Award No. 854
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance 24-T-6
Appeal 1465
Arbitrator: Terry A. Bethel
February 15, 1992
OPINION AND AWARD
Introduction
This case concerns the union's claim that the company violated Article 2, Section 2 and Article 13 of the agreement when it allegedly took certain work away from the truck driver sequence and assigned it to the track laborer (driver) in the transportation department. The union filed the grievance on June 6, 1990. The hearing was held in the company's offices on November 15, 1991. Jim Robinson represented the union and Brad Smith presented the company's case. Both sides filed prehearing briefs.
Appearances
For the company:
B.A. Smith -- Sen. Rep., Union Relations
P.D. Parker -- Project Rep., Union Relations
D. Maravilla -- Section Mgr., METS
F. Williams -- Section Mgr., T&YS
N. Sucevic -- Planner, T&YS
For the Union:
J. Robinson -- Chair, Grievance Comm.
S. Bartoczek -- Griever
J. Velasquez -- Ass't Griever
F. Thomas -- Witness
M. Roman -- Witness
C. Melion -- Witness
T. Frazee
Dennis Quick
Background
As noted above, the union urges that the company violated the agreement when it took work away from a sequence in the Mobile Equipment and Truck Services (METS) department and assigned it to a different sequence in a different department. In particular, the union claims that three new trucks purchased in 1990 should have been assigned to METS drivers rather than employees within the Transportation and Yard Services Department (T&YS). In brief, the union asserts that the trucks are used to do bulk hauling and that such work is within the exclusive jurisdiction of the truck drivers seniority sequence in METS. The company, on the other hand, asserts that the primary function of the trucks is to move men and materials and that the bulk hauling in T&YS is still performed by METS drivers. Some of the important facts are in dispute.
The company called Francis Williams, section manager of track maintenance in the Transportation and Yard Services Department. The section's responsibility is to maintain the 150 miles of track and the 1100 to 1200 switches located throughout the Harbor Works. In addition to track maintenance, there is also a transportation labor section within T&YS. That section supports the activities of track maintenance by delivering labor, materials and supplies (some of which is the work at issue here) and by performing general clean up work. Track maintenance maintains the track system itself and provides twenty-four hour a day, seven day a week coverage. The bulk of the employees work on day turn, Monday through Friday. Williams testified that until the early 1970's, both the track maintenance and transportation labor sections received all their transportation needs from what is now called the Mobile Equipment and Trucking Services Department. There were apparently METS trucks assigned to each section around the clock. Track maintenance had a large flat bed truck assigned on a twenty one turn basis, and an additional two trucks -- with dump beds and crew cabs -- on day turn, Monday through Friday.

By 1972, Williams testified, the company thought there were some problems covering all the areas of need with the METS trucks, so the department purchased a bus and established the position of track laborer (driver) to operate it. This individual would drive the bus and deliver department employees and tools to the job sites, and then work alongside them as a member of the gang. At the end of the shift, he would again drive the vehicle and return men and tools to the locker room. Prior to the purchase of the bus, the METS driver had performed the same function, but had not worked as a member of the gang. Indeed, I understood Willlams' testimony to mean that the METS services were continued as before, but that they were supplemented by the department by the purchase of the bus.

The number of trucks furnished by METS, however, was decreased in 1985, when the department purchased two flat bed one ton pick up trucks with crew cabs. These vehicles were able to handle most of the work of hauling men and tools to the job. They were supplemented by one METS truck, a dump truck that could also haul men. The department used this METS truck only five days a week, day turn Monday through Friday. During those times, the METS truck continued to haul men and equipment to the jobs, as well as moving bulk loads of supplies.

The dispute in this case centers around new trucks the company purchased in 1990. The trucks are crew cab dump trucks, which have been modified in certain respects. Although not identical, they are similar in design and function to the METS trucks utilized by the department up until the purchase of the new trucks. The new trucks were assigned not to METS, but to T&YS, and are operated by the track laborer (driver.) Williams testified that the primary responsibility of the new truck is to pick up and deliver people to and from the job. Moreover, some of the modifications were intended to facilitate that function. For example, when the department's men and equipment were moved by the METS dump truck, there was no place on the truck itself to store tools. Thus, all the tools and equipment had to be removed from the truck at the end of the turn and loaded back on the following day. The new trucks, however, have places for tool and equipment storage, including a place for the storage of burning equipment.

Williams testified about the circumstances that led the company to buy the new trucks and assign them to the track laborer driver. As noted above, Williams said the primary responsibility of the drivers, whether from METS or T&YS, was to move men and equipment to and from the job. There was some difficulty with this assignment for METS drivers, since they worked different hours. The company, then, had to bring in the METS driver a half hour early each day and pay overtime. In addition, the METS drivers did not work as part of the crew and, after delivering the men to the job site, would sometimes sit idle. By contrast, the track laborer driver gets out of the truck and works as a member of the gang.

These periods of inactivity have allegedly increased in recent years as the track maintenance and transportation labor departments have gotten smaller. In 1980, for example, there were 273 employees in track maintenance. Now there are 79. At one point there were 15 gangs. Now there are 7, and there are fewer employees in each gang. Although the bulk of the employees still work on day turn, there are fewer employees present then than there were in earlier years. Williams said that the decrease in the number of gangs has not only decreased the numbers of employees to be delivered to the job sites, but it has also meant that there is now less material to move than in previous years. Thus, the periods of idleness for METS drivers increased as the amount of work to be done decreased.

On cross examination, Williams conceded that, while the department vehicles had hauled some materials like railroad ties, the department had not hauled big loads. Rather, such work was performed by the METS drivers. He also said that it would have been possible for the department's employees to leave their tools and equipment on the flat bed trucks which were purchased in 1985. He also acknowledged that, while the work done on the off turns typically does not involve the movement of materials in bulk, if it does, the department plans ahead and has the movements made on day turn, when the METS truck is available. At least, this was the procedure before the purchase of the three new trucks. Now, such movements are apparently sometimes made within the department, with equipment driven by the track laborer driver. Finally, Williams said that there were occasions when the department flat beds would make more than one trip to obtain materials, but he conceded on cross examination that the trucks did not regularly shuttle back on forth on such errands. Rather, the department tried to stage the materials, using the METS truck available on day turn.

The company also introduced the testimony of Nick Sucevic, formerly the transportation labor supervisor. His testimony supported and supplemented that offered by Williams. In transportation labor, as in track maintenance, the primary function of the METS driver was to deliver men and materials to and from the job site. He would also sometimes haul janitorial supplies, refuse, and garbage generated from the department's cleaning operation.

Like track maintenance, the transportation labor department has been shrinking. Where previously there were as many as 40 or 50 employees on a turn, now there are only 5. Where previously the department did track sweeping as much as eight to ten months of the year, in 1991 it performed such activity only six weeks. These reductions in man power and activity, Sucevic said, meant less work for the METS driver and a corresponding increase in idle time.

Sucevic also testified that T&YS was not the only department that moves its own materials. He denied the union's claim that METS employees do such work exclusively throughout the plant. He said he has seen employees from other departments move materials they use on the job, including IRMC and shop services.

The company also called Don Marevilla, section manager of the trucking area in METS. The primary thrust of his testimony was that the company's action in assigning the three new trucks to the track laborer drivers had no effect on employment security for the truck drivers in METS. Although their number has been reduced somewhat over the last year, the reduction was caused by attrition, and not from layoffs. Moreover, Marevilla said that the company's decision did not result in the elimination of any job, since the assignment at issue was not a separate occupation.

Maravilla agreed with Sucevic's assertion that other departments of the company move their own equipment and materials, citing the IRMC, mobile maintenance, shop services, miscellaneous maintenance, and the sucker truck area. Marevilla also asserted that his department still furnishes some transportation services to T&YS, hauling large quantities of some kinds of materials.

The union called three employees who drove METS trucks assigned to T&YS. Frank Thomas said that part of his job was to take the gangs to and from the work site. He also hauled materials to the job, including ballast, railroad ties, switch points, plates and spikes. He was aware that the track laborer driver drove flat bed pickup trucks, but he denied that they ever hauled material of the kind he hauled, even on the back turns. He also asserted that no other department in the plant has the capacity to make the kinds of moves he makes. On cross examination, Thomas acknowledged that he was only present 5 turns a week and didn't know what might have been hauled by the track laborer drivers on the other turns.

Melvin Roman testified that he performed the same kind of work as Thomas. He also denied having significant idle time, when he wasn't hauling men or materials, Roman said he took refuse to the dump. Like Thomas, Roman asserted that the track laborer driver did not haul large loads of material, although he acknowledged that they sometimes could have moved smaller quantities. Clarence Mellon agreed that the track laborer drivers sometimes moved small quantities of materials like ties, spikes plates and an occasional switch point, but agreed with his coworkers that METS drivers moved the larger loads. He also asserted that, while other departments move materials, none of them have the capacity to move large or bulk loads.

Discussion

1. Protected Practice Issue

The union asserts that the right of METS drivers to make bulk moves is a protected practice under mp 2.2. The company argues that, while protected local working conditions may be created under Article 2, Section 2, no such protection exists here because general work assignments for non-craft, position rated jobs do not fall within the ambit of protected practices. In that regard, the company cites, among other things, language from USS Case No. CI-257. It is not apparent to me that this case is in point.

The specific issue addressed by Arbitrator Garrett was the union's protest over the addition of duties to the shipping clerk and the rolling order clerk. At base, the union asserted that the additional duties overwhelmed the incumbents. The grievance said, in part: "Freedom from the performance of time consuming tasks, and the freedom from mental effort is a benefit in excess of, or in addition to the benefits established elsewhere in the agreement."

Garrett agreed with the company's contention that "the bare assignment of particular duties to incumbents of a given job over the years" did not establish a protected local working condition. It is not clear to me, however, that this quotation, or the longer one in the company's brief, has any application to the instant dispute. The union does not contend merely that one kind of truck driver should do certain work rather than another, which was the essence of the dispute in USS Case CI-257. Rather, the union here protests the removal of work formerly performed exclusively by one seniority sequence and the assignment of it to employees in a different sequence. That is a distinction of substance. I have no opinion about whether, if there were two or more occupations in the MMTS drivers sequence, the company could take the task of making bulk moves away from one step in the sequence and give it to another. But that is significantly different from taking it out of the sequence altogether and assigning it elsewhere. <FN 1>

I think Arbitrator Luskin's opinion in Inland Award 720 is consistent with this observation. He did say, as the company quotes in its brief, that general assignment practices cannot be made the subject of practices protected under 2.2. There was, however, no issue in Award 720 similar to that at issue here, since the dispute was how assignments would be made among employees of the same department. Moreover, it is worth noting that Arbitrator Luskin observed that the pick system "could very well constitute a local working condition" but the facts at issue were not sufficient to make the case.

I am also persuaded that Inland Awards 823 and 824, rendered in the same opinion by Arbitrator McDermott, have no controlling effect in this case. This was a long, fact specific, and (to someone who didn't hear the evidence) somewhat confusing case. Mr. Smith's assertion in final argument is correct: many of the arguments raised by the parties in the instant case were also argued in 823 and 824. But that does not mean the cases are the same.

In 823 and 824 the union, as here, protested the transfer of duties across seniority sequence lines, the same contention it raises here. As I read Arbitrator McDermott's opinion, however, he rendered his decision on different factual findings. There, as here, the union argued that a certain seniority sequence had consistently and exclusively performed certain duties. For the most part, McDermott was unable to reach that conclusion about the transferred work. That is, he was unable to find that the union had established exclusivity. With respect to the duties that had been performed exclusively by the sequence, McDermott found that changed circumstances had reduced the volume of work so dramatically that the jobs could be eliminated and their residual duties assigned elsewhere. That, however, is not tantamount to a finding that no protected practice could exist. Indeed, exactly the contrary is true.

I think McDermott's award in 823 and 824 is consistent with the analysis I applied in a similar case in Inland Award 836. There, like here, the company transferred duties across seniority sequence lines, although unlike here, the company also eliminated a job. The company did not contend, as it does here, that no protected practice could arise, even though the jobs at issue were not craft jobs. Rather, it asserted that changed circumstances had eliminated the need for the eliminated position and that the duties transferred across seniority sequence lines were minimal and residual.

Finally, I think the exact principles contended for by the union here were recognized and applied by Arbitrator McDermott in Inland Award No. 813. Although the issue there was more complex, the union challenged the company's plan to create a new job and transfer work across seniority sequence lines. McDermott acknowledged, as the company contends in this case, that 2.2 alone was of no assistance to the union, since "position rated jobs have no right to claim that past assignment of duties to them requires that such duties always be assigned there. . . ."

That did not end the matter, however, because McDermott found the protection the union sought in Article 13, Section 3. McDermott read the language that says promotional sequence diagrams are to remain in effect for the life of the agreement and concluded that it was intended to provide "some meaningful protection for jobs in a given seniority sequence." He went on to explain:

". . . if a given seniority sequence has done recognizable types of work with reasonable consistency and exclusivity, then the concepts of paragraph 13.11 and local working condition principles of Article 2, Section 2 require that such work not be transferred across seniority sequence lines."

In my view, there could be no clearer rejection of the contention raised by the company in this case.

In final argument, Mr. Smith asserted that Award 813 needn't apply to the instant case because the job to which the work was to be transferred in that case was a new job. I fail to see the relevance of that fact. The focus is not on the job to which the work is to be transferred, but on whether the sequence from which the work is to be taken can establish the reasonable exclusivity and consistency described by McDermott. If the union can prove that, then the principles of Article 13 and 2.2 apply.

In summary, I find nothing in the cases cited by the company to undermine the basic proposition advanced by the union. While it may be the case that position rated occupations cannot claim exclusive rights to certain duties, the union's contention here is that Article 13 and mp 2.2 may be used to prevent the company from transferring work across seniority sequence lines. I agree. The question is whether the union has established such a protected practice in this case.

2. The Body of Work

The company mounts several defenses to the union's claim that there is a protected practice under mp 2.2. First, it asserts that the relevant body of work includes not only the transportation of bulk loads, but also involves the movement of men and equipment. The METS drivers, the company says, cannot show that they have performed this body of work with reasonable exclusivity since it is undisputed that the track laborer driver has been transporting men and equipment since 1972, without objection from the union.

As I have observed before, in cases such at this the parties pull at opposite ends of the string. The company has an interest in defining the relevant body of work as broadly as possible since, the more duties it includes, the smaller the likelihood that any one occupation can claim exclusivity. Conversely, the union has an interest in narrowing the scope of the duties, thereby increasing its opportunity to demonstrate that only one group of workers has performed them.

The question, as I have addressed it in the past, is whether the work claimed by the union is a recognizable body of work that has been performed with reasonable consistency and exclusivity. It does not necessarily follow that all of the duties performed by a particular occupation must be taken into account in making that determination. Here, for example, there is no question about the fact that the METS drivers delivered men and equipment to the job site. Nor can one question that such assignment was an important and integral part of the job. But because men and equipment can be loaded onto trucks and delivered, it does not follow that such work must be considered as a part of every duty the METS drivers perform.

The question is whether one part of the drivers' duties can be looked at separately as a recognizable body of work, without creating artificial distinctions. Here, for example, there was testimony that the METS drivers sometimes deliver aggregate and sometimes deliver railroad ties. Although the issue is not before me, I cannot see how it would be possible for the union to claim that the METS drivers have exclusive jurisdiction to deliver only one of those items. Since the essential work involves the delivery of bulk loads of material, proof by the company that someone other than the METS drivers delivered certain kinds of materials would seem to undermine the union's claim. In short, differentiating between materials would create an artificial distinction that would unfairly narrow the body of work and improperly limit management discretion.

Those are not the facts at issue here. Rather, the question is whether the delivery of bulk materials can rationally be looked at separately and apart from the delivery of men and equipment. Can either one of those tasks be seen as a recognizable body of work? I think the answer is yes and I think much of the support for that conclusion comes from the company's actions.

Williams testified that the principal responsibility of the drivers is to deliver men and equipment. Indeed, he said the primary function of the new equipment is still to deliver men and tools, even though the trucks are fitted with dump beds. Williams said that when METS vehicles were assigned to the department on a regular basis, if one broke down he could not accommodate just any replacement vehicle. He always requested what he called a "man hauling vehicle" since it was more important to get the men to the job than it was to haul trash or material. Moreover, he said that if there were competing demands on the truck, he would always haul men first and defer the movement of materials or refuse.

Sucevic agreed that the primary function of the new trucks is to get men and equipment to the job site. He also confirmed that when a METS truck broke down, his primary concern was obtaining a replacement vehicle that would carry men. He said that hauling men and tools was more important than delivering material and therefore took priority.

I take this testimony to draw a bright line between the two functions the METS drivers performed in the T&DY. The testimony was not that both duties were of equal importance or even that they were integrally related to each other. Rather, the consistent theme of the company's case is that the movement of men and tools was the principal responsibility, the paramount duty to be performed by the METS drivers. It was so important, in fact, that both section managers said they were more interested in having METS furnish vehicles that hauled men than vehicles that hauled bulk loads of material.

This does not mean that the management of T&DY was indifferent to the transportation of materials. Nor does it mean that such work was unrelated to the delivery of men and equipment since, obviously, those men would use the materials the METS drivers transported. Nevertheless, the company's own actions demonstrate that there is a distinction between the two functions performed by the METS drivers.

Prior to 1972, the METS drivers did everything. As far as the evidence showed, they alone moved men and tools to the job sites and they alone made bulk moves. In 1972 the company purchased a bus to supplement the movement of men and tools. In 1985 it bought yet more vehicles, but they, too, were directed primarily at the movement of men and tools. Thus, when the company determined that the METS drivers needed supplemented it did not buy equipment that duplicated all of the METS drivers' functions. Rather, it focused on a part of their service to the department and bought equipment capable of doing only part of the work.

Importantly, the equipment the company purchased did not have the capacity to move bulk loads of materials. Perhaps the company thought such equipment was unnecessary because the movement of men was the more important part of the job. Or, perhaps more realistically, the company believed that the

movement of bulk materials was within the exclusive domain of METS, since it appears METS is the only organization that performs such work plant-wide. Whatever the reason, the point is that the company's action demonstrated that there was a distinction of substance between the two functions performed by the METS drivers. When it decided to supplement the work being performed by METS, it did not purchase equipment: that would allow it to do all the work (at least not then). Rather, it bought equipment that allowed it to move men and tools and left the transportation of bulk loads to METS. This, I think, helps establish the union's claim that the movement of bulk loads is itself a recognizable body of work, apart from the other duties the METS drivers performed in T&DY.

3. Reasonable Exclusivity

This is an issue of some considerable difficulty. Indeed, I had some trouble understanding the union's claim and the company's response to it. That is not a criticism of either the union's or the company's presentation. Rather, it is simply a recognition that the essential contention raised by the union is not easy to state. During the hearing, and particularly in his final argument, Mr. Robinson made repeated references to bulk moves, or to the movement of large quantities of material. My initial reaction was, bulk moves of what? That is, it seemed odd to me to claim that the union could establish jurisdiction over a particular kind of work without reference to the material being moved. And, indeed, much of the company's argument focused on the occasional movement of smaller quantities of the same material by T&YS employees. I think, however, that the union's argument does not necessarily depend on what is moved, but focuses instead on the quantity.

The dispute before me relates only to the movement of materials in T&YS, though the union's concerns are not necessarily that narrow. Testimony established that the material moved in bulk includes ballast, railroad ties, plates, spikes, and refuse. In addition, there was testimony about certain other materials which, while not moved in great quantities, nevertheless required trucks like those traditionally operated only by METS drivers. The company's response has been to assert credibly that the METS employees do not have exclusive jurisdiction over the movement of such materials because T&DY employees have, on occasion, moved such material on T&DY equipment. Thus, there was testimony that the track laborer driver would, from time to time, load a few railroad ties on the back of the flat bed pickup or that T&DY employees would fit a switch point into the bus. Similarly, the company asserts that the METS drivers do not have exclusive jurisdiction plant wide to haul materials, since there are other departments, including T&DY, that also do so.

I believe those claims. It is not clear to me from the testimony exactly how often such movements occurred, but it was probably not possible to be more specific. I doubt that the company kept any records of instances when track maintenance employees would throw a few railroad ties onto the back of the flat bed, or when they would set a keg of spikes in the bus. I am prepared to believe, however, that there were more than a few isolated instances. Nevertheless, I am unable to conclude that this evidence undermines the union's claim.

Mr. Robinson's case does not depend on the transportation of specific materials. He does not claim that the METS drivers have the exclusive right to haul ballast or railroad ties or any other particular item. Rather, he asserts that, throughout the Harbor Works, the METS drivers have exclusively made bulk moves and other items and that the company violates that jurisdiction when it takes part of those movements away, in this case by having the track laborer driver do the work.

The evidence supports his contention. Although employees in both T&DY and other departments sometimes take materials to the job in their own vehicles, both Willlams and Sucevic conceded that they did move large loads. In fact, they could not move large loads since, prior to the purchase of the trucks at issue here, only METS had the equipment capable of doing so. Maravilla acknowledged that departments around the plant call him to make bulk moves, since he is the one who has the equipment to do it efficiently.

I realize that the union's case suffers from a lack of precise definition. Mr. Smith complained in final argument that he could not understand the union's contention, which had been asserted with a variety of terms, including bulk moves, large loads, and "the big stuff." This is not a frivolous complaint. I cannot say with any assurance what the term "bulk loads" means throughout the Harbor Works and my jurisdiction in this case is more limited, in any event. It is clear, however, that there were some moves in T&DY that could be made only by METS drivers because only they drove trucks capable of doing the work. The union's principal complaint here is that their traditional jurisdiction over such work can now be undermined because the company has given to track laborer drivers equipment capable of doing the same kinds of work.

The evidence establishes that, though employees sometimes moved small quantities of material to the work site with their department vehicles, deliveries in bulk were performed by the METS drivers. Mr. Smith does not necessarily deny that, but he asserted that it made no difference whether track laborer drivers took only small quantities or whether they made repeated trips with the result that, ultimately, they would deliver as much as the METS drivers could in one load. Such facts might undermine the union's case. But there was no testimony that the track laborer drivers were doing that. The testimony, in fact, was to the contrary. Williams testified on cross examination that the department's vehicles were not constantly shuttling materials back and forth to the work sites. Instead, the evidence was that the track laborer drivers would deliver the men and tools and then become part of the crew. Moreover, Williams acknowledged that the department tried to have material staged around the work area, so it would be available to employees working on shifts when there were no METS drivers.

I agree with Mr. Smith's assertion that the terminology "bulk moves" is imprecise. I think it would be unfair, however, to require great precision in an area where the practices themselves have been imprecise. If there was a practice of always (or frequently) having ballast, or ties, or spikes delivered in specific quantities, then the union would shoulder more of a burden in establishing that they had consistently and exclusively done that work. Those seem not to be the facts. Rather, the only logical inference to draw from the testimony is that the parties ordered the delivery of the quantity of materials they needed for specific jobs and that, when that quantity was large enough, METS drivers made the delivery in equipment available only in that department.

a. The Company's Action Violates METS' Exclusivity

Much of the company's case involved testimony that the purpose of the vehicles purchased for the use of the track labor driver has always been to move men and tools. There is no doubt this was the case with the bus that went into service in 1972. I am also persuaded that the primary purpose of the flat bed pickups purchased in 1985 was to move men and equipment. I cannot make that same finding with respect to the trucks that are the subject of this grievance.

I understand that the new trucks are still used to move men and equipment and I have no reason to question Williams' and Sucevic's testimony that such movements are their primary concern. But it obviously is not their only concern or, more accurately, whoever ordered the new trucks was not concerned only with the movement of T&DY personnel and tools to the job sites. Although company witnesses repeatedly said that moving men and equipment to the job is their first priority, no one explained why trucks with dump beds were essential to that task. I have no question about the need for crew cabs or about the desirability of modifying the basic design to accommodate certain kinds of equipment. But why the dump bed?

I think the answer to that is obvious. The company wanted the dump bed so it could make the sorts of moves that previously could only have been done by a driver from METS, since that was the only place dump trucks existed. During his final argument, Mr. Smith asserted that beginning in 1972, the company began replacing the METS drivers' functions with the track labor driver. There is no question about the accuracy of that statement. The union cannot claim that the METS drivers have any exclusive right to the transportation of men and tools and, if that was what this case was about, I could have dealt with it in summary fashion.

The new trucks, however, carry the elimination of the METS drivers one step further and, in my view, cross a line that cannot be violated. I heard the company's witnesses testify that T&YS still calls METS for some bulk moves, and I believed them. But it seems clear to me that the department now also has the track labor driver make moves that, before the acquisition of the new trucks, would have to have been made by METS. There is no other explanation for the present configuration of the trucks and for the disappearance of the METS drivers from the scene following acquisition of the new trucks.

I think the union's evidence is sufficient to create a protected practice and that the company cannot defeat it merely by giving trucks to the track laborer driver that can carry the loads previously hauled only by METS drivers.

4. The Issue of Significant Change

The company argues that, should I find a protected practice that has been violated, it had the right to do so under either of two different, but related theories. The company argues correctly that under Article 2, Section 2(d), even an established, protected practice can be modified if the basis for the protected practice is changed or eliminated by management action pursuant to Article 3. The company cites two such changes here. First, it claims that the new trucks are working tools and, second, it points to efficiency concerns about idle time of the truck drivers.

a. Working Tool

The company relies principally on Inland Award No. 645, in which arbitrator Luskin rejected the union's claim that the company had improperly assigned a new winch truck to the wiremen instead of the METS drivers. As in this case, the truck had substantial modifications. Moreover, like here, the truck was used, in part, to move men and tools to the job site. The arbitrator found that the truck was a working tool for the wireman:

"The truck was designed to be utilized primarily as a working tool for wireman forces. The truck was designed to be used primarily for the pulling of cable, making a lift, providing for self contained welding equipment and, at a later point in time, for use in conjunction with a newly purchased tensioner. Those were the primary purposes and the truck was used for those purposes. The use of the truck for hauling supplies, tools and personnel and to obtain needed supplies (when necessary) was incidental. . . ."

The company claims that the new trucks in T&YS are likewise working tools. The company cites the modifications that include making room for certain equipment used by the gangs, providing room for retailing blocks, for burning equipment, for cable racks, and for tool boxes. In addition, the back tail gate was modified. None of these features were present on the METS trucks formerly used in the department.

I am not persuaded by the company's argument, and the company has the burden on this issue. In Award 645 the truck was an integral part of the function performed by the wiremen. For example, it replaced another winch the wireman had used prior to the acquisition of the new truck. The evidence in the instant case does not show that the trucks are an indispensable or inherent part of the work to be performed. Rather, at most it showed that they were a more efficient way of storing and transporting tools and equipment. Moreover, Williams acknowledged that at least part of this function could have been performed by the flat bed pickups, since he said it would have been possible to leave the tools on them.

In addition, I think the company's argument about the use of the trucks undermines its assertion that the trucks are working tools. In Award 645 Arbitrator Luskin found that the primary purpose of the trucks was to assist the workmen in the performance of their jobs and that they were only incidentally used to haul men and tools to the job site. By contrast, in the instant case the company says that transportation of men and tools is the trucks, primary purpose. This cuts against the company's assertion that the trucks themselves are tools for the performance of work.

Finally, the primary thrust of the union's complaint here is not the tool racks or the crew cabs. Rather, it is the fact that the trucks are equipped with dump beds. It is that fact which prompts the union's challenge to the company's action. But there was no testimony that this feature was necessary to make the truck a working tool. If the company's primary interest was the acquisition of a truck that had a crew cab and space for permanent tool storage, then why buy one with a dump bed? Even if the modifications did suffice to make the truck a tool, the company would still have the burden of establishing why the tool needed to have a dump bed. Its only explanation was that the modified tail gate facilitates the hauling of material. But that is exactly the union's complaint -- the truck is being used to haul quantities of material that were previously carried only by METS drivers.

b. Changed conditions

The company also points to the various changes that have reduced the working forces in T&DY and, it asserts, thereby increased the idle time. Frankly, I was not much persuaded by the evidence offered from either side on the issue of the extent to which METS drivers were idle. Both company and union witnesses offered impressionistic evidence that is not itself objectionable but, when it is conflicting, is hard for a third party to evaluate. I think it is fair to conclude that the reduction in working forces led to more idle time, but that in itself is not determinative.

As I understand the cases the parties have given me to review in this controversy and in others, there are restrictions on the company's right to make changes that promote greater efficiency. I have no doubts about the company's right to manage the enterprise and, while I'm obviously not aware of specific problems, I understand that the company and the industry face difficult times. Nevertheless, the right to manage the business and to pursue efficient solutions to difficult problems is not unbridled. In particular, when the union is able to establish a protected local condition, the company must advance some changed conditions to justify the modification or elimination of the practice. I do not think it has carried that burden here. The company has not proven that there is no longer any need to make bulk moves. Nor has it established that the volume of work has decreased so significantly that only residual duties remain. Indeed, it introduced no evidence about the volume of work that remains or the man hours necessary to perform it. All it has really proven, in fact, is that the volume of work has decreased (although it has not proven by how much) and that it was therefore more efficient to purchase trucks that allowed the track laborer driver to do work he had never done before.

As I have observed before, labor contracts advance efficiency, but not always to the exclusion of other values. Here, through mp 2.2, the parties have agreed that security is important as well. Striking the balance between these two legitimate, and sometimes conflicting, interests is a matter of some considerable difficulty. I have considered the company's argument that its action was justified under Appendix Q, but I am unable to find there a justification for eliminating the protections the parties bargained in 2.2.

I realize that no truck drivers were laid off as a result of this action. That, however, is not the only consideration. What the company did was take away from the truck drivers a portion of the work they have done in the past with reasonable consistency and exclusivity. The union does not have to wait until jobs are lost to protest such incursions into the work traditionally done by the seniority sequence.

Conclusion

This is a difficult issue that arises in difficult times. I have no doubt about the good faith in the company's decision to reduce expenditures and increase efficiency. In my view, however, the union was able to establish that the truck drivers have exclusively made bulk moves of materials. The strictures of Article 13 and of 2.2 prevent the company from undermining the local working condition created by that exclusivity. In my view, then, the grievance must be sustained. The union has asked as a remedy that the company cease and desist from transferring the work and make the grievants whole. I will order such a make whole remedy. The details of the remedy can be worked out by agreement of the parties with, obviously, resort to arbitration if they disagree.

AWARD

The grievance is sustained. The company will provide a remedy as discussed in the conclusion, above.

/s/ Terry A. Bethel

Terry A Bethel

February 15, 1992

<FN 1> The company also cites USS Case No. 21, 242, a case I have significant difficulty understanding. I find the facts confusing and the summary holding (on the issue of interest here) to be equally vague. The arbitrator said that the transfer of an entire job from one seniority sequence to another violates section 13, but that the transfer at issue in the case did not because only one duty had been transferred. Mr. Robinson asserted in final argument that this case recognized the principle for which the union contends, but merely found its application not warranted on the particular facts. I'm not certain that accurately describes the case, but frankly, I don't think the company's treatment in its brief is any more revealing. If the arbitrator' opinion means that it does no harm to a seniority sequence to take an isolated duty and assign it elsewhere, then the case is consistent with several of the cases discussed in the text. Moreover, it would have no application to these facts since the kinds of duties at issue here were not isolated but were, in fact, the principal duties performed by the sequence.