion is structured. Attention will be focused first on the scope of this decision. Next, the focus turns to the contract language cited by the parties. After that contract language has been reviewed, attention will be given to certain evidence external to the agreement. The evidence I am referring to involves the parties' bargaining history and an alleged past practice.

B. Scope of this Decision

At the start of the hearing, the Union presented three issues to be decided:

**Issue No. 1:** Can the Company require or allow overtime hours for employees in a department when the department had positions eliminated within the last year and employees have recall rights based on realignment pursuant to Section 26B of the Agreement?

**Issue No. 2:** Is the Company required to provide employees in a different position based on a realignment as defined in Section 26B the Agreement an opportunity to work overtime when offered in the employee's former position?

**Issue No. 3:** If the Company eliminates two weaving positions pursuant to 26B of the Agreement, can the Company have employees in a different position perform the job duties and job responsibilities of the two weave positions that were eliminated?

Issues 1 and 2 above deal with overtime work. The Company objected to them as being beyond the scope of the original grievance and beyond what the parties addressed in the grievance procedure. I agreed with the Company on this point and ruled that the scope of the hearing was to be limited to Issue 3 above because that was the subject matter which was referenced in the October, 2001 grievance. In accordance with that ruling, I will not answer Issues 1 and 2 as worded above. However, this decision is not silent on the matter of overtime. In drafting the decision, I found it necessary to discuss same because it was subsumed into the Union's argument that DeGroot and LaCroix kept their weaver classification for all purposes, including overtime opportunities, for one year following the June, 2001 realignment. Consequently, I have addressed overtime to the extent I felt it was necessary. Another contention which I find subsumed into the Union's argument is that DeGroot and LaCroix remained weavers for one year following the June, 2001 realignment. That contention is addressed and decided herein. Finally, with regard to Issue 3 above, while the Union's wording of that issue is similar in meaning to the Company's, I adopted the Company's wording of that issue rather than the Union's. The reason I did so was because the Company's wording of the issue includes the standard question asking whether the Company violated the collective bargaining agreement, while the Union's wording of the issue did not. A final comment is in order about the word "layoff" which is used in that issue. While the word "layoff" is used in the phrase "two weavers were on layoff", it is noted that the two employees were not laid off in the traditional sense. By that, I mean that they did not have their employment totally temporarily severed by their "layoff". Instead, following the June, 2001 realignment, they moved into different jobs elsewhere in the plant. Thus, in this case, the word "layoff" refers to the fact that two employees were moved from weaver jobs to different jobs.

Having so found, the basic question to be answered is whether the Company violated the collective bargaining agreement by its action herein. The Union contends that it did while the Company disputes that contention. I answer that question in the negative, meaning that the Company did not violate the collective bargaining agreement by its actions herein. My rationale follows.

C. The Contract Language

The first contract provision relied on by the Company is the Management Rights clause which is found in Article 2. In that clause, the Company retains those rights which are not bargained away or limited by the collective bargaining agreement. The first sentence of that clause says that "the management of the plant and the direction of the working force. . . shall be vested exclusively in the Company as functions of management." Among the functions which management specifically retains are the right to "transfer from one job to another", and the right "to assign individual jobs in each department." This language can certainly be read to give management the operational right to determine staffing levels and to assign work to employees and job classifications.

The next question, contractually speaking, is whether any restriction or limitation is imposed on management's right to determine staffing levels and assign work. There is not. Some collective bargaining agreements do that via contract provisions that specify which job classification performs which work, how many employees will be assigned in various job classifications, and how many employees in those job classifications will work on each shift. A review of this collective bargaining agreement indicates that it contains no such language. Specifically, there is no contract provision herein which specifies which job classification performs weaving work, how many weavers or weave department utility operators the Company will employ, how many weavers or weave department utility operators will work on each shift, or how much weaving work can be done by the workers in those classifications. Given that contractual silence, the management rights clause controls, and gives management the right to make those decisions. Under this contract then, management can assign weaving work as it sees fit.

The Union essentially ignores the management right just referenced, and relies instead on two contract provisions which have yet to be reviewed. Those contract provisions will be addressed next.

One contract provision which the Union relies on is Sec. 11(d). That provision provides in pertinent part that the Company will "equitably distribute overtime opportunities within each job classification in each department. . ." The Union contends that the Company violated that provision when it did not offer DeGroot or LaCroix the opportunity to work any of the overtime which was available to the weavers. This contention is obviously based on the

premise that DeGroot and LaCroix were still weavers when the overtime work was available. Building on that premise, the Union avers that, as weavers, they were entitled to their equitable share of the available overtime. It suffices to say here that I do not accept that premise. The rationale for this finding will be elaborated on in the discussion concerning Sec. 26(b). That discussion comes next.

Another contract provision which the Union relies on (to support its position) is Sec. 26(b). In its view, that provision requires the Company to treat DeGroot and LaCroix as weavers for one year following the June, 2001 realignment for all purposes, including overtime opportunities. The Company disputes that interpretation. Given that disagreement, I have to decide how Sec. 26(b) will be interpreted.

I begin my analysis of Sec. 26(b) with the following overview of same. Since that subsection is entitled "Realignment", the logical starting point for purposes of discussion is to ask rhetorically what is a realignment? The answer is found in the phrase which immediately follows the word "realignment" in the title, namely the phrase which begins: "In the event positions are eliminated while the workforce remains the same. . ." Reading this phrase together with the word "realignment" which precedes it, this section establishes that a "realignment" occurs when "positions are eliminated while the workforce remains the same." A review of this section indicates that it does not limit realignments to situations in which there is a reduction in the amount of work performed in the Company. Additionally, this section does not spell out when the Company can implement a realignment. Instead, it gives the Company the right to realign the workforce if it chooses to do so, and creates a mechanism for doing it. That being said, the entire section is predicated on a certain precondition occurring. The precondition is that a position is eliminated by the Company. If that precondition occurs (i.e. that a position is eliminated), then the second paragraph specifies what happens next: the affected employee moves into a different position. However, if that precondition does not occur (i.e. if a position is not eliminated), then Sec. 26(b) does not apply. The second paragraph of Sec. 26(b) then goes on to specify that if a certain act which will be identified and discussed later occurs, the employee "shall be restored to his previous position." I interpret this to mean that the employee who is realigned from one position to another has recall rights to their previous position if a certain situation arises. The certain situation just referenced is this: if the realigned position becomes "open within one (1) year." If that occurs, and the realigned position becomes "open" at any point within one calendar year from the date of the realignment, then the employee who was realigned "shall", in the words of the second paragraph, "be restored to his previous position." What this means is that the realigned employee does not have to go through the posting process again to get the "open" position. Instead, they simply move into it. A final comment is in order. The recall rights just referenced apply only if the realigned position officially becomes "open". That formality has to occur. If it does not, meaning that the realigned position does not officially become "open", then the employee has no recall rights to it (i.e. their old realigned position).

Having given that overview of Sec. 26(b), it will now be applied to the record facts. I begin my analysis with what I consider the easy part. As has already been noted, that section is predicated on a certain precondition occurring, namely a position being eliminated. A common dictionary definition of eliminate is to get rid of or remove. That is exactly what happened to the weaver jobs DeGroot and LaCroix held on June 18, 2001. Their weaver positions were, in fact, eliminated. On that date, the Company went from having 26 weavers down to 24. DeGroot and LaCroix then moved into different jobs elsewhere in the plant because their weaver jobs no longer existed.

The next part of my analysis addresses the crux of this dispute, and quite frankly, the hard part. The Union avers that after DeGroot and LaCroix moved to different jobs following the June, 2001 realignment, they kept their weaver classification for all purposes, including overtime opportunities, for one calendar year. Thus, in the Union's view, they were still officially weavers during that one year period even though they were then working in non-weaver jobs. While my initial reaction is to say that DeGroot and LaCroix were not weavers following the realignment because they worked in other non-weaver jobs, the Union's proposed interpretation cannot be so easily dismissed. The reason is this: two parts of Sec. 26(b) can plausibly be read to support that interpretation. The following shows this. First, as was noted in the overview of Sec. 26(b), the second paragraph of that section does say that the employee who is realigned has recall rights to their realigned position if it becomes "open" within one calendar year. While the question of whether the realigned position became "open" will be addressed later in this discussion, it is sufficient to say here that the Union believes that it did, in fact, become "open". If that was the case, then one or both of the realigned employees should have been restored to a weaver position. Second, the last sentence of the second paragraph of Sec. 26(b) says that "after one (1) year, this new position shall be considered permanent." While this language does say that the employee's new position becomes their permanent position after one year, it does not say what happens in the interim (i.e. before the one-year period ends). The Union infers from this sentence that the realigned employee keeps their old classification for all purposes, including overtime opportunities, for one calendar year. Both of these points are subsumed into the discussion which follows.

The focus now turns to the Union's contention that after DeGroot and LaCroix moved into different jobs following the June, 2001 realignment, their old weaver positions became "open", at which point the Company should have placed them back into them (i.e. their old weaver positions). Knowing that its case is built on the premise that the two realigned employees were still weavers, the Union proposes a definition of the word "open" that is, to say the least, expansive. The Union interprets the word "open" to mean anytime when work is available in the former position, and it asks me to so find. I conclude that expansive meaning of the word "open" lacks a contractual basis, and therefore will not be applied herein. Here's why. When the parties drafted Sec. 26(b), they did not define the word "open", or say who gets to determine when a position is "open". Given that contractual silence, the threshold

question is who gets to make that call. Rhetorically speaking, is it the Union, the affected employees, or the Company that makes that call? It is a well-accepted arbitral principle that the Company gets to make that call; it decides if a vacancy exists. It is also a well-accepted arbitral principle that a vacancy is an open position which the Company decides to fill. If the Company decides to fill the open position, it posts the vacancy. If the Company decides to not refill a position which was formerly filled, then it does not post it. In this case, there was no posting for a weaver position following the June, 2001 realignment. Since there was not, officially there was no "open" weaver position. That was the Company's call to make.

A big part of the Union's case was trying to show that there is no longer a shortage of weaving work. The Union avers that following the June, 2001 realignment, the amount of weaving work increased. Building on that premise, the Union alleges that this increase in the amount of weaving work should have been sufficient to make at least one of the realigned weaver positions "open", and then either DeGroot or LaCroix should have been recalled to it. For the purpose of discussion, it is assumed that following the June, 2001 realignment, the weaving work increased. However, even if that happened, it is of no contractual significance. The reason is this: it has previously been noted that management retains, via the Management Rights clause, those rights which are not bargained away or limited by the collective bargaining agreement. In this case, there is nothing in Sec. 26(b), or elsewhere in the contract for that matter, that either explicitly or implicitly requires the Company to refill or restaff positions or levels of positions when there is an increase in work. An obligation like that to refill or restaff positions when there is an increase in work requires affirmative language in the contract because it is a limitation on an important management right. There is no such language in this contract. That being so, management has no obligation here to refill or restaff positions when there is an increase in work. Consequently, even if there was enough weaving work in this instance to permit the Company to temporarily place a person who had been realigned from a weaver position back into a weaver position within one year of the realignment, the Company was not required to do so.

As a practical matter, the decision just reached disposes of two other contentions raised by the Union. First, it disposes of the Union's argument that the Company did not equitably distribute weave department overtime to DeGroot and LaCroix. As was noted earlier in this discussion, Sec. 11(d) requires the Company to equitably distribute overtime to the workers in the affected classifications. Insofar as the record shows, the Company did that here. While the Company did not offer DeGroot and LaCroix any of that overtime, it did not have to do so. In fact, if it had done so and cut them in on the overtime when they were no longer working in the weave department, the other weavers would have probably cried foul. Since neither realigned weaver position was ever determined by the Company to be "open", neither DeGroot nor LaCroix was contractually entitled to work any of the overtime work which arose in the weave department following the June, 2001 realignment. At that point, they were no longer weavers, so they were not entitled to work any weaver overtime. Second, the decision reached

above also disposes of the Union's argument that any time there is any weaving work which could not be performed during normal work time by the other weavers, no matter how small, such weaving work should have been temporarily assigned to DeGroot and LaCroix. Once again, following the June, 2001 realignment, DeGroot and LaCroix were no longer weavers. Hence, they were not entitled to perform weaving work. While DeGroot had previously been temporarily assigned to work in the weave department as a weaver while officially assigned to another department, that particular work assignment did not obligate the Company to do so here. Once again, under this contract, management has the right to make temporary work assignments as it sees fit. It can assign weaving work to whomever it wants.

D. Bargaining History

I further find that the parties' bargaining history supports the interpretation of Sec. 26(b) noted above. Bargaining history is a form of evidence arbitrators commonly use to help them interpret contract language and ascertain the parties' intent regarding same.

While the witnesses certainly did not agree about all of the bargaining history concerning Sec. 26(b), there was general agreement on the underlying reason that Sec. 26(b) came to be part of the contract. It was this: the parties recognized that when an employee lost their job due to a realignment, the Company lost an employee that was fully trained and experienced in that job. If the Company subsequently decided to refill that job, the employee who formerly held that job could certainly bid for it pursuant to the posting procedure, but might not get it due to their lack of seniority. In order to avoid this scenario (i.e. the realigned employee bidding for the job but not getting it because of their lack of seniority), and to take advantage of the employee's training and experience in that job, the parties agreed to language which, as already noted, says that if the realigned position subsequently becomes "open" within one year, then the employee who was forced out of the position by the realignment would be "restored" to their previous position.

When the parties drafted Sec. 26(b), they obviously drafted some new contract language. However, the part of the language pertinent here (namely, the word "open"), was not new. That word was contained in Sec. 26 of the parties' 1994 collective bargaining agreement. It was also contained in the document entitled "Amendment 1 to Letter of Understanding dated 05/30/97." Since the word "open" was contained in both those documents, it is logical to assume that it had the same meaning there as it does here. In other words, its meaning continued unchanged. As for its meaning, the parties' bargaining history for those documents (i.e. the 1994 collective bargaining agreement and the 1997 letter of understanding) does not show that the parties discussed, much less agreed on, a particular meaning for the word "open". That does not matter though. The reason is this: since the word "open" is not defined in the contract, the Company gets to decide whether and when a position is open. Said another way, the Company decides if a vacancy exists and when it is

filled. This is not atypical in labor relations; it is the norm. Additionally, there is no evidence in the record that the Company ever recognized any employee as continuing to hold a particular job after that job was eliminated.

According to the Union, when the parties negotiated the 1999 collective bargaining agreement, they intended the word "open" to mean whenever work was available. I conclude that even if that was the Union's intent, and that it was the way the Union wanted the word "open" to be defined, that does not make it the meaning which will be applied here. Here's why. When arbitrators use bargaining history to help them ascertain the parties' intent, what they rely on is a manifested intent (i.e. what the parties directly communicate to each other about their understandings of a proposal); not undisclosed intent. In this case, it is not clear that the Union's proposed definition of "open" (i.e. meaning whenever work was available), was told to the Company's negotiators. That being so, Company negotiators did not agree to that particular meaning for the word "open". It can therefore be said with absolute certainty that when Sec. 26(b) was agreed on, the parties did not mutually contemplate that the word "open" in that provision meant whenever work was available. Given the foregoing, I find that the bargaining history does not show that the parties mutually adopted a meaning for the term "open" that meant whenever work was available.

E. Past Practice

Finally, the focus turns to the Union's past practice argument. As the Union sees it, the Company has a past practice of assigning weaving duties to weavers before assigning such work to weave department utility operators. Building on that premise, the Union argues that the Company failed to follow that practice when it allowed weave department utility operators to weave after two weaver positions were eliminated in the June, 2001 realignment. It asks the arbitrator to find that practice binding and enforce it.

Before addressing the threshold question of whether there is or is not an applicable past practice, it is noted at the outset that past practice is primarily used or applied in the following circumstances: (1) to clarify ambiguous language in the parties' agreement; (2) to implement general contract language; (3) to modify or amend apparently ambiguous language in the agreement; or (4) to establish an enforceable condition of employment where the contract is silent on the matter. What is unique about the fourth category just noted is that it does not involve contract language *per se*, while the other three categories do. In this contract, there is no language which deals with weaving work in general, or even more specifically, which limits how much weaving work the weave department utility operators can do. That being so, circumstances (1), (2) and (3) above are inapplicable here. This is because there is no contract provision that the alleged "practice" is suggested as clarifying (#1), implementing (#2), or modifying (#3). Consequently, this is a category (4) case since the Union seeks to have the alleged "practice" concerning who does weaving work supplement the contract so as to be

binding on the parties and become an enforceable condition of employment. In situations such as this where a party wishes to clothe a course of conduct with contractual status, that practice must reflect as many elements of the contract as possible. Simply put, the practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future.

In this case, there is no dispute that the weavers have traditionally done weaving work ahead of the weave department utility operators. There is a simple reason for this: the primary job of weavers is to weave, while weaving is not the primary job of the weave department utility operators; they do other work as well.

That being said, the question in this case is whether the fact just noted (namely, that weavers have historically done weaving work ahead of the weave department utility operators) is sufficient to establish a binding past practice which is entitled to contractual enforcement. I find it is not. The Union's underlying theory that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a binding past practice, particularly when the pattern of conduct arises from the exercise of a management right. That is precisely the case here. What happened previously concerning the assignment of weaving work was not the result of bargaining with the Union, but rather was the Company's unilateral act. The Company had previously decided that weavers do weaving work ahead of the weave department utility operators. That was their right. The Company had the right to make that decision because it reserved to itself, via the Management Rights clause, the right to manage and control the assignment of work. As previously noted, there is nothing in this contract that specifies which classification does what work. Some contracts do, but this contract does not. More to the point, this contract does not limit how much weaving work the weave department utility operators can perform. Additionally, this contract does not say that management has to assign weaving work to weavers ahead of weave department utility operators. This means that previous decisions concerning who does weaving work were the product of management prerogatives. Said another way, they arose from the exercise of a management right.

Since all previous instances of weavers doing weaving work ahead of weave department utility operators resulted from the Company exercising its management right to assign work, the Union had the burden of showing that the Company knowingly waived its management right to assign weaving work and agreed to assign weaving work in the future exactly as it had done in the past. It did not do so. Therefore, the Company has not waived its management right to assign weaving work as it sees fit.

The Union attempts to dodge the bullet just referenced (namely, management's right to assign weaving work as it sees fit) by characterizing the "practice" here as involving a working condition. That contention is unpersuasive.

Aside from the points just made, there is yet another problem with the Union's past practice argument. It is this: the Union's past practice argument is built, of course, on two premises. The first premise is that the Company changed the existing "practice" of assigning weaving work to weavers ahead of weave department utility operators when it failed, in this instance, to assign weaving work to weavers ahead of weave department utility operators. The second premise is that DeGroot and LaCroix were still weavers following the June, 2001 realignment and the elimination of their weaver positions. Even if I accepted the first premise (i.e. that the Company changed the "practice" of assigning weaving work to weavers ahead of weave department utility operators), I do not accept the second. I have previously found that notwithstanding the Union's contention to the contrary, DeGroot and LaCroix were not weavers following the June, 2001 realignment because the Company never subsequently determined that their former positions were "open". That finding is fatal to the Union's past practice argument.

F. Summary

In sum then, it is held that the work assignments involved herein pass contractual muster. Hence, no contract violation has been found.

Any matter which has not been addressed in this decision has been deemed to lack sufficient merit to warrant individual attention.

In light of the above, it is my

**AWARD**

That Voith Fabrics did not violate the collective bargaining agreement on or about October 8, 2001 by assigning weaving duties to weave department utility operators while two weavers were on layoff pursuant to a realignment. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 16th day of September, 2002.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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