Award No. 937
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
February 20, 1998
OPINION AND AWARD
Introduction
This case concerns the union's claim that grievant Sue Nielsen should have been recalled to fill a temporary vacancy in the crane sequence of No. 3 Cold Mill East instead of permitting a junior employee to work. The case was tried in the company's offices on December 15, 1997. Pat Parker represented the company and Dennis Shattuck presented the case for grievant and the union. Each side presented testimony and then submitted the case on final argument.
Appearances
For the Company:
P. Parker -- Arb. Coord., Union Rel.
P. Berklich -- Senior Rep., Union Rel.
J. Spear -- Staff Rep., Union Rel.
For the union:
D. Shattuck -- Secretary, Grievance Comm.
M. Mezo -- President, Local 1010
R. Schneider -- Former Griever
Background
This is a complex case which involves interpretation of language added to the Agreement in the 1993 negotiations. The particular language at issue is found in Article 13, Section 6.a.1, mp 13.19.1:
Temporary vacancies in sequences in departments serviced by a core pool known at the time schedules are posted to be of at least five (5) days duration in the payroll week shall be filled by the employee within the sequence in which such vacancy occurs in accordance with the provisions of Article 13, and where such vacancy is on the lowest job in the sequence shall be filled by the employee with standing in the sequence stepped back out of the sequence, or if none, by the qualified applicant working in such core pool in accordance with Section 1 of Article 13. (emphasis added).
Section 6.a.2., mp 13.19.2, provides a similar procedure for filling a vacancy known to be less than five days duration or whose duration is not known at the time the schedules are posted.
John Spear explained the history of how temporary vacancies are filled, and the current procedure under the language quoted above. The parties agree that employee R. Amezcua was properly called back from the core pool to fill a temporary vacancy as a wrapper in the shipping sequence even though he was junior to grievant. This is because Amezcua had an application to the shipping sequence on file and grievant did not. Subsequently, Amezcua filled a temporary vacancy in the crane sequence, for which he also had an application on file. Grievant also had an application on file for the crane sequence and she was senior to Amezcua. However, the parties agree that Amezcua properly filled the temporary vacancy in the crane sequence because of the underscored language from mp 13.19.1, above.
The key is that Amezcua was a qualified applicant who was already "working," and, as the parties agree, properly working instead of grievant. Since he was already working, he was entitled to be moved to another temporary vacancy in a sequence in which he had an application on file, even though there was a more senior employee with a like application laid off. Obviously, mp 13.19.1 favors employees who have already been called back to work to fill temporary vacancies. If another vacancy occurs for which they are qualified (and there is no contention here that Amezcua was not qualified) then they can fill the vacancy notwithstanding the fact that there are other, more senior qualified applicants laid off. Such assignments, however, cannot necessarily go on indefinitely. Mp 13.88.15 provides a twice-a-year bumping procedure in which junior employees can be displaced. The union does not claim in this arbitration that the company has failed to comply with that provision.
The problem identified in this arbitration is the union's claim that, when Amezcua went on sick leave or vacation (each of which happened when he was assigned to a temporary vacancy), he could not be recalled to fill a temporary vacancy that occurred at the end of his vacation or sick leave. And, the union says, this is

true even if the temporary vacancy is in the same sequence in which Amezcua worked prior to sick leave or vacation. As the union sees it, an employee who is on vacation or sick leave is not "working" as that term is used in mp. 13.19.1. Thus, if there is a temporary vacancy to be filled when the vacation or sick leave terminates, the employee is not entitled to the preferential treatment prescribed by mp 13.19.1. The employee, after all, was entitled to fill the temporary vacancy over more senior employees only because he was working. But he forfeits that status -- and therefore the preference established by mp.13.19.1 -- when he stops working either because of vacation or sick leave.

During the hearing, the parties debated vigorously whether there was a vacancy during the weeks Amezcua was on sick leave or vacation and, if so, how the company was entitled to fill it. The company says there was a vacancy though, as I will explain below, it says that fact isn't crucial to this case. In any event, the company says that it elected to fill the vacancy by having the other employees in the sequence work overtime while Amezcua was off, which it says it has the right to do. There was some question raised by the union president (though not necessarily from its advocate) about whether the company can fill a temporary vacancy through overtime. It is clear, however, that whatever work Amezcua had performed before sick leave or vacation was handled through overtime assignments while he was away.

The union argued that the failure to fill the temporary vacancy formerly filled by Amezcua while he was on vacation or sick leave meant there was no vacancy while he was away. And, if there was no vacancy while he was away, he surely could not have been filling that vacancy, which means that he was not "working" those weeks. If someone is to be recalled to fill a temporary vacancy after Amezcua's sick leave or vacation, the union says the decision must be made on the basis of seniority, which would have favored grievant. That is because Amezcua no longer qualified for the preference given "working" employees under mp 13.19.1.

The company agrees that the issue is whether Amezcua was "working" while he was away on vacation or sick leave. However, it says that the existence of a temporary vacancy while Amezcua was off is not an essential inquiry. However that work might have been done, Amezcua cannot be considered as having been laid off merely because he went on vacation or sick leave. The company says that it has consistently treated similarly situated employees as though they had been at work while they were away. Indeed, Spear testified that the company has never displaced employees merely because they took a vacation or went on sick leave. That is not to say that an employee might not be laid off for other reasons just before or while on vacation or sick leave. But the absence itself, Spear said, has never caused the layoff.

In addition to its defense on the merits, the company also advances a procedural argument. The grievance was initially filed on October 8, 1993 and, apparently, protested Amezcua's initial assignment to the crane sequence after having been recalled to fill a temporary vacancy as a wrapper. The union now apparently concedes that that assignment was proper, though it would not have been under the language of the previous contract. The new language had become effective only the month before the grievance was filed. Through the third step of the grievance procedure, the union also argued that the parties had agreed to extend the previous contract language through the time this grievance arose. It appears that there was an extension of some previous procedures, but not those that would have required the initial recall of grievant over Amezcua for the crane vacancy.

At the hearing, the union protested the fact that Amezcua went on sick leave in 1994 and on vacation in July 1995 and both times was allowed to return to fill a temporary vacancy in the crane sequence. The company notes that the union did not file a grievance after either occurrence and that it never identified those matters as subjects of the instant grievance until after March of 1997. Thus, the company says that there is no grievance properly raising this issue and that it is now too late to file one. The company also calls my attention to Article 13, Section 17, c, which says that in the case of an alleged improper recall "the aggrieved employee shall be entitled to the following preferred handling in the grievance procedure" and then goes on to establish a procedure that is less time consuming than the ordinary grievance procedure. The company notes that the union did not comply with this procedure in this case.<FN 1> Finally, the company says the union's case is defective because it fails to point to any section of the agreement that requires it to treat employees on vacation or sick leave as though they were not working.

Discussion

1. The Procedural Issue

Union president Mezo testified without rebuttal that following the 1993 negotiations, the company and union reviewed every grievance pending at the third and fourth step in every department of the plant. The instant grievance was part of that process. Mezo testified that he "articulated" to Manager of Union Relations Bob Cayia and Section Manager Tim Kinach the union's position that if a junior employee like

Amezcua goes on vacation, there was no vacancy for him to fill that week. Therefore, following the completion of the vacation, Mezo argued that the employee's return to work amounted to a recall and the senior employee should get the job. Mezo said neither Cayia nor Kinach said anything about a procedural issue at that point.

Mezo testified that at the fourth step meeting, he said the same thing to company advocate Parker that he had earlier said to Cayia and Kinach. Parker did raise a procedural issue, either "there or later." On cross examination, Mezo acknowledged that his comments in both meetings had concerned an employee absent on account of vacation and not because of sick leave. However, Mezo said that he may have mentioned sick leave in the course of the discussion. Mezo did not testify about the date of his meeting with Cayia and Kinach and the record does not reveal the date of the fourth step meeting. The third step meeting, which Mezo did not attend, was not until March, 1997. There is no evidence in the minutes that the company raised a procedural issue at the third step, but the union apparently had not settled on its current argument at that time. According to the third step minutes, the union was still arguing that the parties had agreed to extend the previous agreement at the time the grievance arose. There was, then, no reason for the union to raise a procedural objection at that time.

A fair inference from the record is that the union did not raise its argument that vacation or sick leave meant that an employee was not "working" under mp 13.19.1 until sometime after the third step meeting. Thus, Mezo's conference with Cayia and Kinach must have occurred after that time. And, sometime between March and December, the parties held the fourth step meeting and Parker told Mezo "there or later" that the company would contest the union's right to make its argument in this hearing. Interestingly, union advocate Shattuck said that he did not know the company would raise a procedural issue in the case until the evening of December 14, which was the night before the hearing, when the company advocate called him. And, to make matters more complicated, the union apparently did not tell the company until just before the hearing that it would argue that Amezcua's sick leave was at issue. Until then, both parties apparently assumed that Amezcua's absences were due to vacations, an assumption that proved to be incorrect.

This is not an easy argument to resolve. Certainly it would be better if the union had filed grievances when Amezcua was reassigned to the crane sequence after his sick leave and after his vacation. Frankly, I suspect the union did not do so because it had not yet formulated that theory of recovery. The union's initial position, maintained through the third step, was that grievant should have been recalled at the time of Amezcua's initial assignment to the crane sequence. The union now concedes the invalidity of this position. Nevertheless, it kept the grievance active, searching for some theory under which it could maintain that a senior qualified employee had recall priority over a junior employee.

I appreciate the company's position that the union failed to file a specific grievance protesting the theory articulated by the union at the hearing. Nevertheless, the initial grievance was timely and the parties continued to discuss it throughout the grievance procedure. Moreover, the union did give the company advance notice of the position it argued at the hearing in the meeting between Mezo and Cayia. At that point, at least, the company did not raise any timeliness objection, even though it obviously knew that this theory had not been advanced before. Thus, the company had an adequate opportunity to prepare its defense and the company did not indicate its objection at its first opportunity. Exactly when it did raise the objection is not clear, since Mezo said that Parker told him at some point but Shattuck said he knew nothing about it until the night before the hearing.

Obviously, this was not a clean handling of the grievance by either side. There are several factors, however, that convince me that I should consider the case on the merits and deny the company's procedural defense. First, this was new contract language that radically altered the previous method of filling temporary vacancies. The union did file a grievance over the effect of what the parties had negotiated, though it initially had difficulty understanding just what might have gone wrong, an understandable problem given the magnitude of the change. There was, then, a grievance pending over the company's failure to recall grievant all during the period that Amezcua continued to work in the crane sequence. The company obviously could not claim that it had no notice of the dispute and, while it would have been better to file a grievance over the specific acts complained of, the company at least had sufficient notice of the union's theory to allow it to prepare a defense.

This should not be interpreted as an indication that the procedural requirements of the Agreement can be easily circumvented. In the peculiar circumstances of this case, however, I am persuaded that the instant grievance was sufficient to require consideration of the union's claim on the merits.

2. The Merits

I have some sympathy for the union's position. Part of the purpose of the 1993 amendments was to insure a more equitable use of seniority in filling temporary vacancies. The union acknowledges that the 1993 amendments did not guarantee that junior employees would never work while senior qualified employees were laid off. But in the circumstances at issue here, the junior employee would be retained over a senior laid off employee only if the junior employee was already "working." It seems anomalous to find that an employee is working when he is absent from the plant while on vacation or on sick leave.

The company points out, however, that vacations and sick leave are benefits available to active employees and that employees do not forfeit their active status just by taking advantage of them.<FN 2> As Spear testified, the company has never laid off an employee merely because he took a vacation, which is essentially what the union is asking for in this case. Nor under the circumstances at issue here do I think that Amezcua forfeited his status as a working employee by taking a vacation or by going on sick leave.

I emphasize the circumstances of this case because I cannot say that there are never circumstances when the unavailability of a working core pool employee would not trigger an opportunity for a senior laid off worker. But part of the problem here is uncertainty about the parameters of the union's claim. For example, the longer of Amezcua's two periods of absence was for sick leave, which was apparently a period of about two weeks. But if his absence from the crane temporary vacancy was the triggering event for a finding that he was no longer working, then would he also lose his protection if he was out merely one day? It may be that by use of the term "sick leave" the union intended to convey that Amezcua took advantage of the benefits contained in the Program of Insurance Benefits (PIB), though that was not made clear at the hearing. But it is not easy to see why one should distinguish between absences for which an employee is paid and those for which he is not. In either case, he is not "working" if that word is to mean the actual rendition of service.

The point is that if any absence would trigger the action the union asks for here, the company could experience the "administrative nightmare" it predicted in its closing argument. Every time a core pool employee was absent, the company would have to ask whether there was a senior qualified employee on layoff before allowing the absent employee to come back to work. The union does not argue in this case that such action is required by any absence, but I fail to see how sick leave and vacation differ from absence due to short term illness, jury duty or a host of other circumstances in which employees are sometimes permitted to be absent from the work place. In each such instance, the employee is not "working" under the union's definition of that term, and if there is work to be done, then the union would require the recall of another employee. But the need to fill in behind absent core pool employees on a routine basis seems to be what the parties intended to avoid when they negotiated mp 13.88.15, which provides for twice yearly bumps of junior employees -- like Amezcua -- who are working while a senior qualified employee -- like grievant -- is laid off.<FN 3>

This is not to say that there is no period of absence which would forfeit the working status of someone like Amezcua and it does not mean that there is no difference to be drawn between vacation and sick leave and other forms of absences. On this record, however, I am not satisfied that Amezcua forfeited his status as a working core pool employee due to his absences. And, of course, this does not address the situation in which the company uses another core pool employee in the same job while the junior core pool employee is on vacation. Here, however, the company used overtime to fill in for Amezcua's absence, something Mr. Shattuck acknowledged it had the right to do. As is the case with other employees, the company had the right to consider Amezcua an active or "working" employee during those periods of absence. I will, therefore, deny the grievance.

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

February 20, 1998

<FN 1>It is not clear to me whether this grievance procedure is mandatory. The contract says the employee is "entitled" to preferred handling, which doesn't necessarily mean that the typical procedure cannot be used. Given the special circumstances of this case explained infra, I need not resolve that issue.

<FN 2>I realize that vacation is also available in certain circumstances to employees who have been laid off, so that employees do not necessarily have to be "working" to take advantage of that benefit. But the question here is whether an employee who is working forfeits that status by taking a vacation.

<FN 3>I Understand union president Mezo's testimony that whether an employee is active or "working" is a issue by issue analysis, and that the term "working" can mean different things in different circumstances.

Surely it could mean the actual rendition of service. But it also makes sense for the company to consider an employee to be active or working when he is absent temporarily from an assigned job with a reasonable expectation that he will return.