Award No. 851
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 4-S-20
Appeal No. 1462
Arbitrator: Terry A. Bethel
November 10, 1991
OPINION AND AWARD
Introduction
This case concerns the union's allegation that the company violated the agreement when it stopped scheduling the labor leader classification in the ladle reline area of number 4 BOF. The grievance dates from March 1988. The hearing was held in the company's offices in East Chicago, Indiana on September 12, 1991. Bradley Smith represented the company and Jim Robinson presented the union's case. Both sides filed prehearing briefs.
Appearances
For the Company:
B.A. Smith -- Senior Rep., Union Relations
J. Bradley -- Section Mgr., No. 4 BOF/CC
M. Banasiak -- Mason Foreman
V. Soto -- Human Resources Generalist, No. 4 BOF
C. Johnson -- Attorney, Inland Steel Industries
W. Peterson -- Representative, Union Relations
B. Arkins -- Human Resources Generalist, 80"
R. Allen -- Human Resources Generalist, No. 2 BOF
For the Union:
J. Robinson -- Chair, Grievance Committee
J. O'Donahue -- Griever
D. Harvey -- Ass't Griever
J. Shumaker -- Steward
R. Salinas -- Witness
D. Luchene -- Witness
I. Henderson -- Witness
J. Relf -- Witness
Background
As noted above, the dispute in this case involves the company's decision to stop scheduling labor leaders in the ladle reline area of No. 4 BOF. This action took place over some time, culminating in March, 1988. These matters are undisputed. The parties disagree vigorously, however, about other important facts.
The company's principal witness was Jim Bradley, section manager of steelmaking in No. 4 BOF. He testified that in the early to mid 1980's, the company sometimes scheduled more than 100 laborers in his department. Although they were supervised by a labor foreman, there were enough employees that a labor leader was assigned to help keep track of the laborers and coordinate their movements. By 1987, Bradley said, a number of changes had contributed to the company's decision to stop scheduling the labor leader. He cited as the "initial reason" the financial condition of the company and the resulting need to reduce the work force. Those reductions could occur in the ladle reline areas, he testified, because of the diminution of the number of laborers who worked there. Although there was no direct evidence about the size of the labor crew in No. 4 BOF in 1987 and 88 (when the decision to eliminate the labor leader was made) the company offered Company Exhibit 14, which shows that in the last week of June, 1991, there were only 23 laborers assigned to No. 4 BOF. Fewer than half of these were assigned to the ladle reline area. Bradley testified without contradiction that the numbers of laborers at No. 4 BOF can vary from a high of around 40 or so to a low of about 20. He also said, again without serious question from the union, that the 1991 staffing practice is representative of manning levels in 1987.
In addition to reduced numbers, Bradley said less supervision of the ladle reline areas was required because the work to be performed has become more standardized. The company has developed a set of standards or

procedures for repetitive jobs which, among other things, reduced the need for close supervision. The standards, Bradley said, are made available to all employees, although the only No. 4 BOF laborer to testify claimed never to have seen them before.

The other factors mentioned by Bradley as justification for elimination of the labor leader were changes in areas of responsibility of the supervisors, a downgrading of the capacity of the furnace, and standardization of laborer assignment within the department. This latter factor helps ensure that laborers have more familiarity with the day-to-day requirements of the job. All of these changes, Bradley testified, caused him to conclude that more of the responsibility for supervision of the laborers could be shouldered by the supervisors, thus eliminating the need for a labor leader in the ladle reline area.

The union vigorously contests the company's assertions that the labor leader's duties are no longer required in the ladle reline area and its claim that the labor leader's residual duties were assumed by the supervisors. Rather, the union urges that the labor leader's duties are still present in the ladle reline area, but have merely been assigned to the mason working foreman, which the union calls the mason pusher.

Discussion

a. The Factual Issue

Local 1010 represents most of the company's production and maintenance employees who are eligible for collective bargaining under the National Labor Relations Act. It does not, however, represent them all. While laborers assist in the ladle reline function in No. 4 BOF, the actual work of replacing refractory is performed by masons, who are represented for purposes of collective bargaining by the Bricklayers Union. I do not have a copy of the collective bargaining agreement covering the masons and, obviously, I have no authority to construe any part of it. It is clear, however, that one of the bargaining unit jobs covered by that agreement is that of mason working foreman.

Prior to the elimination of the labor leader from the ladle reline area, the company contends that his principal responsibility was to communicate work assignments to the laborers. There is no question about the fact that the labor leader himself did not determine which ladle was to relined or exactly how that work was to be accomplished. Those decisions, rather, were made by supervision and by the masons.

Typically, as described at the hearing, the mason working foreman would tell the labor leader the areas in which labor assistance was needed and the labor leader would make the assignments. In addition, other requests for assistance from the laborers were funneled through the labor leader, who had responsibility for the crew. Bradley testified that the labor leader would also oversee that job performance of the laborers. Although authorized to perform work alongside the laborers, the labor leader seldom, if ever, did so.

Following the elimination, the company claims, the supervisory duties formerly performed by the labor leader have been retrieved and assigned to the supervisors. It is apparently not the case, however, that supervisors make daily work assignments. The standardization of work procedures may help here, but company witnesses were unable to furnish a satisfactory answer to Robinson's question of how the laborers know exactly where to work on a day to day basis. Bradley asserted that the laborers just work it out among themselves. The only laborer to testify, however, -- and the only witness at all who is apparently in the area on more than an intermittent basis -- disputed that claim.

Joyce Relf is a laborer in No. 4 BOF, who has also served as labor leader. She said that prior to the elimination of the labor leader, he was the one who lined up the laborers each day, a function that is now performed by the mason working foreman. The union produced three other witnesses, all former laborers or labor leaders in the ladle reline area, each of whom said that the mason working foreman is now doing the same job formerly performed by the labor leader.

I realize that, except for Relf, the union's witnesses all spend limited time in the ladle reline area. The same thing is true, however, of the company's witnesses. Bradley is an impressive man who now does the work formerly done by five managers. I have no question at all about his credibility. He was quite candid, however, about the limited time he could spend in the ladle reline area.

The same is true of Wally Banasiak, the mason foreman (not the mason working foreman) who has supervisory responsibility for, but not day to day direction of, the masons working in the ladle reline area. I was impressed by Banasiak's unwillingness to exaggerate. He described how the labor leader and the mason working foreman interacted prior to elimination of the former. He asserted that prior to the elimination, the mason working foreman had no control whatever over the laborer and then said he still does not, whereupon he paused and added "to my knowledge."

I think Mr. Smith did about as much as one could do with the company's argument that the labor leader's functions were simply eliminated. The difficulty was not Smith's advocacy and certainly not the credibility of the company's witnesses. Rather, the problem is that the facts simply don't support the company's theory.

The question in this case is not whether the labor leader was a supervisor as that term is defined in the National Labor Relations Act. The weight of the evidence <FN 1> supports a conclusion that the company took the duties that the labor leader performed -- which seem to have been primarily lining up the laborers and generally overseeing their performance throughout the day -- and sent them elsewhere. That elsewhere was the mason working foreman. The company chooses to characterize that assignment as merely one of communication. Thus, in his closing argument, Mr. Smith asserted that, while the masons formerly conveyed requests to the laborers through the labor leader, they now make them directly to the laborers themselves. This, Smith argued, was nothing more than a change in receptacle for the dissemination of information.

That characterization is accurate, as far as it goes. The masons, after all, are still conveying the same information they formerly conveyed, they now have just, as Smith says "cut out the middleman." The participants in this exchange, however, are not the only focus. The nature of the information is also of significance. Thus, the masons, (or more accurately, the mason working foreman) aren't merely passing along data. Rather, the mason working foreman is telling the laborers what to do and where to do it, work that was formerly done by the labor leader. More important, this type of communication is an essential ingredient of supervision. In short, it begs the question merely to say that the masons are only passing along information. All human interchange is an exchange of information. The point is that the information passed along here is instruction about how to work or where to work, and that is exactly the kind of function the labor leader used to perform.

I cannot say from the evidence presented how much of the labor leader's traditional work remains in the ladle reline area, how long it takes to perform, or how the quantity of the work compares to what the labor leader did at his peak. Bradley asserted credibly that there is less work now than formerly. The company has not asserted, however, that it has discontinued scheduling an occupation because there is no longer work available. Rather, the company claims that there is lees work than before, but that some of the work remains. That work, the company asserts, was reclaimed for supervision, a right management enjoys under the contract. There is no question about that right, as, I will discuss below. The facts, however, do not support the company's factual contentions. While the work was taken away from the labor leader, it was not, as the company asserts, given to the supervisor. Rather, the work formerly done by the labor leader is now performed by the mason working foreman. <FN 2>

b. The Contractual Issue

A finding that the labor leader's duties have been assumed by the mason working foreman does not make this case easier to resolve. To the contrary, the easy way to decide the matter would be to hold simply that the supervisor has assumed the duties, a contention not supported by the evidence. The fact that the company has given the work to a non-management member of a different bargaining unit makes this a such more difficult case.

The company relies on management rights recognized in Article 3, section 1 and Article 10, section 7. As I will discuss below, it also relies on language from Article 5. The company's right to manage the business is not a matter for serious question. That right, however, is not absolute. Thus, even the basic management's rights clause in Article 3 recognizes that the rights of management may be "limited by the provisions of this agreement." The real question, then, is whether the contract restricts management's ability to assign the labor leader's duties to non-management employees in a different bargaining unit.

I understand that I have no authority to construe the company's relationship with the masons. Indeed, I have no interest in that relationship. The question is not what the company can or cannot do with the masons. Rather, the issue is whether the company's contract with Local 1010 restricts assignment of the supervisory duties formerly performed by labor leaders. The fact -- if it is a fact -- that the agreement with the masons may allow such assignments is of no consequence. A contracting party cannot rely on the terms of a different contractual relationship as justification for breach.

Important to the resolution of the issue, the company claims, is Article 5, section 1, which provides, in pertinent part:

When management establishes a new or changed job in the plant so that duties involving a significant amount of production or maintenance work, or both, which is performed on a job within the bargaining unit . . . are combined with duties not normally performed on a job within the bargaining unit, the resulting job in the plant shall be considered as within the bargaining unit. This provision shall not be construed as enlarging or diminishing whatever rights exist in respect of withdrawal of non-bargaining unit duties from a job in the bargaining unit, provided that where non-bargaining unit duties are placed in a job in the bargaining unit under this provision, such duties may be withdrawn at any time.

There is no question about the fact that supervisory responsibilities are typically not bargaining unit work. Supervisors and other managers are excluded from the unit, as they are excluded from most collective bargaining units. No one doubts the trite observation that, in relationships between employers and unions, management is for management.

That does not mean, however, that employers must always vest all management responsibilities in non-unit employees. Here, for example, the employer and the union have agreed that, in certain instances, bargaining unit employees known as labor leaders will assume some limited role in the assignment and direction of working forces, a traditional management responsibility. The parties seemingly assume that the portions of Article 5 reprinted above are broad enough to encompass such assignments. That same provision makes clear that management is under no obligation either to make or to continue such delegation of supervisory authority: "such duties may be withdrawn at any time."

As other arbitrators have recognized, there is no question about management's right to retrieve from the labor leaders the management authority delegated to them. Thus, if the facts here were as the company would have them -- that is, if supervisory responsibility had been taken away from the labor leaders and given to the turn supervisors -- the union could advance no legitimate complaint. The contract allows the company to withdraw the supervisory duties from labor leaders at any time and no one can question management's right to assign such work to supervisors. <FN 3>

Those, however, are not the facts at issue here. Management did take the duties away from the labor leaders, but it did not give them back to supervision. Rather, as I have found, it gave the duties to the mason working foreman, a non-management employee member of a different bargaining unit. The company argues that this action did not violate the agreement. It points to Article 5, reprinted above, and argues that the right to withdraw recognized there is sufficiently broad to permit redirection of the duties elsewhere. Neither Article 5 nor any other provision of the contract, the company claims, restricts management's authority to determine who will perform supervisory functions. It can give them to the labor leaders and, having done so, it can take them away and direct them elsewhere. Neither Article 5 nor any other provision of the contract restricts such redistribution only to management employees of what are concededly management responsibilities.

The union asserts that the assignment of supervisory duties to labor leaders is a protected practice under Article 2, section 2. It concedes that management is free to retrieve supervisory duties from the labor leaders and give them to supervisors, but it says that reassignment to other non-management employees distorts the bargain struck when the parties negotiated Article 5, section 1. In that regard, the union points to that section's use of the word "withdrawn" which, the union claims, is deliberately more restrictive than "transfer."

The company responds that Article 2, section 2 does not apply because that section cannot operate to restrict rights recognized in the collective bargaining agreement. The company correctly argues that local working conditions cannot become protected practices when the agreement itself gives the company the right to change the practice. As justification, the company, points to management rights language from Articles 3 and 10 as well as to Article 5, section 1. The issue with respect to Article 2, then, just as the issue generally in this case, is the extent of management's authority under those provisions of the contract. Granted that Article 5 allows withdrawal of supervisory responsibility from the labor leader, does it (or any other provision of the agreement) also restrict the ability of management to give those duties to someone other than supervision.

As is not uncommon in disputes between these parties, this is a difficult case. Left entirely to my own devices, I might doubt the applicability of Article 5, section 1 to this case (mp 5.3). I recognize that the labor leader occupation is a mixture of both bargaining unit and non-bargaining unit functions. Nevertheless, the first sentence of mp 5.3 does not necessarily describe the labor leader occupation. While the labor leader job description says that the incumbent "performs general labor work along with the laborers," the testimony was that the labor leaders never did so. One might question, then, whether the labor leader position is one that involves "a significant amount of production and maintenance work" as required by mp 5.3. <FN 4>

Despite these concerns, both parties rely on this provision. Probably more significant is the company's reliance. Thus, the company's brief points to the phrase "such duties may be withdrawn at any time." In my view, this reliance concedes the general applicability of mp 5.3. In the first place, neither party can simply pluck attractive language out of context in order to support a position grounded elsewhere. More important, the sentence itself limits its application to the situation described in mp 5.3. Thus, the entire sentence recognizes that non-unit duties may be withdrawn at any time when they have been "placed in a job in the

bargaining unit under this provision. . . ." (emphasis added). "This provision," as I read the language, is mp 5.3.

The conclusion that mp 5.3 applies to the case is important -- in my view determinative. The first sentence provides that when management creates a job that includes both unit and non-unit work (like the labor leader occupation here) "the resulting job in the plant shall be considered as within the bargaining unit." I assume that the principal reason for that language is to make clear that, even though a unit employee has been assigned to some non-unit work, he does not forfeit his inclusion in the bargaining unit. That does not mean, however, that the language has no other effect.

As I noted above, the issue in this case is not merely whether the company can take supervisory work away from the labor leaders. It certainly can do that. The question is what it can do with the work after removing it from the labor leaders. Without question, the company can give it to supervisors. In Inland Award No. 537 Arbitrator Kelliher recognized that direction of the working force is a right vested exclusively in management. Thus, management can retrieve its delegation of such authority to non-management employees. The question here, however, is whether management can give the work to other non-management employees in a different bargaining unit.

I think it cannot. I find significant the language in mp 5.3 which says "the resulting job shall be considered as within the bargaining unit." In my view, this language is broad enough to restrict the company's freedom to assign such work to non-management employees outside the bargaining unit with Local 1010. I don't know, frankly, whether the company created the position of labor leader or whether it was the product of negotiation. That is not a matter of great significance, at least in this case. The point is that, while it did not have to do so, the company in fact did delegate supervisory duties to the labor leader. The job, including the delegated supervisory responsibilities, is "within the bargaining unit."

This language, I find, means that the work the employees perform is bargaining unit work. Jobs don't exist in the abstract. They are simply bundles of duties, usually (but not always) related, that comprise the responsibility of an incumbent in the position. If a job is "within the bargaining unit," then necessarily that bundle of duties is within the unit. It is simply not possible to say that a job is within the bargaining unit and at the same time exclude from the unit a significant part of what the employee holding the job is expected to do.

I emphasize that mp 5.3 does not compel the company to make any such assignments Moreover, both mp 5.3 and Article 3 (as interpreted by Kelliher) provide that, having made the assignment, the company can withdraw It. But I think the parties have agreed that, if these supervisory responsibilities are to be performed by non-management employees of Inland Steel Company, they belong in the unit represented by Local 1010.

The practice of the parties supports this interpretation. Thus, prior to the incident complained of here, the company had consistently assigned supervisory duties in the ladle reline area only to the labor leaders, except, of course, for those it assigned the supervisors themselves. There is no allegation that the company had ever before given supervisory responsibility to any other bargaining unit employee (except, of course, labor leaders), either within the Local 1010 unit or otherwise.

I need not resolve the union's contention that this consistent practice itself is sufficient. Inevitably, that contention raises the question of whether mp 5.3 is a specific contract provision which allows the company to change the practice. As I interpret mp 5.3, it does not. Indeed, my reading of mp 5.3 specifically restricts the company from doing what it did. <FN 5>

The parties should understand that the effect of this decision is limited strictly to the facts at issue here. I have no intention of affecting how the company makes supervisory assignments generally or, for that matter, in any circumstance other than the one presented to me. In this case, the company assigned supervisory responsibility to the labor leader in the ladle reline area of No. 4 BOF. As I read mp 5.3, those supervisory responsibilities could be withdrawn and given to supervisors at any time. If they are to be performed by non-management employees of Inland Steel, however, they are part of a job within the bargaining unit represented by Local 1010.

I realize that the company has some practice of assigning supervisory duties to individuals who are not non-management employees of Inland Steel. Thus, the company has hired supervisors on a contract basis in the IRMC, in the scrap yard, and in janitorial services. The issue of whether the company can take work away from the bargaining unit and give it to a subcontractor is not before me. I do note that the company did not allege at the hearing that the supervisory work performed by contractors in any of these areas had previously been done by labor leaders whose jobs were eliminated. Moreover, Inland Notification No. 2334, CO-EX 12, decided by Arbitrator McDermott in September 1988, indicates that the work at issue

there had never been performed by bargaining unit employees. Thus, none of these instances deals with the narrow issue of whether supervisory work that has been assigned to labor leaders can be taken away and given to non-management Inland employees in a different bargaining unit.

The Remedy

During the hearing and in its brief, the company asserted that, should I find for the union, I could not award any monetary relief. The company relies on Article 7, section 1, which provides that the issues in arbitration are limited to those set forth in the step 4 minutes. In this case, the parties adopted the step 3 minutes in lieu of step 4 minutes. One portion of the "Brief Statement of the Union Position" of the step three minutes says that the affected labor leaders had "suffered no loss of pay." Thus, the company argues that make whole relief cannot be an issue in arbitration because the union did not raise it as an issue in step 3.

I disagree. The statement under "Union Position" referenced above does recognize that, at least as of the time of the step 3 hearing, none of the grievants had suffered monetary loss. Nevertheless, under the section headed "Relief Sought" is the statement "pay all monies lost." In addition, the statement of facts concludes with the following statement: "the grievance requested as relief that the company restore the practice of scheduling labor leaders to the ladle reline area and pay all monies lost." The issue of make whole relief, then, is "set forth" in the step 3 minutes.

I don't know how previous arbitrators may have interpreted Article 7, section 1. Ordinarily, arbitrators recognize that the purpose of such provisions is to preclude one party from surprising the other by injecting into the hearing an issue not previously disclosed. Obviously, fairness and an opportunity to prepare are prime concerns. At the same time, arbitrators typically have not held either unions or employers to the same standards faced by lawyers pleading a civil case.

In my view, the company cannot claim either surprise or that it was unable to prepare. Indeed, Mr. Smith raised no such contentions. Rather, he simply argued that back pay was not set forth as an issue in the step 3 minutes. I think it was. It was listed as the relief sought and it was referred to expressly in the statement of facts. The union's recognition that there were no lost earnings at the time of the step 3 hearings does not preclude its ability to rely on its grievance, also referenced in the minutes. Clearly, had the union expressly waived its intention to recover monetary relief, it could not properly resuscitate that claim at the hearing. But its recognition that there was no money lost as of the time of the step 3 hearing, without more, does not constitute such a waiver.

I find, then, that the company violated the contract when it assigned supervisory duties formerly performed by the labor leaders in the No. 4 BOF ladle reline area to the mason working foreman. I will not order the company to recommence scheduling the labor leaders because it has the discretion to give the same work to management employees, should it choose to do so. I find, however, that the company violates the contract with Local 1010 when it assigns this work to a non-management member of a different bargaining unit. Moreover, I will order the company to provide make whole relief to the labor leaders adversely affected by its violation of the contract. In previous cases in which the union sought a make whole remedy, the parties agreed that I need not consider specific relief. Rather, determination of the precise relief granted each employee is to be left to them. I assume the same understanding accompanies this case.

AWARD

The grievance is sustained. The company will provide make whole relief as discussed in the remedy section of the opinion.

/s/

Terry A. Bethel

Bloomington, IN

November 10, 1991

<FN 1> I understand why the company did not -- perhaps could not -- call the mason working foreman to testify. Notably absent, however, is the testimony of any of the supervisors who, the company claims, assumed the residual supervisory duties formerly performed by the labor leaders. In the face of union testimony that such work is actually performed by the mason working foreman, testimony from the supervisors about what they do might have been of some significance.

<FN 2> Further support for the conclusion that the labor leader's duties still exist and have been assumed by the mason working foreman is found in assignments made by the company during a strike last year. When the masons struck in 1990, supervisors (and perhaps other nonbargaining unit employees) assumed their duties. During that period, the company reinstituted its practice of assigning labor leaders to the ladle reline area. I understand Mr. Smith's argument that it is unfair to attribute such significance to actions taken

by the company during a strike. I agree. Normal operating patterns are obviously disrupted during a strike. The point here, however, is that the assignment of a labor leader was obviously a recognition that, strike or not, someone has to perform those duties. It may be that the supervisors (who the company claims now do what the labor leaders formerly did) could not exercise those responsibilities because they were too busy performing ordinary mason work. That conclusion, frankly, is not consistent with the company's claim that it eliminated the labor leader, in part, because there was little work to be performed. The more reasonable inference is that the company had to assign a labor leader because the person who ordinarily does that work -- the mason working foreman -- was on strike.

<FN 3> As I will discuss below, the company relies on the quoted language from Article 5 to support this right. The principal arbitration award it cites is Inland Award No. 537. As I read that case, Arbitrator Kelliher did not address the company's right to withdraw under Article 5. Rather, his analysis is confined to management's authority under what was then Article IV, which is what is now Article 3, the general management rights clause.

<FN 4> Despite this possible reading, the parties' conclusion that mp 5.3 applies is not unreasonable. Thus, even though the labor leader may not in fact do any labor work, the job description, at least, contemplates that he could perform a significant amount of such work. Moreover, that may well have been the intent when the occupation was established.

<FN 5> Similarly, my reading of mp 5.3 makes it unnecessary to consider whether the management rights language in Article 3 and 10 are specific provisions contrary to the practice the union urges. I note only that while the company has the unquestioned right to withdraw supervisory responsibility given to the labor leaders, it does not necessarily follow that it also has the authority to give the same work to another bargaining unit.