Award No. 919
OPINION AND AWARD
Introduction
This case calls for an interpretation of the Shapes Products Organization Mutual Agreement, entered into between the parties in 1988. The case was tried in the company's offices in East Chicago, Indiana on September 17, 1996. Patrick Parker represented the company and Dennis Shattuck presented the union's case. The parties submitted the case on final argument.
Appearances
For the company:
P. Parker Arb. Coord., Union Relations
R. Vela Sr. Staff HR Gen., ISBC
R. Sanger Manager, Mfg.Maint.
For the union:
D. Shattuck Secy., Grievance Committee
A. Jacque Chrm., Grievance Committee
A. Aguilar Mechanical Tech.
D. Aiduke Elect. Tech.
R. Gilbert Mechanical (Welder)
L. Aikens Mechanical Tech.
T. Reel Mechanical Tech.
J. Rosas Mechanical (Griever)
Background
I have had occasion in two other cases to describe the parties' objectives in the Shapes Products Organization Mutual Agreement. I need not repeat here the descriptions and background I recited in those earlier awards. Among other things, the company committed a significant capital expenditure for the bar company and the union, in turn, agreed to modify certain work rules and to create certain skill-based occupations. Among the commitments the parties made was paragraph 12 of the mutual agreement, which reads, in relevant part:

> A coordinator occupation shall be established as the top occupation in the mechanical and electrical sequences as determined by the company. Job descriptions shall be established in accordance with Article 9, Section 6 of the Collective Bargaining Agreement. The Coordinator occupation shall be filled on a voluntary basis and in accordance with the Collective Bargaining Agreement....

...
The union's grievance, filed in March of 1993, protests the company's inaction in creating the coordinator occupation. At that time -- and continuing at least until the time of the hearing -- the company had not established a coordinator in either the electrical or mechanical sequences.
The company's only witness was Robert Sanger, who was general mechanical foreman at the 2A 21" mill at the time of the negotiations in 1988, and participated in the negotiations as the representative of the various maintenance departments in the bar mill. Sanger said that the coordinator occupation was the company's proposal. The company was influenced by maintenance procedures at Nippon Steel Company (NSC) and by the activities of that company's foremen and assistant foremen. As envisioned by Sanger, the coordinator would have significant training and would be responsible for, among other things, diagnosing problems, planning, scheduling, and problem solving. He described it as a "very high level job" which would require significant training and education.
Sanger said the precise duties of the coordinator were never defined in negotiations. There was no agreement about how many coordinators would exist or when the company would create them. Sanger's testimony described the coordinator as more of a concept than a definite plan. In fact, Sanger said that there was no way to be specific about the coordinator because the company did not know what the form the maintenance functions would assume. He said that he wanted to leave "wiggle room" so the company could look at the concept and decide whether to use it. That was the reason, he said, that he insisted on the language "as determined by the company." He said he added that language because he wanted to insure that "the company can't be forced into this."

The company never created the coordinator, Sanger said, because a continuing dispute about the inspection method of maintenance got settled shortly after the parties agreed to the Shapes Products mutual. The company apparently implemented some of those concepts in the bar company and, Sanger said, as he "moved up" in maintenance management, he found "ways to address those issues within the framework of existing jobs in the plant." On cross examination, Sanger said that there were basically two paths the company could have followed. One was the NSC model, with the coordinator occupation. The other was IMM. When the company and the union reached the IMM agreement (which apparently had no effect in the bar company itself), the company decided to adopt the latter path. And, it says, it was free to do so because Paragraph 12 of the mutual agreement did not obligate it to create a coordinator.

Not surprisingly, union witnesses came away from negotiations with the impression that the company had done more than merely explore a concept in paragraph 12 of the mutual agreement. The union introduced Union Exhibit 4, which was part of a company proposal handed to the union during negotiations. The sheet of paper is headed "Anticipated Technician and Coordinator Assignments, Plant #4 Maintenance." It shows 5 mechanical and 4 electrical coordinators in various areas. The coordinator term itself is marked with an asterisk. which is explained below as follows: "To be established from existing technicians when job description, training and qualifications have been determined."

The union finds a parallel between the use of the word "determined" on the proposal and the use of the word "determined" in paragraph 12 of the mutual agreement. Thus, the union urges that the words "as determined by the company" should be understood to refer to the company's determination of the job description, training and qualifications, as identified on Union Exhibit 4. The language "as determined by the company" was not intended to give the company discretion to create the occupation or not, the union says. Indeed, it argues that the use of the word "shall" militates against any such reading.

In response, the company argues that Union Exhibit 4 did not bind it to create any particular numbers of coordinators in any locations or, for that matter, to create the occupation at all. Sanger said that the sheet was given to the union merely to indicate what coordinator assignments might look like if the company adopted that occupation. He noted that it dealt only with plant 4 and not with other units that were part of the bar company. He stressed that, from the company's perspective, the document was not an agreement but merely a demonstration of how the concept could be implemented. In addition, Sanger discounted the union's parallel between the use of the word "determined" in Union Exhibit 4 and Paragraph 12 of the mutual agreement. He said the language following the asterisk on Union Exhibit 4 was added merely to placate union concerns about how bargaining unit employees would get to be coordinators. It was not in any way related to the company's discretion reserved by the words "as determined by the company."

The union questioned this assertion with testimony that Union Exhibit 4 was handed out to employees in 1989 or 1990. The testimony was that the exhibit was given to employees for informational purposes to encourage them to prepare themselves to become coordinators. There was no indication at that time, the union says, that the company would not create the coordinator occupation or that it thought it had reserved the discretion not to act. Indeed, the testimony was that the company never said that it didn't have to create the job; the only question was when it would do so.

Salvador Aguilar testified that Sanger told the union that the coordinator would have some combination of technician duties and supervisory duties, but that the company hadn't settled on a final vision of the job, though there were people working on it, as well as on the training that would be required. Aguilar said that the union gave the company the language "as determined by the company" in order to insure that it had the latitude to decide on duties and the appropriate training, but not to decide not to create the job at all.

Discussion

It is not surprising that the union should cite my opinion in Inland Award 883. The issues are different, but there are still similarities. In that case the parties had agreed to language that, perhaps, each side had expected to accomplish different objectives. The same thing is true here. Sanger testified credibly that he understood the disputed language to give significant discretion to the company about whether to create a coordinator; just as credible is the union's understanding that the job would be created as soon as the company settled certain details of scope and responsibility. As in Award 883, the fact that the parties did not share the same vision does not mean that they did not reach agreement. Perhaps more extended discussion would have made them realize that there were issues yet unresolved. That does not mean that the parties somehow failed in their negotiations. The coordinator was not the only matter under discussion, and, given the projected $100,000,000 dollar investment and the decision adopt to skill-based occupations, the coordinator may not even have been a particularly important issue. Nevertheless, the parties did agree.

They adopted language and they ratified their agreement. The question before me now is how to interpret what they agreed to, exactly the same thing I was called on to do in Award 883.

Obviously, the union's strongest argument is the use of the word "shall." The agreement does not say that the company "may" create a coordinator or that it "has the discretion" to do so; it says the company "shall" do so. The word "shall" is not ambiguous. We ordinarily understand it to be directive, to require certain action. It typically constrains discretion and compels action. If the first sentence of paragraph 12 had a period after the word "coordinator," then this case would be simple. The company might still raise arguments, but it would be hard to muster support for a claim that it kept the discretion to have a coordinator or not.

The problem here is that the sentence does not end with the word "coordinator." Rather, it adds the words "as determined by the company." My task, then, is not merely to interpret the meaning of a direction that "the company shall create the position of coordinator" but to understand the meaning that it "shall" do so "as determined by the company." I have no right to ignore the words "as determined by the company." as the union certainly understands. My job is to try and give meaning to all of the words of the contract, and I cannot leave out those that make interpretation more difficult.

The union says that insight into the meaning of paragraph 12 can be gained by comparing it to paragraph 9 in the same mutual agreement. I agree that such a view is helpful but, unfortunately for the union, I think it hurts rather than helps its cause.

As the union points out, the wording at issue in paragraph 12 is also used in paragraph 9. That section says, in relevant part, "a leader occupation shall be established in certain sequences as determined by the company," language that is virtually identical to that at issue here. The union notes that the company has already created the leader occupation and that, when it did so, it said nothing about its action being discretionary. Rather, the union argues that the company created the leader because it recognized that the mutual agreement required it to do so. If "as determined by the company" did not vest the company with discretion in paragraph 9 of the agreement, the union says, then it did not do so in paragraph 12 either.

This argument has obvious limitations. The company's creation of the leader occupation is not inconsistent with its claim that the language "as determined by the company" gives it discretion to do so or not. The company would merely say that it exercised its discretion to create the leader but not the coordinator. But the common language between paragraphs 9 and 12 causes more serious problems for the union.

The union claims that the words "as determined by the company" were merely intended to allow the company to, as Mr. Shattuck said in his opening statement, "determine the details of the job." The third step minutes indicate the union's belief that the disputed language gave the company discretion to determine qualifications and training, though it was clear at the hearing that the parties had an incomplete understanding not only of those matters, but also about exactly what the coordinator would do. Undoubtedly, this is what led to Mr. Shattuck's assertion in opening statement that the union agreed to accept the coordinator position "in whatever final form the company determined."

This comment suggests that the company's discretion was to have significant scope. Moreover, I am unable to determine that the words "as determined by the company" were to be limited to small details or to such things as training and qualifications. It is true that paragraph 12 mentions nothing about training, qualifications, or responsibility. I have no trouble determining that these matters were to be left to company discretion. But I cannot find that the discretion ended there. The words "as determined by the company" were also used in paragraph 9. Unlike paragraph 12, paragraph 9 does speak to issues of responsibility, training and qualifications. Thus, paragraph 9 says that a leader occupation "shall" be established "as determined by the company" and it goes on to say:

> Leaders shall be responsible for directing the crew. Vacancies in the leader occupation shall be filled from qualified bidders in accordance with the applicable provisions of the collective bargaining agreement, subject to the following procedure: (1) promotion to the Leader occupation shall be voluntary, (2) candidate must be fully qualified and established on the skill-based occupation immediately below the leader occupation, (3) candidates will be given a job preview at which time the leader's responsibilities will be explained in detail, (4) candidates will be given a leadership needs analysis and thereafter an appropriate training program will be established for the candidate if he chooses to proceed, (5)

> upon successfully completing this program the candidate shall be considered a qualified leader in his respective sequence, ...[section goes on to discuss remedial instruction and trial program].

Paragraph 9, then, speaks directly to some of the issues that the union says "as determined by the company" were intended to cover in paragraph 12; yet the "as determined by the company" language also appears in paragraph 9. It must be the case that the parties intended "as determined by the company" to mean the same thing in paragraphs 9 and 12. But it must also be the case that "as determined by the company" in paragraph 9 cannot speak merely to training, qualifications and responsibility, since those matters are addressed directly by other language in the same paragraph.

In short, "as determined by the company" cannot be as limited as the union argues or the words would be superfluous when they were used in paragraph 9. Of course, that does not solve the problem. Determining what the words do not mean is not the same things as figuring out what they do mean. I must conclude, however, that when the parties agreed to the creation of a coordinator "as determined by the company," they vested the company with significant discretion about how and when to act. The question before me is whether the company has breached that commitment or, even if it has, whether the commitment was sufficiently definite to allow the imposition of a remedy.

The union urges that it is not necessary for me to define the precise parameters of the language. Rather, it says that I should merely declare that the company has an obligation to create a coordinator occupation and then leave it to the parties to work out the details of the job and the resultant remedial consequences. It is true that I have often had little involvement in the construction of make-whole remedies. Indeed, in the ordinary case with these parties in which a make-whole remedy is appropriate, I merely order the relief and leave it to them to work out the details. Typically that involves little difficulty because these parties have a good relationship (despite occasional tiffs) and a mature understanding of the need to work together to solve problems. Although I have often applauded such efforts, I have considerable doubt about whether a similar order is appropriate here.

In other cases, the scope of the company's contract violation is clear, though there may be some controversy about the harm its actions have caused. If, for example, the company improperly sub-contracts work, then the controversy might be which bargaining unit employees would have done the work and how much income (if any) they actually lost. But the contract violation itself may be less complicated, or at least more easily discernable by ordinary principles of contract construction. The violation in the instant case, however, is much more speculative. The word "shall," standing alone, is not ambiguous. The contract does say that the coordinator "shall" be created. But the agreement sheds almost no light on what that occupation would do, how he would be assigned, how many there would be, or even when the company would act. It merely says that an occupation "shall" be created "as determined by the company." The ambiguity here is not merely a remedial consideration. Rather, it is a matter of substance that goes to the merits of the union's claim that the contract requires particular action. In short, what particular action was the company to take?

I understand the union's evidence that the parties discussed responsibilities a coordinator might assume. And, certainly, it was reasonable for the union to assume that the job, once created, would include some or all of those duties. But that is not what the parties agreed to. Rather, they left those issues -- as well as any other issue concerning the creation of the occupation -- to the company's discretion. I know of no other way to interpret the words "as determined by the company." The use of the word "shall" indicates the parties intent to create a coordinator, but the remaining language, while not necessarily relieving the company from that responsibility, seemingly creates significant discretion about how and what the company would do, and when it would do it.

Given the discretion left to the company, it would be improper at this point for me to determine what a coordinator should do, where and when he should work, and when the practice should have started. Obviously, the parties did not bargain for my judgment about such matters. It would be equally inappropriate for me to now require the company to bargain specific solutions with the union, which would be the effect of the award the union wants me to enter. That would obligate the company to reach agreement with the union on various issues concerning the coordinator. But the time to do that was when they bargained the Shapes Products agreement and that is not the path they chose. They bargained about the coordinator, but they did not agree to settle all issues and they did not agree to meet later and resolve any disagreements. Instead, they left most decisions to the company's discretion and they did so without a blueprint that allows someone to come in after-the-fact and impose a settlement.

As I have often observed, the parties to this relationship are intelligent, experienced negotiators. This is not a relationship where one side compels agreement from a demonstrably weaker party. Thus, I suspect that when the parties negotiated this mutual agreement, the company had every intention of creating a coordinator and that it thought it would do so along the lines described in negotiations. But, as Sanger described, the company was sufficiently uncertain about what the coordinator would be to insist on what he described as "wiggle room." One might question whether the union will be amenable to such arrangements in the future. Nevertheless, the difficulty here is that, though the parties used the word "shall," they also left the company so much discretion that it becomes impossible to articulate the obligation the company assumed, or to describe an appropriate remedy for its failure to act. That makes it impossible for me to sustain the grievance.

AWARD

The grievance is denied.

s/Terry A. Bethel
Terry A. Bethel
October 14, 1996