BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

V.P. BUILDINGS, INC.

and

UNITED STEELWORKERS OF AMERICA, LOCAL 9435

Case 1
No. 64972
A-6175

Appearances:

Frank Gumina, Esq., Wessels & Pautsch, P.C., Attorneys at Law, 330 East Kilbourn Avenue, Suite 1475, Milwaukee, Wisconsin 53202, appeared on behalf of the Company.

William Breihan, Representative, United Steelworkers of America, Local 9435, 1126 South 70th Street, Suite S106A, West Allis, Wisconsin 53214, appeared on behalf of the Union.

ARBITRATION AWARD

On July 18, 2005, V.P. Buildings and Local 9435 of the United Steelworkers of America filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of the Commission's staff, serve as a grievance arbitrator to hear and decide a dispute pending between the parties. A hearing was conducted on August 15, 2005 in Evansville, Wisconsin. No formal record was taken. Post-hearing briefs were filed and exchanged by October 6, 2005. Reply briefs were waived by letter received October 13, 2005.

The parties stipulated the following issue:

> Has the Company violated the Labor Agreement by allowing Production Leaders to continue to perform bargaining unit work while bargaining unit employees are on mandatory layoff?

BACKGROUND AND FACTS

V.P. Buildings is a manufacturer of pre-fabricated steel buildings with production facilities in five states. The approximately 130 production employees of the Evansville,

Wisconsin facility are represented by the United Steelworkers of America. The Wisconsin operation competes for work with competitors and with other production facilities of the Company. V.P. has 9 Production Leaders (P.L.'s) in its Evansville operation. P.L.'s are responsible for safety, production, quality, production scheduling, and discipline. They perform a good deal of paperwork.

The union was certified to represent the bargaining unit in 1997. At the time the P.L.'s were excluded from the unit. In the first round of negotiations between the parties the Union again sought, unsuccessfully, to have the P.L.'s included in the unit. Having failed to include the P.L.'s in the unit, the Union brought its work jurisdiction concerns to the bargaining table, and the parties negotiated Sections 9.3 and 9.4, which are set forth below. The provisions found in the current agreement are those originally bargained.

During the first few years of the parties' relationship, there were relatively few mandatory layoffs. Temporary workforce reductions were handled by volunteer layoffs. During these periods the P.L.'s worked. In approximately 2002 the incidence of mandatory layoffs increased significantly. At one point 140 of 160 bargaining unit employees were on layoff. The Union filed a grievance challenging the Company's use of P.L.'s in production capacities while bargaining unit employees were on layoff. It was the essential claim of the Union that bargaining unit members could have been performing the bargaining unit work then being performed by P.L.'s. The Company responded by denying the grievance, and pointing out the reasons P.L.'s were assigned production work. In what it characterized as an act of sensitivity to the contentious nature of the issue, the company pulled the P.L.'s from the floor. As production increased the Company advised the Union that the P.L.'s would be sent back to the floor and explained the productivity advantages of doing so.

The grievance was subsequently held in abeyance to permit a Company survey of the P.L.'s to determine how many hours of bargaining unit work they performed over time. The survey had the Production Leaders self report bargaining unit hours worked over the period July 5- Sept. 27, 2002. The result of the survey was that the P.L.'s reported a modest number of bargaining unit hours worked. The number ranged from an average of 2.8/week to 6.1/week. 9 P.L.'s reporting over a 13 week span reported 1-20 hour week, 3-16 hour weeks, 3-15 hour weeks, and 8 weeks of 10 –14 hours. Most weeks and most P.L.'s reported very modest numbers of bargaining unit hours worked. The Union was skeptical of the reported data.

The grievance was ultimately withdrawn or abandoned.

In the negotiations leading to the current collective bargaining agreement (2004 – 2007) the Union proposed that "Production leaders will not work at any bargaining unit job while any member of the bargaining unit is on layoff." The Company proposed that there be no restrictions on how much and when Production leaders could perform bargaining unit work. Both proposals were dropped, leaving the *status quo* intact.

In January, 2005, during a period of mandatory layoff, the Union filed the grievance that has led to this proceeding. In its answer denying the grievance the Company pointed to the bargaining history of proposed, and dropped, modifications of the contract, to its enforcement of the 50% provision, to the fact that P.L.'s had been performing production work during periods of mandatory layoff, without objection from the Union, and to the production formula that ties manpower levels to production. In subsequent exchanges the Union claimed that maximum efficiency was achieved by having people who knew the jobs best perform them. The Company noted that there are times when Production Leaders are on layoff while bargaining unit members are working on projects of short duration.

A number of witnesses testified that P.L.'s performed bargaining unit work while bargaining unit employees were on layoff. The most precise testimony came from John Mauerman, a materials handler in the Shipping Dept. Mauerman testified that his P.L. performed bargaining unit work for an average of 3-4 hours per day during the period of layoffs. He testified that such work could have been performed by employees on layoff. He further indicated that prior to the layoffs the P.L. had performed unit work for an average of approximately 3 hours per day.

Paul Neuman, Plant Manager, testified for the Company. It was his testimony that the company staffed the plant according to a formula, driven by what management regards as Productivity Drivers. Each project is rated as to how many hours of work per ton is allocated to secure work and fabricate buildings. Once the tonnage of the project is identified simple division is used to staff the plant. Hours of the Production Leaders are treated as a constant. It was Neuman's testimony that the bits and pieces of work complained of would not result in recall of laid off employees. Neuman also testified that having the P.L.'s on the floor actually increased the efficiency of the operation, which assisted in securing work.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 9
ASSIGNMENT OF WORK

9.3 Supervisory personnel may perform bargaining unit work in the following cases: (a) relieving an employee for a short period; (b) instructing and training employees (including demonstrating the proper method to accomplish the task assigned); (c) analyzing equipment malfunction and breakdowns; (d) where the function is performed at the request of an employee; or (e) providing emergency assistance when another employee's safety is in jeopardy.

9.4 In addition to the provisions of Section 3, the Company may utilize Production Leaders to perform bargaining unit work on a daily basis, provided, however, that Production Leaders shall not spend more than 50% of their normal work hours performing bargaining unit work. The Company also agrees

that Production Leaders shall not be utilized to deprive bargaining unit employees of overtime opportunities nor in a manner that will result in the layoff or prevent recall of bargaining unit employees. The Company agrees to provide the Union with the names of such Production Leaders.

POSITIONS OF THE PARTIES

The Union contends that the Company has violated 9.4 by having Production Leaders out on the floor doing bargaining unit work when bargaining unit employees are on mandatory layoff, and that this practice has in fact resulted in bargaining unit employees being denied recall to their jobs. The Union distinguishes P.L.'s performing bargaining unit work during periods of voluntary layoff from their performing bargaining unit work during periods of mandatory layoff.

The Union raises no objection to P.L.'s doing unit work, up to 50% of their time during periods of voluntary layoff. However, when layoffs are mandatory it is the view of the Union that no bargaining unit employee should be denied recall because his or her work is being performed by supervisory personnel. It is the Union's belief that while mandatory layoffs are in effect the Company must refrain from requiring P.L.'s to perform bargaining unit work, except as provided in Sec. 9.3 (instruction, troubleshooting, emergency) and that is the intent of the language in Sec. 9.4.

Union witness Tim Tway, Union President, testified that the 2002 grievance was settled when the Company agreed to pull the P.L.'s off the production floor. The Union pointed to the testimony of Tway and Pete Van Galder, who was on the Union negotiation committee, each of whom testified that it was the intent of the parties to restrict P.L.'s from doing bargaining unit work during periods of mandatory layoff.

Tway and Van Galder testified to personally observing P.L.'s performing bargaining unit work, which could have been performed by employees on layoff. The Union called Jon Mauerman, an employee in the Shipping Dept., who testified that his P.L. routinely spent 3-4 hours a day doing bargaining unit work. According to Mauerman, his P.L. worked an increased number of hours during the period of layoff. He indicated the hours rose from a norm of 3 per day to closer to 3½ – 4 per day.

The Union acknowledges that both parties made proposals to modify the contract, and both proposals were withdrawn. The Union believes the language was always ambiguous, that the parties disagree over its meaning, and that clarifying proposals were withdrawn in order to get an Agreement.

It is the Union's view that the most productive results derive from assigning people who regularly perform jobs to those jobs, and not from a formula which assigns P.L.'s to work on a fill in basis, with regular employees on layoff.

The Company contends that P.L.'s perform essential non-bargaining unit work. Their hours are calculated into the production formulas whether or not they perform bargaining unit work. If they were barred from performing bargaining unit work during periods of layoff, the productivity numbers would suffer, and the ability of the Evansville plant to compete would be compromised. The Company contends that it would not recall laid off employees to handle the relatively modest amount of work currently handled by P.L.'s.

The Company points to the Union's proposed modification of the contract, which was dropped. The Company contends that the proposal shows that the union understood that the contract did not mean what it now claims it to say, and that the Union seeks to have this award grant it a protection it could not achieve in bargaining.

After the 2002 grievance, the Company removed the P.L.'s from the shop floor, but returned them shortly thereafter. The grievance was held in abeyance to permit a study of the P.L. time on the shop floor. The study showed very little time on the shop floor, and the grievance was withdrawn. There were mandatory layoffs in 2003 and in 2004. P.L.'s continued to perform bargaining unit work during these periods of mandatory layoffs.

The Company notes that Mauerman essentially testified the his P.L. worked somewhere between 0 – 5 hours per week more than he had previously. The Company would not have recalled for so few hours.

It is the view of the Company that Sec. 9.4 is clear and unambiguous. It allows P.L.'s to perform bargaining unit work so long as that work does not exceed 50% of their work hours. Additionally, the Company may not use P.L.'s in a way that results in layoff or prevents recall. The Company focuses on the causation standard it believes is reflected in Sec. 9.4. Unless the P.L. work causes the layoff or is the cause for the non-recall, the Company contends it is acting within its contractual rights.

The Company argues that bargaining history and past practice supports its position that P.L.'s may perform bargaining unit work, even during periods of layoff.

DISCUSSION

Article 9, Sec. 4, set forth above, is key to this dispute. It allows the Company to use P.L.'s on a daily basis subject to certain provisos. Those restrictions include "that Production Leaders shall not spend more than 50% of their normal work hours performing bargaining unit work." Additionally, "Production Leaders shall not be utilized to deprive bargaining unit employees of overtime opportunities nor in a manner that will result in the layoff or prevent recall of bargaining unit employees."

As to the 50% standard restriction, there is no evidence P.L.' s work in excess of 50% of their normal work hours. The self-report of the P.L.'s reflect hours worked well below the 50% standard. The most analytical testimony came from Mauerman, who testified that his

P.L. worked 3½ – 4 hours per day. Assuming Mauerman is right, the number of hours described falls within the 50% standard.

The Union contends that the P.L.'s may perform unit work when the workforce is fully employed or when there are voluntary layoffs only, but not when there are employees on mandatory layoff. No such distinction is drawn from the words used by these parties in drafting the first sentence of Sec. 4.

The real claim of the Union is that P.L.'s performing production work is keeping laid off employees from being recalled. That is to say, if the Company was not free to use P.L.'s to perform unit work, it would have to recall employees on layoff to perform such work. The record does not lend much support to this claim. Some P.L.'s do a good deal of bargaining unit work. Some do not. The P.L.'s have work planning and organization components to their jobs that exist independently of the production work they perform. That is the reason the Company treats their hours as a constant in the staffing formula. The Production Drivers formula varies the size of the workforce around the volume of production associated with work in the plant. Under the formula, and with the P.L. hours treated as constant, the Company will only recall if the volume of work justifies recall under the formula. The fact that a P.L. does unit work will not influence the recall since recall is driven by the formula. The marginal increase in P.L. work testified to by Mauerman is so small that it, standing alone, will not warrant recall.

There is no recall because the formula, tying employment levels to production, ignores whether or not P.L.'s are performing bargaining unit work. This raises the question of whether or not the collective bargaining agreement permits the Company to use the formula in this way. This question is presented because the bargaining unit work performed by P.L.'s during periods of layoff is work that could be performed by bargaining unit employees who are on layoff.

The union contends that in bargaining it sought to bar the Company from using P.L.'s to do bargaining unit work while bargaining unit employees were on layoff. Its witnesses testified that that was the purpose of Sec. 9.4. However, Sec. 9.4 does not say that. The language is a compromise that allows P.L.'s to work unless it results in a layoff or prevents a recall. Both parties recognized the fact that the language contained limitations they disliked, and attempted to remove those restrictions in the negotiations leading to this contract. Both proposals were dropped, leaving the *status quo*.

The Union filed a grievance in 2002 over the Company's use of P.L.'s during an earlier period of layoff. In response, the Company pulled the P.L.'s from the floor. It explained that it did so in order to address the discontent on the floor. Formally, the Company maintained its position that it did not violate the contract. The matter was held in abeyance to allow for a study of P.L. production hours worked. The number ultimately came in low, and the Union expressed skepticism. Ultimately the grievance was not pursued. Viewed alone, the withdrawal of the P.L.'s from the floor in response to the grievance would lend support to the

unions interpretation of the agreement. But this event cannot be viewed in isolation. Ultimately the Company took the position the grievance was denied. The P.L.'s returned to the floor and performed bargaining unit work. The P.L.'s continued to perform bargaining unit work in 2003 and 2004 while bargaining unit employees were on mandatory layoff.

A full consideration of the bargaining history and practice of the parties support a conclusion that the parties have behaved as if the P.L.'s can perform unit work while employees are on mandatory layoff. The Union complains of a greater incidence of P.L.'s performing unit work. There is little indication this is true. Mauerman's testimony supports a finding that there was marginally more work being performed in one department. The amount was minimal. Nothing was identified that was of such significance that it might prompt a re-evaluation of the historic relationship.

In conclusion, I believe the Company has the right to apply its production formula as it has with respect to P.L.'s performing bargaining unit work while bargaining unit employees are on layoff.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 9th day of February, 2006.

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

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