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

Case 47
No. 66151
A-6231

(Brueggeman Overtime Grievance)

Appearances:

Mr. Kevin D. Lee, Business Manager, on behalf of Laborers' International Union of North America, Local 140, 1920 Ward Avenue, Suite 10, La Crosse, WI 54601 and **Douglas Brueggeman**, personally.

Mr. Jeffrey Kilpin, Manager, on behalf of Sparta Manufacturing Company, 445 Holtan Street, Sparta, WI 54656.

ARBITRATION AWARD

The Union and Sparta Manufacturing Company, referred to below as the Company, are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the Company agreed that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of Douglas Brueggeman, who is referred to below as Brueggeman or Grievant. The Commission appointed Paul Gordon, Commissioner, to serve as the arbitrator. Hearing was held on the matter on October 5, 2006 at the Company office in Sparta, Wisconsin. No transcript was prepared. The parties waived the filing of written briefs or written arguments, and the record was closed on October 5, 2006.

ISSUES

The Union proposed the issues be stated as:

Did the Company violate the collective bargaining agreement by changing Grievant's start time and having a 3rd shift employee do his bid job?

If so, what is the remedy?

The Company proposed the issue be stated as:

Did the Company not violate the collective bargaining agreement by having someone else do the particular job in place of Grievant and set the start time?

The Union's statements of the issues are selected as those which more closely reflect the record in the case.

RELEVANT CONTRACT PROVISIONS

ARTICLE III
UNION REPRESENTATION

. . .

Section 3.

. . .

c. If the Company or any of the employees of group of employees has a grievance, the following procedure shall be used:

1. If the Company has a grievance, it may take it up with the employee or employees involved in the presence of their respective steward or directly with the shop steward of the Union, or directly with the Business Manager of the Union.
2. Any aggrieved employee must first present his/her grievance to this shift steward. The shift steward will report the grievance to the employee's immediate supervisor. If not resolved, then to the shop steward. If the shop steward cannot resolve the grievance, it must be reported to the Business Manager of the Local Union, who shall determine if it shall be processed further.
3. If the grievance is not settled satisfactorily, it shall be the duty of the Business Manager along with the Bargaining Committee to present the grievance to the management in writing. The aggrieved employee's shift steward and shop steward may be present when grievance is presented.
4. The Company when contacted by the Union for grievance meeting will set meeting within twenty-four (24) hours and shall meet within five (5) days of said date.
5. If the grievance is not settled satisfactorily upon meeting with the Company, either the Company or the Business Manager may file for arbitration.

6. The Union and the Company agree the Wisconsin Employment Relations Board shall appoint an arbitrator from their commission to arbitrate such grievances. The decision of the arbitrator shall be final and binding upon both parties.

ARTICLE IV
HOURS OF WORK

Section 1.

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

b. An employee must be punched out to leave the property during breaks.

c. 4-10 hour days may be worked if mutually agreed upon by the Union and Company on a week by week notice. Time and one half will be paid after ten hour and forty hours. All employees must work same days.

Section 2. Overtime Provision

a. Time and one-half (11/2) shall be paid for all time worked in excess of eight (8) hours in any one-day or shift.

. . .

d. Daily Overtime. Daily overtime belongs to each department. Employees wishing to work overtime will sign the overtime list and will be asked according to seniority.

. . .

ARTICLE V
SENIORITY

Section 1.

Seniority shall prevail on the date of employment, except where other provisions are specifically made on the terms of this Agreement. Seniority is the relative status of employees with respect to their length of service during employment.

ARTICLE IX
GENERAL PROVISIONS

Section 1. Management

Subject to the provisions of this Agreement, the management of the plant, property and business of the Company, the direction of the working force, including the right to determine who shall be hired, promoted, demoted, transferred and/or assigned to jobs. To suspend, discipline and discharge

employees for cause, to increase or decrease the working force, and to determine the products to be handled, produced or manufactured and the methods, processes and means of production or handling shall be vested exclusively in the Company. Suspensions, discipline and discharge shall be subject to the grievance and arbitration procedures provided in Article III hereof. Any employee who is promoted, demoted or transferred by the Company contrary to his/her desires, shall not suffer any loss of seniority as a result of such promotion, demotion, or transfer.

. . .

Section 5. Promotions

a. The Company agrees that when a job opening occurs, the employees shall have an opportunity to bid on such job openings. When qualifications and ability are equal, then seniority will be the consideration. All job openings shall be posted for five (5) working days. Jobs posted for five (5) working days with no employees bidding, such jobs shall be filled with the youngest employee on the seniority list or a new hire.

. . .

b. When the Company needs to transfer employees to fill another job classification, absentees, or extra help in another area or department, they shall use those employees that are not on bid jobs first. No employee shall be replaced on a bid job while being transferred to another job classification, unless there are no employees available who have the skill and ability to perform such work. When employees on lay off are recalled, they shall be placed on their bid job and shift, when possible.

. . .

BACKGROUND AND FACTS

Grievant is a first shift crane operator doing yard work for the Company. This is a bid job that Grievant obtained through the posting process under the collective bargaining agreement. Prior to May 29, 2006 his start time was 2:30 a.m. and he was working an eight hour shift, five days per week. He had worked some overtime prior to that date, with any available overtime generally being split between himself and another crane operator. The department he worked in generally has two people working at any one time, those being the crane operator and another yard person doing sorting work on the ground. These two people

switch their work during a shift. They sometimes have different start times. There are always two people working on the yard, but someone may be filling in for one or the other during a scheduled break or at other times. Grievant is not the senior employee in the department. When the other employee had started earlier than Grievant and would finish an eight hour shift, but production required a longer run, a different, third employee would replace the senior employee for the duration of the production run.

The Company's production hours take varying lengths of time, sometimes eight, ten or twelve hours. There have been one or two production shifts in the past, depending on customer production demands. The yard department generally starts before other production operations in order to fill the cupola to melt iron needed for the production runs. This means that the start times for the yard department could and did fluctuate. The yard department rarely, if ever, ran two full shifts.

On or about May 29, 2006 the Company changed Grievant's start time to 5:00 a.m., and continued his eight hour bid job shift. The Company had a 3rd shift employee who did not have a crane operator/yard bid job do yard work for the 2 hours prior to 5:00 a.m. However, neither that employee nor anyone in the yard work department earned or worked enough hours in a shift to be paid for overtime. No one got overtime on the crane operator bid job. The Company did not offer overtime to Grievant or anyone else to do the yard work from 2:30 to 5:00 a.m. At the time of this start time change, like some other times in the past the Company was running a ten hour production run, with employees working eight hours per day five days per week. Employees in various departments were working with various start times to cover the beginning and ends of the ten hour production runs, sometimes in other departments. This included yard work and, after May 29, 2006, the 2:30 a.m. to 5:00 a.m. yard work person. In some instances in the past the Company has used some overtime in parts of its operations to cover production runs. In the current instance the Company moved Grievant's start time back in order to have at least one experienced person qualified to operate the crane during the entire ten hour production. The Company did not want both qualified bid job operators only working the same eight hours and then have two hours of production time without an experienced person there. The Company did not specifically offer overtime to Grievant and the Company did not want to rely on an employee deciding whether or not to take optional overtime.

Both parties acknowledge that the Company has the right to regulate and establish the start times.

On May 30, 2006 Grievant had his grievance written up and it was received by the Company on May 31, 2006. The Company ran ten hour production runs with employees working eight hours per day, five days per week, for the weeks of May 29th, June 5th and June 12th. Employees were laid off for the next five weeks while production did not occur. Thereafter, the Company again ran ten hour production runs with employees working eight

hours per day, five days per week, for the weeks of July 24th and July 31st. Then, starting August 7th, the Company went to ten hour work days four days per week, and Grievant's start time was changed back to 2:30 a.m. On June 8th the Union and the Company had a meeting concerning the grievance. Grievant was not in the actual meeting between the Union and Company representatives. At that meeting the Union and the Company agreed that Grievant would start at 4:00 a.m. which would provide him one hour of overtime per day. The Company thought this agreement was a settlement of the grievance. Grievant personally did not agree to this when told of the result of the meeting, but began working the one overtime hour on June 14th and was given credit for 50 minutes for June 13th (he had the 12th off for his birthday). He worked the overtime hour each day the rest of that week and for the week of July 24th with the exception of July 28th when he punched out after working eight hours. Sometime shortly before July 31st the Company became aware that Grievant was pursuing arbitration of his grievance and the Company then went back to his 5:00 a.m. start time for the week of July 31st. As mentioned above, the Company went to four ten hour days starting the week of August 7th and, Grievant's start time was changed to 2:30 a.m. with a ten hour shift, four days per week.

Between May 29th and the end of the week of August 7th, Grievant was the only person paid overtime for doing the bid job.

Other matters appear as in the discussion.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues that the Grievant is a first shift bid crane operator and yardman who started his shift at 2:30 a.m. The Company changed his start time to 5:30 a.m. and gave his bid job to a 3rd shift employee who is not a bid 3rd or 1st shift crane operator/yard person, denying Grievant 2 hours of overtime pay per day. Article IV Section 2c states "Daily overtime belongs to each department." The Union contends that the Company's response was they don't have enough employees. The Union also argues that in the past Grievant has worked overtime in the department. When the Company elected to go to ten hour production, instead of asking Grievant to work overtime they had the third shift employee do his bid job and put Grievant's start time back by 2 ½ hours. Grievant was denied any overtime when the Company removed him from his bid job and had someone else perform his bid job.

Company

In summary, the Company argues the Company has the right and reserved the right to regulate start times pertaining to production needs. Although the start times were shifted, the Company had capable people to bridge both ends of the shift with one yard crane person and then another person filling in. No one received any overtime during this period. The

Company also argues that it felt the grievance had been settled at the Union-Management meeting whereby Grievant was then scheduled for one hour of overtime work per day, and was surprised when the arbitration proceedings were then initiated.

DISCUSSION

Grievant contends that because there were two hours per day of his type of bid job work to do which a non-bid job employee did, he was denied an opportunity to work and earn two hours of overtime per day in violation of the collective bargaining agreement. Moving his start time back for his eight hour shift while running ten hour production created a two hour time which Grievant contends should be his to work under the agreement, citing Article IV, Section 2.c. of the agreement. That provision states as follows:

> c. Daily Overtime. Daily overtime belongs to each department. Employees wishing to work overtime will sign the overtime list and will be asked according to seniority.

Central to this issue is whether there was overtime here. Under this section of the agreement the overtime is for the department, not necessarily any particular employee. The person who covered the two hours per day was not a crane/yard person bid job employee. Thus, Grievant is correct to the extent that there was bid job work to be done that was not performed by a bid job person.

What is significant here is that there was no overtime worked by anyone, bid job person or not. Article IV Section 2.c. refers to overtime. It does not automatically extend the hours of work set out in the agreement. The relevant language in the agreement is set out in Article IV Section 1.a., which states:

> a. The workday shall consist of eight (8) hours. The workweek shall consist of forty (40) hours.

There is no provision in the agreement which requires the Company to offer overtime to an employee. The Company may offer such overtime, but is not required to do so. Certainly, if the Company offers overtime to an employee who accepts it, then time and one-half shall be paid for the overtime that is worked. Additionally, if there is overtime worked then the employees in the affected department must first be offered the chance to work it under Section 2.c. However, there is only overtime if an employee works in excess of eight (8) hours in any one-day or shift. Article IV Section 2. states:

> Section 2. Overtime Provision
>
> a. Time and one-half (1 1/2) shall be paid for all time worked in excess of eight (8) hours in any one-day shift.

Here, the employee who did the two hours of bid job work did not work in excess of eight hours per day. They did not work or earn overtime. Apparently there would have been two such employees, one at either end of the ten hour production run. It also appears that at least on one of those ends more than a single employee did the two hours of bid job work on any given day. However, none of these non-bid job employees worked more that eight hours per day or were paid overtime. Thus, there was no overtime to apply under Article IV Section 2.c. to Grievant or his department.

The result might be quite different if the non-bid job employees were working in excess of eight hours per day and thus earning overtime. If that were the case then the agreement would require that Grievant and the other employee in that bid job be offered the opportunity to work the overtime. This is an important difference.

All parties acknowledge that the Company has the right to set the start times for shifts. That right was never bargained away by the Company and it is also implicit in the Article IX Section 1. Management rights clause, which states in pertinent part:

> Section 1. Management
>
> Subject to the provisions of this Agreement, the management of the plant, property and business of the Company, the direction of the working force, including the right to determine who shall be hired, promoted, demoted, transferred and/or assigned to jobs. To suspend, discipline and discharge employees for cause, to increase or decrease the working force, and to determine the products to be handled, produced or manufactured and the methods, processes and means of production or handling shall be vested exclusively in the Company. . . .

In setting the starting time the Company must still honor the eight hour work day provision in the agreement, which it did. Grievant always was afforded at least eight hours of work per day.

Grievant has pointed out that it was a non-bid job employee who was doing bid job work that he otherwise would do. The record at the hearing in this case reveals that various employees from various departments have filled in or covered for other department work to meet production runs. The history appears mixed on this in that sometimes overtime was used and sometimes it was not. Grievant noted that there have been some grievances filed in at least some of those instances, but the result of those was not made a part of the record. Moreover, unless the factual circumstances were shown to be extremely similar, those other matters would have little if any bearing in this case. Similarly, it appears that in the past sometimes Grievant or the other crane/yard person did earn some overtime, and sometimes they did not when their start times were staggered. Thus, there is no clear past practice established one way or the other to help in applying the contract language here. The agreement is not silent or

ambiguous on the hours of work or overtime. There has not been a showing that the parties have accepted a practice that is unequivocal, that has been clearly enunciated and acted upon, or what the scope may be. All these are common considerations in determining whether there is a past practice that will be binding on a party. See, *How Arbitration Works,* Elkouri & Elkouri, Sixth Edition pp. 607-610.

There is an additional section of the agreement that is relevant to the point of a non-bid job person doing bid job work. Article IX Section 5.b. states in pertinent part:

> b. When the Company needs to transfer employees to fill another job classification, absentees, or extra help in another area or department, they shall use those employees that are not on bid jobs first. No employee shall be replaced on a bid job while being transferred to another job classification, unless there are no employees available who have the skill and ability to perform such work. . . .

Here, the other employees were non crane/yard person bid job employees but there has been no showing or argument that their work violated the above right of the Company to transfer an employee for extra help in another department.

The Company correctly observed that the overtime provisions in the agreement are in part actually voluntary on the part of the employee. As set out above, Article IV Section 2.c. contains the statement: "Employees wishing to work overtime will sign the overtime list and will be asked according to seniority". This sentence shows that the Company must ask an employee to work overtime – if there is overtime in the first place. The sentence does not require the employee to accept an offer of overtime and reference to seniority also clearly implies an employee may decline an offer of overtime. Thus, the contract does not assure the Company that the needs of a ten or twelve hour production run can be meet by an offer of overtime. The Company has a legitimate reason to plan for productions needs, including the availability of the workforce. Such decisions as to how to manage that production are within the rights of the Company to make.

The Company has the right to set start times and the agreement does not require it to make employees work overtime. The Company did not have anyone work overtime in this instance. There was no overtime to which Grievant had a right under Article IV Section 2.c. of the collective bargaining agreement, even if bid job work was performed by a non-bid job employee. The Company did not violate the provisions of the collective bargaining agreement. Therefore, it is not necessary to determine the exact number of hours at issue or analyze the purported settlement.

Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The grievance is denied. The Company did not violate the collective bargaining agreement by changing Grievant's start time and having a 3rd shift employee do his bid job. Because there is no violation, no remedy is made.

Dated at Madison, Wisconsin, this 13th day of October, 2006.

Paul Gordon /s/
Paul Gordon, Arbitrator

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