

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL UNION NO. 140

and

SPARTA MANUFACTURING COMPANY

Case 29
No. 51334
A-5267

Appearances:

Mr. Kevin D. Lee, Secretary-Treasurer/Business Manager, Laborers' International Union of North America, Local Union No. 140, appearing on behalf of the Union.
Gleiss, Locante & Gleiss, Law Offices, by Ms. Shari LePage Locante, appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to a request by Laborers' International Union of North America, Local Union No. 140, herein the Union, and the subsequent concurrence by Sparta Manufacturing Company, herein the Company, the undersigned was appointed Arbitrator 1/ by the Wisconsin Employment Relations Commission on November 4, 1994, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on December 21, 1994 at Sparta, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on January 17, 1995.

After considering the entire record, I issue the following decision and Award.

ISSUES:

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Did the Company violate Article IX, Section 5 of the collective bargaining agreement when it failed to place the grievant into the third shift maintenance position he bid?
2. If so, what is the appropriate remedy?

1/ James W. Engmann was originally appointed Arbitrator on August 1, 1994. However, after an unsuccessful attempt to mediate the dispute, Arbitrator Engmann recused himself from the case.

PERTINENT CONTRACTUAL PROVISIONS:

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 own 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, 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 one week. Jobs posted for one week with no employees bidding, such jobs shall be filled with the youngest man on the seniority list or a new man. When employees bid job openings and are awarded the job, he shall undergo a two (2) week probationary period, the job getting reposted if his performance is not satisfactory. The employee shall be allowed one week to reconsider the bidding of the job and return to his previous job. When an employee bids a job and is awarded that job, he must be placed on that job within ten (10) working days. After a satisfactory probationary period, he shall remain on that job for a period of at least three (3) months or the job no longer exists.

DISCUSSION:

On May 24, 1994, the Company posted a notice for an opening on third shift in a maintenance position. On May 25, 1994 the grievant, Terry Seekamp, bid for the job. He was the only employe to bid this job.

It has been recognized by both the Company and Union that a maintenance position is a specialized position requiring special skill and knowledge. It has been the practice for the past several years for the Company to test the qualifications and ability of potential maintenance employes before awarding the job to them. The test previously used was a very basic practical exam including welding, cutting and some electrical testing. The Company believed that this test was inadequate to its intended purpose of determining the qualifications of a potential maintenance employe, and engaged in general discussions about replacing it with a new test prior to the May 24th posting.

Shortly after the grievant bid for the job, the plant manager, Aaron Gesicki, decided he wanted to change the testing procedure. He asked the plant engineer, Robert Meyers, to find a test to give the grievant.

On June 20, 1994, the grievant filed a grievance claiming that since he was the only person to bid on the job according to the contract the Company "has 10 working days to put me on the job."

Thereafter, the Company discussed the dispute with Union representatives, and advised them the new test would be given to the grievant as soon as it arrived.

At or about this same time, the Company received a written Test of Mechanical Comprehension by the Psychological Corporation. This new test was designed to provide insight into a candidate's ability to analyze and solve mechanical problems. Seventy percent was considered a passing score.

On June 29, 1994, this test was given to the grievant by Meyers who then scored the test. Based upon the grievant's test score of fifty percent, the Company advised him that he was not awarded the maintenance job for which he bid.

As noted in the grievance, the Union initially argues that the grievant was denied "due process" because as the senior bidder the Company had ten days to place him in the maintenance position to see if his performance was satisfactory. However, as noted above, Article IX, Section 5, provides that only after an employe "is awarded that job" is the Company obligated to place him on the job "within ten (10) working days." (Emphasis added) It is undisputed that the Company never awarded the grievant the disputed position. Nor was the Union able to cite any

past practice where the Company automatically awarded an employe a bid maintenance position and placed the employe in the job within ten (10) working days of the bid without first determining the employe was qualified for the position through testing and then deciding to fill the position with said employe. Even the Union's own witness, Norm Dearman, admitted the Company often did not place a person in a job within ten days of bidding or prior to testing.

As part of this "due process" claim, the Union also argues the grievant should have had the opportunity to prove his qualifications for the maintenance job by working in the position for a probationary period. However, Wayne Dearman, second shift supervisor, testified un rebutted that in his twenty-six (26) years with the Company the Company has always tested the qualifications of a potential employe before placing an employe in a position. (Emphasis added) The Union has not grieved this approach in the past.

The Union attacks the use of the new test as contrary to the contract, past practice and bargaining history. However, the contract provides that the Company has the authority to determine who "shall be hired, promoted, demoted, transferred and/or assigned to jobs." There is no contractual provision which specifically restricts the Company right to determine the method of testing or evaluating an employe's qualifications and ability to fill a position. Nor has the Union challenged this right in the past only reserving its right to question the outcome or result. The Union also claims the Company did not bargain or agree with the Union over the use of this new test. However, the Union could point to no contractual obligation or practice which requires the Company to bargain over same.

The Union further attacks the validity of the test. As noted above, the new test was used to evaluate an applicant's mechanical comprehension. Even Union witness Norm Dearman admitted that mechanical comprehension was an important aspect of the maintenance position's responsibility. In addition, Robert Myers, plant manager, testified un rebutted that said test was an industry standard and was an effective tool to gauge an employe's qualifications and ability to perform maintenance duties. The Union simply provides no persuasive basis to reject the Company's use of this test for filling a maintenance position.

The Union next maintains that the Company used this test in a discriminatory manner to reject the grievant's bid for the maintenance position. It is true that the Company requested the specific test in question after the grievant bid for the job. However, the Company was discussing switching to a new test prior to the posting. In addition, there is no persuasive evidence in the record that the Company used this new test in an attempt to deny the grievant the job. Therefore, the Arbitrator rejects this claim of the Union as well.

Finally, the Union maintains that if the Company was concerned about the grievant's ability to perform the job it could simply have placed him in it without prior testing and if his performance was not satisfactory allow him to return to his former position pursuant to the terms of the contract. Article IX certainly permits such an approach. However, as noted above, the Company has the contractual authority to act in the manner described herein. The Union was unable to point to any authority requiring the Company to act in a different manner with respect to filling the disputed maintenance position.

Based on all of the above, the Arbitrator finds that the answer to the issue as framed by the undersigned is NO, the Company did not violate Article IX, Section 5 of the contract when it failed to put the grievant into the bid third shift maintenance position.

In view of all of the foregoing, it is my

AWARD

That the grievance is denied and the matter is dismissed.

Dated at Madison, Wisconsin this 9th day of March, 1995.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator