Award No. 943
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
July 1, 1998
OPINION AND AWARD
Introduction
This case concerns the union's claim that the company improperly excluded certain employees from regular overtime assignments as members of their crews. The case was tried in the company's offices on May 15, 1998. Patrick Parker represented the company and Dennis Shattuck presented the case for the union. The parties submitted the case on final argument.
Appearances
For the company:
P. Parker -- Section Mgr., Arbitration and Advocacy
J. Gordon -- Mgr. of Maintenance, Flat Rolled Operations
W. Johnson -- Section Mgr. Maintenance, 12" Bar Mill
J. Medellin -- Human Resc.. Area Mgr., ISBC
C. Lamm -- Senior Rep. Union Relations
For the union:
D. Shattuck -- Secy. Grievance Committee
L. Aguilar -- Vice Chrm., Grievance Committee
J. Rosas -- Griever, Plant 4
S. Aguilar -- Staff Rep., USWA
D. Jones -- Griever, MMD
K. Nelson -- Plant 4 Mechanic
F. Jutkus -- Plant 4 Mechanic
F. Azcona -- Plant 4 Mechanic
Background
In 1987, the parties entered into a mutual agreement concerning the equitable distribution of overtime in the Plant 4 mechanical department. The agreement defined an "overtime opportunity" as hours paid or offered at overtime rates, whether scheduled or not. It provided that overtime would be considered "equalized" when there was not more than a forty-eight hour difference between the overtime opportunity of the employee having the greatest number of overtime hours and the remainder of the department. For purposes of this arbitration, the appropriate overtime equalization group consists of all plant 4 mechanics and the company's obligation was to make a good faith effort to equitably assign overtime within the group. There were to be two equalization periods a year. If there was a discrepancy of more than forty-eight hours at the end of any such period, the company was to receive a six month make-up period. If the make-up period did not alleviate the discrepancy, the agreement provided for a monetary penalty, which is not at issue in this case. Although the relevant equalization group consisted of plant 4 mechanics, not every mechanic was included. Pursuant to paragraph 14 of the agreement, employees could ask to be excluded from the equalization group. In that event, "any such employee . . . will not fill available overtime turns unless directed by management to fill an immediate need or emergency. . . ."
In addition to these provision, the company points to two other paragraphs of the agreement as relevant to the instant dispute:
15. The existing right of management to assign overtime to employees of its choosing is modified only to the extent that said assignments and/or offerings of overtime shall be made with a consciousness of the responsibility to attempt to equalize overtime opportunities. . . . .
16. No grievance(s) shall be filed by an employee concerning the terms of this Mutual Agreement, except a grievance alleging failure of the Company to abide by the terms of this Agreement.
There are four crews of mechanics in Plant 4, which must provide 21 turn coverage every week. This is typically accomplished by having three crews work 5 turns and the fourth crew work six turns, which includes one overtime turn. The parties agree that this assignment rotates among the crews, with each crew working six turns an average of once every four weeks. Historically, the sixth overtime turn has been

assigned by crew. That is, both before and after the parties agreed to the Mutual Agreement at issue in this case, requiring the equalization of overtime, an entire crew was scheduled for the sixth turn without regard to the relative overtime standing of its members. In addition, such assignments were made without regard to whether a mechanic had excluded himself from the overtime equalization list, a status the parties refer to as "not interested." Such not-interested employees, therefore, were scheduled an overtime turn on an average of once every four weeks. What gave rise to this grievance was management's decision to stop scheduling the not-interested employees to the sixth overtime turns.

The company says its action was prompted by a combination of factors. On May 14, 1994, the union filed two identical grievances which read, "The company has improperly scheduled non-interested mechanics ahead of interested mechanics." The situation protested by these grievances is not identical to the matter at issue in the instant case but, like the instant case, the grievances also involved sixth day overtime. Moreover, the union's grievances protested the assignment of non-interested employees to work the sixth day while interested employees were not scheduled. The company says that it recognized its error and agreed to stop scheduling non-interested employees for overtime when interested employees were not scheduled. In addition to the grievances, the company says its decision was prompted by a desire to use the sixth day overtime opportunity as a way of insuring overtime equalization. Company witness John Gordon, section manager of the 12" bar mill maintenance group at the time the grievance arose, testified credibly that overtime equalization was "out of control" at the time he took over his responsibilities in 1994. I understood this to mean that prior to his arrival, previous management had assigned overtime without sufficient regard to equalization. The discrepancies were difficult to rectify, he said, because the company was also trying to reduce overtime, meaning that there were fewer overtime assignments available to use as make-up assignments. Thus, given the two grievances which had protested the scheduling of non-interested employees while interested employees were not working overtime, Gordon decided to cease scheduling non-interested employees to sixth turn overtime all together. This action not only complied with his interpretation of the settled grievances, but it also freed up several more overtime opportunities that the company could use for make-up.

The union, however, denies that the two settled grievances were similar to the one at issue here. In the two settled grievances, the company had scheduled non-interested employees for sixth day overtime while interested employees on the same crew were scheduled for only five days. In those cases, then, the entire crew was not scheduled for the sixth day. What the union says it protested was management's decision to choose the employees on the crew who would work without regard to their interested or non-interested status. When less than the entire crew was assigned for the sixth day, the union claimed that non-interested employees could not be scheduled ahead of interested employees. However, the union says its grievances cannot reasonably be understood as a protest of any overtime assignments to non-interested employees. To the contrary, the union says that historically, when the company has scheduled an entire crew for sixth day overtime, it has scheduled interested and non-interested employees alike.

The union says this historic pattern is a protected practice under Article 2, Section 2 of the Agreement. This practice, the union says, did not arise merely from a repeated pattern but rather from an express - albeit oral - agreement about how to schedule sixth day overtime. Union witness Salvador Aguilar was a griever at the time the mutual agreement about overtime equalization was negotiated. Initially, he said the parties understood that it did not permit non-interested employees to be scheduled for sixth day overtime. This created some problems because, prior to the mutual agreement, there had been a consistent practice of scheduling entire crews for the sixth day. Aguilar said that practice was effectively nullified by the mutual agreement, though some non-interested employees still got overtime. Aguilar said he received so many complaints from employees (apparently from both interested and non-interested employees) that he approached Will Johnson, the day turn supervisor who then controlled scheduling. According to Aguilar, he and Johnson reached an understanding that from that point on, non-interested employees would be scheduled with their crews for sixth day overtime when the entire crew was scheduled on the sixth day. Aguilar said the company continued that pattern of scheduling until the change that is the subject of this arbitration.

According to the union, then, this agreement constituted a protected practice under Article 2, Section 2 and it cannot be terminated unilaterally by management, at least unless management can show changed conditions that warrant its elimination. However, the company has not alleged any such conditions here. Rather, the company argues that there was never a protected local working condition to start with. The company called Will Johnson on rebuttal, who said that he never had any discussions about sixth day overtime with Aguilar and that there was no agreement to modify the mutual agreement. The company

says, then, that it not only had the right to stop scheduling non-interested employees for sixth day overtime, but it also had the obligation to do so in order to equalize overtime among the interested employees. The company notes that paragraph 13 of the mutual agreement provides that the agreement does not guarantee overtime and gives the company the right to determine the size of the scheduled crew. Paragraph 15, quoted above, reserves management's right to assign overtime, and paragraph 16 prohibits the union from filing grievances other than those that protest a violation of the terms of the mutual agreement. The company also notes that it has the right to determine the make-up of the crews and that membership does not have to remain constant from week to week. The union introduced evidence, however, that crew composition is only rarely changed.

In addition to its position on the merits, the company says the instant grievance should be dismissed because it is effectively controlled by the settlement of the two grievances discussed above, in which the company agreed that it would not schedule non-interested employees ahead of interested employees. In addition, the company notes that the union asked for make-whole relief for all affected employees, though it did not file a class grievance. Rather, there are three named grievants and the company says that any remedy should be restricted to those three grievants.

Discussion

1. The Settlement Issue

I am not able to accept the company' s claim that the settlement of the two 1994 grievances effectively controls this case. It is true that the grievances protested "improperly schedul[ing] non-interested mechanics overtime ahead of interested mechanics." As the union points out, however, those grievances cannot reasonably be read to embrace the instant dispute. Despite the broad wording in the grievance complaint, the cases did not actually protest all overtime assignments to non-interested employees. Rather, they simply complained that non-interested employees were being scheduled ahead of interested employees on the same crew, an obvious violation of the mutual agreement. In the instant case, however, the union asserts that there is a protected practice of scheduling a crew together - interested and non-interested alike - when sixth day coverage is desired and when an entire crew complement is needed. In such cases, the union says that it is not only proper to schedule non-interested employees, but that it is required. On their face, then, the cases raise different issues and the settlement of the first two cases does not control the instant grievance.

2. The Merits

Under cross examination, union witnesses conceded that the mutual agreement was intended to cover all overtime, including the sixth day assignments at issue here. In those circumstances, it is not easy to understand why the company continued to schedule non-interested employees on the sixth day from 1987 until May of 1994. If such sixth day scheduling was to be included within the definition of "overtime opportunity" under the mutual agreement - as it clearly was intended to be - then the company' s action for that seven year period clearly violated the mutual agreement. The sixth day was an overtime opportunity and it was routinely given to non-interested employees without regard to the relative overtime standing of interested employees, an obvious violation of the express terms of the mutual agreement for an extended period of time. Of course, it is possible the company might have done that by accident, since schedulers are typically not involved in the complexities and nuances of negotiation and, when there is doubt about meaning, they might revert to established patterns of conduct. It seems more likely, however, that the company scheduled non-interested employees for the reasons articulated by Aguilar - that is what the parties had agreed to do.

I thought Will Johnson was a credible witness and I believed him when he said he did not make an agreement with Aguilar about sixth day scheduling. But the fact that he had no recollection of it eleven years later does not mean that no such agreement occurred. <FN 1> Moreover, there is really no other rational explanation for the fact that non-interested employees continued to be scheduled for a sixth day in spite of a mutual agreement that would otherwise seem to prohibit such actions. As arbitrator Milton Schmidt observed in a similar situation in Continental Can Co.

Case No. 97, where there was also conflicting testimony about the existence of an oral agreement:

It seems to me highly improbable that this scheduling practice would have been followed so regularly and consistently unless it was grounded in Management' s recognition of an understanding with the Local Union.

In the instant case, there are two additional persuasive factors. First, unlike Continental Can, the company's scheduling practice at issue in the instant case would have violated a mutual agreement, absent the oral agreement; second, and even more persuasive, the company previously granted a grievance which recognized its obligation to schedule non-interested employees for the sixth day.

In 1990, a non-interested employee filed a grievance because he had been scheduled a sixth day as part of his crew. The employee had previously been working solely on days and was not familiar with the practice of scheduling entire crews to work sixth day overtime. He protested the overtime assignment because he was on the not-interested list. The company denied the grievance and the second step "Company Decision and Supporting Facts" reads as follows: "The company does not deny scheduling Jeff Blumenhagen on a sixth day. Jeff is on a regular rotation schedule the same as our crews, to fill the necessary open turns, they are scheduled a sixth day." The company denied the grievance and the union accepted the company's decision at the second step. <FN 2> Obviously, this settlement is evidence of the company's understanding that when entire crews were scheduled for a sixth day, non-interested employees were assigned along with interested employees.

I find, then, that the parties reached an agreement to continue scheduling entire crews, including non-interested employees, to cover sixth turn overtime, just as they had done prior to the overtime mutual agreement. Nothing in Article 2 or in the mutual agreement appears to restrict the ability of the parties to agree to implement the mutual agreement in a particular way, especially when the action is consistent with historic practice. I recognize that paragraph 16 of the mutual agreement restricts the right to file grievances "concerning the terms of this mutual agreement" except for alleged violations of the terms. That language, however, appears intended to prevent employees from protesting what the parties did in the mutual agreement, even if the agreement somehow disadvantaged them. It was not intended to prevent grievances over an understanding between the parties about how it would be administered. The company, then, had no right to change the practice of scheduling non-interested employees for sixth day overtime.

There remains the issue of whether the grievance is limited to the three grievants or whether relief may been extended to other affected employees on the not-interested list. The Company says that the instant case was filed solely by three grievants and not on behalf of all affected parties. Thus, any remedy must be restricted to the three named grievants. It is true that the Union sometimes files group or class grievances and that the instant one is not expressly so identified. Perhaps, in the typical case, the union should be precluded from expanding the scope of the remedy beyond the grievants identified in the grievance. Even without regard to the merits, the company's willingness to settle a case could be affected by the scope of the group seeking relief. The instant case, however, does not appear to be one in which the company was unfairly surprised. In the first place, the face of the grievance is not necessarily restricted to the three named grievants. Rather, the complaint speaks generally of violating an accepted practice of crew scheduling on a sixth day and the relief requested is that "all employees" be made whole. Granted, the company could have understood "all employees" to relate to the three grievants. However, the union claimed that the case was always treated as though it sought relief for all affected employees, and it points to the "Brief Statement of the Union' s Position" in the third step minutes: "The union is requesting that the company schedule everyone on the turn crew a sixth day when it is their 'turn,' regardless of their written request to the contrary and pay all monies lost to all employees who were not scheduled in this manner." The company's response is directed solely at the merits and does not mention the scope of relief requested by the union. Indeed, the union says (and the company does not deny) that the company never raised this issue prior to arbitration. This omission supports the union's argument that the parties understood the grievance as requesting class relief. This is not to suggest that the union can easily convert a limited grievance into one of greater scope. Nevertheless, under the circumstances of this case, I find that the parties understood that the grievance requested relief for all members of the affected class. I will, therefore, order the company to provide make-whole relief for all affected employees.

AWARD

The grievance is sustained. The company will schedule turn employees for the sixth day without regard to their status as interested or non-interested. The company will provide make-whole relief for all employees not properly scheduled.

/s/ Terry A. Bethel

Terry A. Bethel

July 1, 1998

<FN 1> The company suggests that Johnson could have made no such agreement because he had no such authority. Clearly, Johnson and Aguilar would have had no authority to enter into the mutual agreement itself. But their agreement was merely an understanding about how the mutual agreement would be administered. I cannot say whether Johnson's superiors had given him the authority to reach such understandings. However, he was in charge of scheduling and seemingly had apparent authority. I also note

that the fact the agreement was maintained for some seven years without deviation is some indication either that Johnson had the authority or that his superiors had ratified his unauthorized action.
<FN 2> The company objected to this exhibit because it claimed the grievance had been settled at the first step and therefore had no precedential value. The company tendered a document in which the company denied the grievance at the first step with the "accepted" block checked for the union. However, the same document showed that the union had appealed the case to the second step. The union suggests that it may have taken this action in order to gain a decision that had some precedential value, even though it did not disagree with the result at the first step. It could also be that the "accepted" block was checked by mistake. In any event, the appropriate time to raise the matter was at the second step. If the company did not believe the grievance was properly at the second step, it should have refused to consider it. Having considered the case, however and having rendered a decision, it is now too late to claim that the settlement is for naught.