

FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

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<b>IN THE MATTER OF ARBITRATION</b>	)	
	)	
<b>Between</b>	)	
	)	<b>FMCS# 10-58298-3</b>
<b>POLAR TANK TRAILER</b>	)	
	)	
<b>and</b>	)	
	)	<b>John Remington,</b>
	)	<b>Arbitrator</b>
<b>INTERNATIONAL ASSOCIATION OF</b>	)	
<b>MACHINISTS DISTRICT LODGE 165</b>	)	
_____	)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over an interpretation of their collective bargaining agreement, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on February 18, 2011 in Opole, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file written closing arguments which they did subsequently file.

The following appearances were entered:

For the Company:

Reid Nelson	Human Resources Manager
Gene Waldvogel	Director of Operations, Holdingford
Kyle Chown	Plant Manager, Opole

For the Union:

Colleen Murphy-Cooney	Business Representative
Jim Storlie	Financial Officer
Ray Puchalla	Steward and Grievant

**THE ISSUE**

DID THE COMPANY VIOLATE ARTICLE 25 OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT WHEN IT POSTED THE "ROBOT CELL" JOB ON JUNE 17, 2010 AND, IF SO, WHAT SHALL THE REMEDY BE?

**PERTINENT CONTRACT PROVISION**

**Article 25. Minimum Wages**

25.01 Classifications (This article lists, by classification, the pay rates and effective dates for the following classifications of employees): Maintenance, Maintenance Electrician, Layout & Setup, Inside Finisher (Barrel Room), Welder, Metal Finisher, Truck Driver, Assembler, Stockman, Operator, Utility Production and the Minimum Starting Wage. The listed wage rates are not in dispute.

25.02 Job Descriptions

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**Layout and Setup**

Lays out complicated shapes for further fabrication and assembly. Sets up the break and press for complex or low tolerance parts. Makes and directs templates for proper fit of parts. Must be skilled in blue print reading.

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**Operator**

Work involves primarily setting up and operating various metal fabrication machines.

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**Article 18. Seniority**

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18.07 Promotions and transfers within the bargaining unit will be made by the selection of the employee with the most seniority in accordance with the procedure hereinafter set forth.

A. All vacancies and all new jobs shall be bulletined. Such bulletins will be posted on the Company’s bulletin boards for five (5) work days in the classification where the vacancy exists. The bulletin will state the number of jobs to be filled, the scheduled location of the job, the rate of pay for each job to be filled and a description of the work required. All bulletins shall be valid for thirty (30) days following the five (5) day posting period. A copy of this signed posting will be given to the shop committee for their record and faxed, mailed or e-mailed to the Union’s District office for their record.

**BACKGROUND**

Polar Tank Trailer, LLC, hereinafter referred to as the “COMPANY,” is engaged in the manufacture of trailer tanks used in the transportation of liquids at its plant in Opole, Minnesota. All classifications of Company employees in the production departments, tool cribs and plant, and truck drivers; but excluding office, plant restroom and lunchroom cleaning janitors, quality control inspectors, all office employees, guards

and supervisors are represented by the International Association of Machinists and Aerospace Workers and its Local Lodge #165, hereinafter referred to as the “UNION.” Ray Puchalla, the Grievant in this matter, has been employed by the Company since 1974 as a press Operator and is currently working in the Robot Cell area.

On June 7, 2010 the Company posted a “\*\*Notice\*\*” to all employees advertising that an “Operator for Robot Cells, (1-2)” was needed. This notice lists the position as follows:

“Job Description: Operator”

Work involves primarily setting up and operating various metal fabrication machines.

Rate of Pay: \$13.13 to \$18.90

Any questions regarding this posting may be directed to Gene Waldvogel.

\* Only sign below if you are serious about making a job change.

Ryan Zellner and seven other employees signed the above posting. Although Zellner was not the senior bidder, he was subsequently awarded the position as an Operator in the Robot Cell area. On June 14, 2010, Union Steward Ray Puchalla challenged the above posting through the filing of Grievance Number 103-1. Puchalla had previously raised a verbal complaint concerning this matter on June 10. The grievance alleges a violation of Article 25, Section 02 of the collective bargaining agreement and states:

I do not agree with your decision not to post with Layout Setup classification—saying that your answer to my written grievance makes it binding, but it doesn’t disclose this to all members who may want to sign this posting because of higher pay classification. Operator is not a progressive classification to the Layout Set Up position.

Although there is no dispute that the Company denied this grievance, the substance of the Company’s answer is in dispute. The Company maintains that it sent the

following memo written by Gene Waldvogel and Reid Nelson concerning the grievance to Union Representatives Ray Puchalla and Colleen Murphy-Cooney on June 10, 2010:

We acknowledge that presently most employees running the robot equipment are classified as Layout and Set Up. Some employees, especially those running the equipment as back up are Assemblers or Operators from other departments. As production increases, it is necessary to have operators on both shifts, as well as back up operators. Tom Lashinski's progression and job posting history shows as Operator who developed over time and was [sic] subsequently had his pay scale increased to that of a Layout & Setup person. That is our intent on these postings as well. The qualified employee will have the opportunity to grow their wage to reflect their ability to perform the tasks necessary to match that of a Layout & Setup position. However, the position we are seeking to fill at this time is that of an Operator. See definitions from the Union Contract below. (Cites descriptions for Layout and Setup and Operator from Article 25.02 listed above.)

However, this "answer" was not included in the grievance exhibit (Joint Exhibit #2) submitted at the hearing nor was it offered as a Company Exhibit. Rather, it was included as an Addendum to the Company's written closing argument submitted to the Arbitrator after the close of the hearing. The Union strongly objects to this addendum noting that it had no opportunity to cross examine the authors, both of whom were in attendance at the arbitration hearing, or to rebut its contents.

It cannot be denied that the Union's objection to the above memo is well taken and that the Company was negligent in failing to make the memo available at the arbitration hearing. Accordingly, the Arbitrator finds that he will receive this document only for the limited purpose of establishing that the Company did, in fact, answer Grievance #103-1 in a timely manner and that this answer asserted that the position was properly posted as an Operator position.

The Company sent a second memo to the Union concerning Grievance #103-1 on June 14, 2010. This memo from Waldvogel and Nelson states:

As I understand your concern at this time; you are not disagreeing with Polar's response on 6/10/10 to Grievance #103, you are desiring for the candidates to see the Company's response to the grievance.<sup>1</sup> We do not have an issue with you posting the Company's response along side the job posting if you feel that will satisfy any employee concerns or questions.

It is apparent from the record that this response was not satisfactory to the Union and that the parties continued to discuss resolution informally. On June 15 Nelson sent the following e-mail to Union Business Representative Colleen Murphy-Cooney:

I have had a couple of conversations with Ray (Union Steward and Grievant Puchalla) on this topic. He is set that we must post this position as a Layout & Setup position. As you are aware, this is a position that we want to get corrected to have the contract language fit the definition. I believe by stating in my earlier response that the qualified employee will have the opportunity to grow their abilities to that of the Layout Setup role that they will be paid properly. Ray is going to want to meet on this subject.

The Union did not respond in writing to this e-mail.<sup>2</sup> However, on June 29, 2010 Murphy-Cooney sent the following e-mail to Nelson:

Article 6 Section 6.05 in the grievance procedure states, the Company is to give an answer from the meeting within three working days. It is now going on 5 days and the Union has not received an answer from our meeting on June 22, 2010.

The Union is with the understanding that with no reply from the Company within the timeline laid out in the

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<sup>1</sup> No written response or statement of "concern" from the Union was submitted into evidence at the hearing. Since the Union did not object to the June 14, 2010 memo, the Arbitrator can only conclude that the Union's response to the June 10, 2010 memo (to which the Union objects), if any response was made, was verbal.

<sup>2</sup> The Arbitrator has concluded from the record that a grievance meeting over grievance #103-1 was held on or about June 22, 2010. It is readily apparent that this meeting did not resolve the grievance.

contract between Polar Tank Trailer and IAM District 165 that the Union **prevails** in this grievance and the Company will continue to pay Layout Setup instead of operator pay as the job was posted.

Nelson responded the same day by e-mail that:

I believe we are still following the 6.05 procedure. On 6/10/10 Ray gave a written note on a scrap of paper on the issue titling in Grievance #103. Polar responded in writing on 6/10/10. On 6/14/10 Ray used the Grievance form labeling in #103-1. Polar responded on 6/14/10. Ray asked to meet, which we did on 6/22/10. As the completing of that meeting you stated that your position was unchanged on the issue. Polar's response remains the same. We will change the posting to one of Welder, which is .16 per hour more pay than an Operator based upon the need to do touch up welding, however, we do not need or expect an employee to be able to program and trouble shoot the robot. This is the start of re-classification process in which Polar wishes to pay people based upon their desire and ability. You may take this email as the written notification that Polar's response to #101-1 [sic] is unchanged. (There can be no doubt that "#101-1" is a typographical error and that Nelson was referring to Grievance #103-1.)

Although the above response is less than fully responsive to Murphy-Cooney's e-mail, there can be little doubt that the Company maintains that its responses to Grievance #103-1 were timely; that it would be willing to settle the grievance by paying welder's pay rather than operator's pay (but not Layout & Setup pay); that it desires to renegotiate job classifications with the Union; and that it denies the grievance.

The grievance remained unresolved and was ultimately submitted to arbitration in compliance with the provisions of Article 7 of the parties' collective agreement. As a preliminary matter, the Arbitrator finds that the grievance was timely filed and processed within the requirements of Article 6 of the collective agreement. There being no dispute

over the substance of the grievance, it is properly before the Arbitrator for final and binding determination.

### **CONTENTIONS OF THE PARTIES**

The Company takes the position that it properly posted the disputed position as an Operator opening. It argues that it is irrelevant that the job will be performed in the Robot Cell since the work involves primarily setting up and operating various metal fabrication machines. While the Company concedes that the collectively bargained job descriptions do not accurately describe the work actually performed in the Robot Cell, it argues that the work performed in Robot Cell better fits the Operator classification and that employees working in the Robot Cell area are not required to perform all of the duties of the Layout and Setup classification. The Company further takes the position that it has attempted to negotiate new job descriptions more appropriate to the Robot Cell area but has been unable to reach agreement with the Union, and that it is willing to advance employees assigned to Robot Cell to the Layout and Setup classification when they have developed the requisite skills and abilities to be fully functional within the Robot Cell area.

The Union takes the position that the Company's prior practice clearly reveals that employees who work in the Robot Cell area have been, without exception, classified as Layout & Setup personnel. While the Union agrees with the Company that the negotiated job descriptions do not match the duties actually being performed by employees assigned to the Robot Cell, it contends that the Company may not unilaterally change the job descriptions and that the Company has been unsuccessful in attempting to negotiate revisions to the contractual job descriptions. The Union further takes the

position that it has demonstrated through testimony and documentary evidence that Robot Cell employees have always been classified as Layout & Setup and that the Company has failed to adequately respond to, or rebut this evidence. Accordingly, the Union requests that the grievance be sustained.

### **DISCUSSION, OPINION AND AWARD**

There can be little doubt that the Company has been frustrated by the admitted inadequacy of the collectively bargained job descriptions with respect to work performed in the Robot Cell. This frustration is clearly reflected in the June 7, 2010 job posting which seeks an “Operator for Robot Cells” despite the fact that, as the Union clearly demonstrated through testimony and documentary evidence, employees in the Robot Cell were all classified as Layout and Setup. Neither is it helpful to the Company’s argument that the Operator classification work “involves primarily setting up and operating various metal fabrication machines.” While it is undisputed that the Company has attempted to revise and reduce the number of job classifications, it cannot be denied that its attempt to bargain new classifications with the Union has been wholly unsuccessful. Despite the desire of the Company to create some sort of progression in the Robot Cell area whereby employees can come in at a lower classification and advance to the Layout and Setup classification over time, no such progression has been agreed to and there is no provision within the current agreement that would permit such progression. Indeed, there is no provision which would permit employees to progress from one classification to another.

Neither is this proposed progression reflected by the Company’s practice. The Arbitrator is sympathetic with the Company’s desire to revise job descriptions to make them more descriptive of work actually being performed. However, until such revisions

are accomplished through the collective bargaining process the Arbitrator must be guided by the language of the existing agreement. In this connection the Arbitrator notes that it is well established in grievance arbitration that one party may not obtain through arbitration what it was unable to obtain in collective bargaining. Here the parties agree that the job descriptions are inadequate with respect to work performed in the Robot Cell and that they have attempted to negotiate new descriptions for that area. However, it is undisputed that the Union has rejected the proposals made by the Company to date. The Arbitrator has neither the authority nor the expertise to create a new job description for the Robot Cell and thereby grant the Company what it has been unable to obtain through bargaining.

It is also undisputed that the Company has classified all of the employees in the Robot Cell area as Layout and Setup. The Union established, through the credible testimony of Ryan Zellner (currently classified as an Operator in Robot Cell) and Jim Storlie (currently classified as Layout & Setup in Robot Cell) that both perform essentially the same job duties. Zellner's time cards support his testimony that he is trouble shooting, programming and repairing equipment in the Robot Cell, duties which appear to be the type of work contemplated by the Layout and Setup classification set forth in Article 25.02. Where the language of the collective bargaining agreement is ambiguous as it is here, Arbitrators frequently look to the actual practice of the parties in interpreting that language. There is little doubt that it has been the consistent practice of the Company to classify employees working in the Robot Cell as Layout and Setup. The Arbitrator must therefore find that the work performed by Zellner in the Robot Cell is

Layout and Setup work within the meaning of the parties' collective bargaining agreement.

The Arbitrator has made a detailed review and analysis of the entire record in this matter, and has carefully read the written closing arguments submitted by the parties. Having done so, he is satisfied that the critical issues that arose in the instant proceeding have been addressed above and that certain other issues raised by the parties must be deemed immaterial, irrelevant, or side issues at the very most and therefore have not been afforded any significant treatment, if at all, for example: whether or not employees are required to test to obtain posted positions; whether or not employees in the Robot Cell are skilled in blue print reading; and so forth.

Having considered the above review and analysis, together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties collective bargaining agreement, that the Union has established, by a preponderance of the evidence, that the Company improperly posted the Robot Cell job on June 17, 2010 in violation of Article 25 of the parties' agreement. Accordingly, as award will issue, as follows:

**AWARD**

THE COMPANY VIOLATED ARTICLE 25 OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT WHEN IT POSTED THE ROBOT CELL JOB ON JUNE 17, 2010. THE GRIEVANCE OF RAY PUCHALLA MUST BE, AND IS HEREBY, SUSTAINED.

**REMEDY**

THE COMPANY SHALL CONTINUE TO POST AND CLASSIFY ROBOT CELL JOBS AS LAYOUT AND SETUP. RYAN ZELLNER SHALL RECEIVE BACK PAY FOR THE PAY DIFFERENTIAL BETWEEN THE OPERATOR CLASSIFICATION AND THE LAYOUT AND SETUP CLASSIFICATION FOR ALL HOURS WORKED IN THE ROBOT CELL AREA.

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John Remington, Arbitrator

May 4, 2011

St. Paul, MN