

Inland Steel Award No. 794

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SAFETY AND HEALTH

GRIEVANCE NO. 32-S-24

AWARD NO. 794

SUMMARY: (1) The Safety and Health provisions of the Agreement incorporate OSHA regulations and standards into the Agreement, and the Company's duties and obligations under the Agreement with reference to lead safety procedures must be decided in light of the reasonable and objective meaning of OSHA's Lead Standard. (2) Under the Standard, the Company may not use compressed air to blow lead dust off floors and other surfaces under the conditions that exist in the plant, and use of such blowing in the past was a violation of the Safety and Health provisions of the Contract, for which employees who requested relief and were not assigned to other available equal or higher-rated work are entitled to be made whole. (3) Even if the Standard were treated as persuasive, rather than as having been incorporated into the Agreement, the result would be the same. (4) The matter is remanded to the local parties for further consideration of specific remedies.

COMPANY: INLAND STEEL CO.

PLANT: INDIANA HARBOR

DISTRICT: 31

ARBITRATOR: CLARE B. McDERMOTT

DATE OF DECISION: FEBRUARY 9, 1989

STATEMENT OF THE GRIEVANCE

"Proper lead safety procedures are not being followed at #4 BOF. I want a clarification and written procedure made up to ensure that proper safety procedures are followed and that they comply with OSHA regulations. This includes sucker trucks and anything associated with them.

"Relief Sought Written procedures on use of sucker trucks and compliance with OSHA regulations.

"Violation is Claimed of Article 14 Section 6 of the Collective Bargaining Agreement."

BACKGROUND

This grievance from the Mobile Maintenance Service Department of Indiana Harbor Works claims violation of Sections 1 and 6 of Article 14 of the August 1, 1986 Agreement in Management's having lead-laden dust removed from surfaces on, about, and in #1 charging crane at No. 4 BOF and Slab Caster by blowing it off with compressed air, rather than by vacuuming it into closed containers, as allegedly required by an Occupational Safety and Health Administration Regulation, said to have been incorporated in Article 14. Blowing the lead-laden dust recirculates it and exposes employees to dangers from lead.

Absorption of excessive quantities of lead causes diseases of the kidney, peripheral and central nervous systems, and damage to the urinary and reproductive systems, with effects ranging from mild to acute, chronic disease, and death. It also causes birth defects.

Electrical Maintenance employees in the Mobile Maintenance Service Department have been assigned in the past to clean dust from equipment at No. 2 BOF, and they began to suspect that the graphite-like material contained lead. Tests and monitoring of the employees and areas confirmed that.

Certain Electrical employees in the Mobile Maintenance Service Department are assigned each week, ordinarily on Tuesdays, to perform crane maintenance and clean-up work on the charging crane at No. 4 BOF. They thought, since they had learned there was lead in the scrap charged at 2 BOF, there well might be lead in the scrap charged at 4 BOF and, therefore, lead-laden dust where they worked, too. In May of 1988 employees requested that tests be made for lead there. They were, and they showed presence of lead particulates in the graphite dust that results from charging lead-laden scrap, which dust flies in all directions from charging and blowing the vessel with 30,000 cubic feet of oxygen per minute. The dust settles on and in all surfaces not very tightly sealed. The graphite dust is so thick and pervasive that, as a result of normal operation of the BOF, it will pile up to several feet thick on many surfaces, and accumulate about three inches every week, with six to eight inches of dust on some roofs at hearing time. In all areas the dust

presents a danger to employee which must be removed. On machines, especially those that operate electrically, however, it can shut down the equipment because the graphite is an electrical conductor and, if allowed to accumulate to any appreciable degree in crane motors, limit switches, resistance banks, contactors, collector shoes, and brakes, it will conduct a current when none should be conducted and short-circuit or ground the equipment, interfering with effectiveness of many machines, especially crane brakes. In order to prevent that, Motor Inspectors from the Mobile Maintenance Service Department have been assigned, during the regular maintenance downturns on Tuesdays, to get the graphite dust off and out of crucial charging-crane equipment, among the other duties they normally perform then and there. They had blown this dust away by compressed air at 80 pounds per square inch in the past, apparently from about 1966.

When it was learned in May of 1988 that the graphite dust was lead-laden, Motor Inspectors assigned to the dust-removal work there began to insist that respirators, and sometimes a certain kind of respirator, be provided to protect them against inhaling and ingesting the lead-containing dust. The dust condition is so severe that all such employees in the area wear, in addition to ordinary safety equipment and respirators, white suits with feet in them, to protect against becoming coated with the dust.

The employees and the Union then began insisting that, instead of blowing the dust off surfaces and equipment with compressed air, which, although it probably cleans the equipment adequately, simply sends clouds of dust into the atmosphere in which employees are working and which they are breathing, that it should be taken away in the controlled procedure of vacuuming it up with large vacuum trucks, called "sucker" trucks and "super sucker" trucks, with tanks to which it would be pumped. In that way, the dust would not be stirred up but would be captured. Further investigation by Union representatives then disclosed a 1979 OSHA Standard on Occupational Exposure to Lead, reading in pertinent part as follows: "(h) Housekeeping.

(1) Surfaces. All surfaces shall be maintained as free as practicable of accumulations of lead.

(2) Cleaning floors. (i) Floors and other surfaces where lead accumulates may not be cleaned by the use of compressed air.

(ii) Shoveling, dry or wet sweeping and brushing may be used only where vacuuming has been tried and found not to be effective.

(3) Vacuuming. Where vacuuming methods are selected, the vacuums shall be used and emptied in a manner which minimizes the reentry of lead into the workplace.

". . .

"(q) Appendices. The information contained in the appendices to this section is not intended by itself, to create any additional obligations not otherwise imposed by this standard nor detract from any existing obligation." (29 C.F.R. Section 1910.1025 (1979))

The Regulation, as do all or many such regulations, has a substantial preamble and an extensive appendix, in addition to the Regulation, itself.

All possibly relevant and other cited provisions of the preamble, appendix, and Supplemental Statement of Reasons of 1981 read as follows:

"SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

"The statement of reasons accompanying this regulation (the preamble) . . .

". . .

"H. HOUSEKEEPING: PARAGRAPH (h)

"The final standard requires that all surfaces be maintained as free as practicable of accumulation of lead dust. This is to be accomplished primarily by vacuuming of floors, rafters, and other surfaces or by methods equally effective in preventing the dispersal of lead into the workplace. This is an exceptionally important provision because it minimizes additional sources of exposure that engineering controls are generally not designed to control. All participants to the rulemaking agreed to the need for scrupulous housekeeping.

". . .

"OSHA's view is that a rigorous housekeeping program is absolutely necessary to keep airborne lead levels below permissible limits but that the obligation should be measured by a standard of practicability. (Tr. 5747) This contemplates a regular housekeeping schedule based on exposure conditions at a particular plant and the capability for emergency cleanup of spills or other unexpected sources of exposure.

"Vacuuming is considered by all experts to be the most reliable method of cleaning surfaces on which dust accumulates (Tr. 2379:2069) but equally effective methods may be used, for example, a wet floor scrubber.

(Tr. 2922) Dry or wet sweeping, shoveling, or blowing with compressed air may not be used except where vacuuming or other equally effective methods have been tried and do not work. (Tr. 2196-99; 2379)" (All material quoted immediately above is from the preamble to the Regulation.)

"(h) Housekeeping

(1) Surfaces. All surfaces shall be maintained as free as practicable of accumulation of lead.

(2) Cleaning floors.

(i) Floors and other surfaces where lead accumulates may not be cleaned by the use of compressed air.

(ii) Shoveling, dry or wet sweeping, and brushing may be used only where vacuuming or other equally effective methods have been tried and found not to be effective.

(3) Vacuuming. Where vacuuming methods are selected, the vacuums shall be used and emptied in a manner which minimizes the reentry of lead into the workplace."

(Verbatim copy of the relevant Standard language.)

"(1) Employee information and training.

(1) Training program.

(i) Each employer who has a workplace in which there is a potential exposure to airborne lead at any level shall inform employees of the content of Appendices A and B of this regulation.

(ii) The employer shall institute a training program for and assure the participation of all employees who are subject to exposure to lead at or above the action level or for whom the possibility of skin or eye irritation exists.

(iii) The employer shall provide initial training by 180 days from the effective date for those employees covered by paragraph (1)(1)(ii) on the standard's effective date and prior to the time of initial job assignment for those employees subsequently covered by this paragraph.

". . .

"Your employer has prime responsibility to assure that the provisions of the standard are complied with both by the company and by individual workers. You as a worker, however, also have a responsibility to assist your employer in complying with the standard. You can play a key role in protecting your own health by learning about the lead hazards and their control, learning what the standard requires, following the standard where it governs your own actions, and seeing that your employer complies with provisions governing his actions.

". . .

"VI. HOUSEKEEPING PARAGRAPH (H)

"Your employer must establish a housekeeping program sufficient to maintain all surfaces as free as practicable of accumulations of lead dust. Vacuuming is the preferred method of meeting this requirement, and the use of compressed air to clean floors and other surfaces is absolutely prohibited."

(All material quoted immediately above is from the appendix to the Regulation.)

"B. Maintenance and Repair

"OSHA recognizes that workers involved in maintenance and repair operations are placed in circumstances where engineering controls often cannot be used to control lead exposure. Obviously, one of the functions of these workers is to repair the control devices designed to capture airborne lead. Since these devices would be idle during repair and maintenance operations, workers would have to be protected from lead exposure by means other than engineering controls. OSHA acknowledged this condition of industrial life in its discussion of maintenance operations for primary and secondary smelters. The agency conceded that respirators would be necessary for the protection of maintenance workers in each of these industries. See 43 FR 544182/1-2, 54483/3; *United Steelworkers*, supra, 647 F.2d at 1281, n. 128, 1286. Accordingly, if maintenance workers in other industries operate under similar working conditions . . . it would be inconsistent for OSHA not to permit the use of respirators to protect them from lead exposure. In OSHA's view, the fact that respiratory protection may be required during maintenance and repair operations does not detract from a general finding of feasibility for an industry. See *United Steelworkers*, supra, 647 F.2d at 1281, n. 138. Therefore, if an employer can demonstrate that the engineering controls which normally control exposure cannot feasibly be used to control exposure for repair and maintenance operations, the employer may permissibly protect those workers with proper respiratory equipment." (Supplemental Statement of Reasons-1981) (29 Fed. Reg. No. 238)

The Union urges that the Regulation is applicable and prohibits blowing lead dust with compressed air and that vacuuming is required, instead.

The oral complaint on this matter was filed on September 12, 1988, and the written grievance was filed on September 22.

Following several meetings after the Step 3 meeting, the parties agreed that the sole issue remaining in this grievance was whether the Company violated Article 14, Section 1 or 6 or both in requiring employees to use compressed air to blow off this lead-laden dust from equipment surfaces in No. 4 BOF.

The Company insists it is fulfilling its Article 14, Section 1 obligation to make reasonable provisions for the safety and health of employees at the plant. It notes, first, that when the lead-dust problem was discovered earlier at No. 2 BOF, it was resolved there to the satisfaction of those parties by improved housekeeping methods. The Company says here that those same problems were reviewed with Mobile Maintenance Service Department Safety Committeeman Pondo and that he agreed that similar procedures put into effect at 4 BOF would be satisfactory regarding crane-maintenance work there.

The Union answers that blowing of this lead dust by compressed air is not done at No. 2 BOF.

The Company notes, secondly, that, as urged by the Union, it has conducted a training program regarding potential hazards associated with, and procedures to avoid, exposure to lead particulates.

Management says, thirdly, that there now is a written job procedure dealing with proper methods to use in doing this work. It says that graphite and residue material on crane hoists is to be removed by vacuum truck before blowing it off with compressed air. The Company says it began vacuuming before blowing in July of 1988. The pertinent part of the procedure says that:

"NOTE: VACUUMING MUST BE PERFORMED ON MAIN HOIST AND AUXILIARY HOIST BEFORE BLOWING CAN BE DONE. IF VACUUMING IS NOT DONE, DO NOT BLOW OFF. IF BLOWING IS PERFORMED, A MAXIMUM OF 30 PSI AIR PRESSURE IS TO BE USED."

(Emphasis in original.)

The fourth Company point is that it now is monitoring the atmosphere. It contends that some such readings show exposure levels below the Permanent Exposure Level (PEL) and, therefore, that use of the protective clothing and respirator protection of the OSHA Regulation are not required. Employees nevertheless are offered and required to wear protective, disposable clothing, and respirators approved by Indiana OSHA while doing this work.

In light of those four points, the Company asserted in Step 3 that the requests of this grievance already had been granted.

The Company's fifth point in Step 3 was that it had investigated the possibility of installing automatic blowers on the cranes to prevent build-up of the graphite dust, but it found that was not feasible.

Management says also that initially it was impracticable to vacuum graphite from the crane before these employees would perform their maintenance work by blowing it off because time was needed to obtain a vacuum truck from the outside contractor, and even after one had been secured, there was not adequate advance notice as to the exact time when the crane could be shut down and available for maintenance work. The latter was difficult because demands of No. 4 BOF operations were such as to make it uncertain when the crane would be shut down. Number 4 BOF supplies 65 percent of the steel used at the plant. In short, the Company says use of a vacuum truck was not practicable then.

Arrangements later were made, however, to have a vacuum truck available on a scheduled basis. It vacuums away all graphite dust it can get to before these employees blow the dust away with compressed air. A narrower wand attachment (3" or 4") to the vacuum hose had been obtained by late October or early November, and it enables the vacuum process to penetrate smaller and narrower places on crane equipment that the larger, more blunt device could not reach in the past. Accordingly, the Company says all that makes this issue even more moot.

Management also committed itself in Step 3 to take whatever practical steps are possible to improve this situation. Two such definite steps were listed. The charging of lead-laden scrap was said to be scheduled to be discontinued at this operation after the current inventory was consumed, which allegedly was expected to be soon after January 1, 1989. At this hearing, however, Management said charging of lead-laden scrap had been discontinued in early December, before the arbitration hearing. That eventually will eliminate the source of this problem.

Moreover, the Company says the Department has received approval for and plans to build and install during 1989 (by October) a \$10 million scrubber and furnace-hood ventilating system to capture furnace emissions, including particulates emitted during charging. That will further reduce this airborne residue.

The Union claims violation of Sections 1 and 6 of Article 14 of the Agreement. It charges that the Company has not cooperated in the continuing objective to eliminate accidents and health hazards (14-1) and that its requiring employees to work in conditions which do not obey demands of the applicable OSHA Regulation, forces these employees to work in conditions which are unsafe and unhealthy beyond the normal hazards inherent in the operation (14-6). Specifically, the claim is that the Company is violating

Sections 1 and 6 of Article 14 by way of violation of the OSHA Standard by requiring employees to use compressed air (80 psi) to remove lead-laden dust from crane equipment. The Union contends that the last sentence of paragraph 14.1 (added in 1983) incorporates the OSHA Regulation into the Agreement.

Pertinent provisions of Article 14 read as follows:

"ARTICLE 14

Safety and Health

"Section 1. The Company and the Union will cooperate in the continuing objective to eliminate accidents and health hazards. The Company shall make reasonable provisions for the safety and health of its employees at the plant. The Company, the Union and the employees recognize their obligations and/or rights under existing federal and state laws with respect to safety and health matters. "Where devices which emit ionizing radiation are used, the Company will continue to maintain safety standards with respect to such devices not less rigid than those adopted from time to time by the Nuclear Regulatory Commission and will maintain procedures designed to safeguard employees and will instruct them as to safe working procedures involving such devices.

"Where the Company uses toxic materials, it shall inform the affected employees what hazards, if any, are involved, and what precautions shall be taken to insure the safety and health of the employees. Upon the request of the Union Chairman of the Safety Committee or the Area Safety Committeeman the Company shall provide in writing requested information from material safety data sheets or their equivalent on toxic substances to which employees are exposed in the work place; provided that when the information is considered proprietary, the Company shall so advise the Union Chairman and Area Safety Committeeman, and provide sufficient information for the Union to make further inquiry.

"The Company will continue its program of periodic in-plant air sampling and noise testing under the direction of qualified personnel. Where the Union Chairman of the Safety Committee or the Area Safety Committeeman alleges a significant on-the-job health hazard due to in-plant air pollution, or noise. The Company will also make such additional tests and investigations as are necessary and shall notify the Union Chairman of the Safety Committee when such a test is to take place. A report based on such additional tests and investigations shall be reviewed and discussed with the Chairman of the Safety Committee. For such surveys conducted at the request of the Union Chairman of the Safety Committee, a written summary of the sampling and testing results and the conclusions of the investigation shall be provided to the Union Chairman and the Area Safety Committeeman.

"The Company shall provide adequate first aid for all employees during their working hours.

". . .

"Section 6. Disputes. An employee or group of employees who believe that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question shall discuss the complaint with his or their foreman. Following such discussion, the oral disposition form provided for in Step 1 of Section 3 of Article 6 shall be immediately prepared, signed, and distributed as therein provided. If the complaint remains unsettled, the employee or group of employees shall have the right to (a) file a grievance in Step 3 of the grievance procedure for preferred handling in such procedure and arbitration or (b) relief from the job or jobs, without loss to their right to return to such job or jobs; and, at the Company's discretion, assignment to such other employment as may be available in the plant; provided, however, that no employee, other than communicating the facts relating to the safety of the job, shall take any steps to prevent another employee from working on the job. Should either the Management or the arbitrator conclude that an unsafe condition within the meaning of this Section existed and should the employee not have been assigned to other available equal or higher-rated work, he shall be paid for the earnings he otherwise would have received."

It is clear and undisputed that employees are being required to clean surfaces where lead-laden graphite accumulates, by use of compressed air. There have been many occasions when employees have been exposed to lead levels over the Action Level, that is, exposure to airborne concentrations of lead without regard to respirators of thirty micrograms per cubic meter of air, averaged over an eight-hour period. There have been instances also of employee exposure to airborne concentrations of lead several times higher than the Permissible Exposure Level, of fifty micrograms of lead per cubic meter of air averaged over an eight-hour period.

The Union reads the OSHA Standard as clearly prohibiting removal of lead graphite by compressed air. It insists that the Company's excuse that it is impracticable and unreasonable is not a legitimate defense. Moreover, the Union suggests that there is a feasible and legal alternative to use of compressed air. That is said to be vacuuming, first, and then dry brushing and sweeping. It is argued that the fact, if it be one, that

compliance with the OSHA Standard might be too time consuming, expensive, inconvenient, or all three, is said to be no excuse. The Union insists Management cannot be allowed to violate clear OSHA Standards simply because noncompliance is easier.

The Company argues, however, that the preamble to the Lead Standard implies that compressed air may be used to blow off lead graphite when vacuuming or other equally effective methods have been tried and have failed.

The Union replies, first, that there is no evidence that the Company actually tried the other methods. More to the point, says the Union, the preamble simply states the reasons for existence of the Regulation, and a summary of its parts, and the evidence and rationale supporting it. The preamble does not and allegedly could not supersede the actual Standard, which is the operative part of the Regulation. The Union notes also that the appendix to the Standard places an additional emphasis against use of compressed air for this purpose by saying that it is "absolutely prohibited." Finally, the Union stresses those parts of the Standard that impose obligations on employees to comply with it. It is said that the Company's ignoring the Standard forces the employees to violate it.

[Paragraphs 31 through 95 of the "Background" portion of the Award, which consist mainly of a summary of the contentions of the parties and the testimony at the Arbitration hearing, are not reprinted here. For a copy of the full text of the Award, contact Pike & Fischer, Inc., 4550 Montgomery Ave., Suite 433N, Bethesda, Md. 20814.]

FINDINGS

It will be unnecessary to decide whether or not there has been violation of Article 14, Sections 1 and 6, independent of the OSHA Standard. That follows because it is clear that the last sentence of 14-1 incorporates the OSHA Regulation into the Agreement. It says that

"The Company, the Union and the employees recognize their obligations and or rights under existing federal and state laws with respect to safety and health matters."

The OSHA Lead Standard was an existing administrative regulation, with the status of federal law (enforceable by state agencies), and it therefore became part of and created obligations and rights under this Agreement, enforceable in all the ways open to the parties to police all other provisions of the Agreement, including the grievance and arbitration proceedings. In light of the Agreement language in 14-1, the Arbitrator is not enforcing an OSHA Standard directly, as would a state OSHA, an Administrative Law Judge, the OSHA Review Commission, or a Court of Appeals, but is enforcing the language of Article 14 of the Agreement, which has adopted the substance of the OSHA Standard. In that posture of this Agreement, no reason is seen and none has been suggested as to why this arbitration proceeding could not take cognizance of and enforce this Lead Standard, when relevant.

Accordingly, the Company's cooperation in the continuing objective to eliminate health hazards, its duty to make reasonable provisions for the safety and health of its employees at the plant, its recognition of its obligations under existing federal and state laws with respect to safety and health matters, and its duty to refrain from requiring employees to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation, all must be decided in light of the reasonable and objective meaning of this Lead Standard, where applicable.

Quotation of the detailed requirements of the Standard calling for mandatory respirator use need not be set out, since they apparently are worn when required and, therefore, are relevant here largely as background. Employee exposure to inorganic airborne lead particulates above both the Action Level and Permissible Exposure Level has occurred with some regularity.

Following a rather long and detailed statement of respirator requirements and provisions as to protective clothing, comes that part of the Standard directly in issue here. It reads as follows at 29 C.F.R. 53009, Part 1910:

"(h) Housekeeping.

(1) Surfaces. All surfaces shall be maintained as free as practicable of accumulations of lead.

(2) Cleaning floors. (i) Floors and other surfaces where lead accumulates may not be cleaned by the use of compressed air.

(ii) Shoveling, dry or wet sweeping and brushing may be used only where vacuuming has been tried and found not to be effective."

The language of (h)(1) and (2) would appear on its fact to prohibit blowing off dust with compressed air.

But the Company relies on the provisions of the preamble and appendix, quoted in Background, urging that they are necessary to help in "interpreting" the Standard as less prohibitory and more permissive.

Management argues that a sharp distinction must be drawn between "housekeeping," which it says is the only activity dealt with by the relevant part of this Standard, and "maintenance," which allegedly is the activity being done here and which it says is not covered by that part of the Standard, so that, allegedly having done all that it thought was practicable and then provided respirator protection, no more was required while it continued to have this plumbiferous dust blown off by compressed air, often at 80 psi. That does not appear, however, to be a fair and reasonable reading of the pertinent language. It says "Floors and other surfaces where lead accumulates may not be cleaned by the use of compressed air." That is perfectly straightforward language.

The Company urges that the "other surfaces" in the Standard must be read as including only those surfaces similar to "floors." But the Standard does not say only "Floors and other surfaces. . . ." It says "Floors and other surfaces where lead accumulates. . . ." (Emphasis added.) Thus, it is not just floors and like surfaces, whatever they may be, that are covered. It is all surfaces where lead accumulates, and that surely includes all the surfaces in dispute here, where lead accumulates to several inches thick in a week's time and in some places over a foot thick in more extended periods.

Management argues also that a statement in the 1981 Revised Supplemental Reasons issued by OSHA show that maintenance work done by maintenance employees sometimes may have to be done on the very engineering controls required by the Standard to reduce concentrations of airborne lead to lawful levels. While that is being done, the equipment, ventilating, and other such devices, of course, of necessity would be idle, so that during such times airborne lead in the atmosphere might rise to levels that otherwise would be impermissible. The statement says that in those cases employees must be protected against lead exposure by other means than engineering controls, that is, by wearing respirators.

After the above statements, the Company cites 1981 Supplemental Reasons, saying that, "Therefore, if an employer can demonstrate that the engineering controls which normally control exposure cannot be feasibly used to control exposure for repair and maintenance operations, the employer may permissibly protect these workers with proper respirator equipment."

But that language has nothing to do with blowing as against vacuuming. It assumes there are engineering controls (ventilating devices and such) that normally would reduce airborne lead exposure of employees to permissible levels but which, while they are being repaired and maintained, cannot be run and, therefore, proper respirator protection will be seen as compliance with the Standard. No such maintenance work is being done on engineering controls here, and no such controls are shut down. It is not that devices which regularly reduce airborne lead must be shut down for a time while they are being repaired. Blowing is the operation that increases airborne lead, raising it to levels which the basic Standard prohibits. It is the very blowing operation that is causing the seriously increased lead levels in the atmosphere. It is not readily seen, therefore, how the Company realistically can seek aid from that statement, even assuming but without deciding that it could dilute the basic Standard.

The Company notes that the problem of removal of airborne lead as related to crane work at No. 2 BOF was resolved by improved housekeeping procedures there. It says they were reviewed with a Safety Committeeman at No. 4 BOF, who allegedly agreed that similar procedures there would be satisfactory. A crucial difference exists between the two operations, however, since blowing with compressed air is not done at No. 2 BOF.

The Company notes also its having installed a training program about this problem; installation of a Check List for work on #1 charging crane, calling for vacuuming on the main and auxiliary hoist before blowing and, if vacuuming is not done, that blowing should not be done and, if blowing is done, a maximum of 30 psi is to be used; its conducting monitoring of the atmosphere; its making the vacuum trucks available on a scheduled basis, so that vacuuming can be done, first; its ceasing to charge lead-laden scrap in December of 1988; and its approved plans for a \$10 million scrubber and furnace-hood ventilation system in 1989. It says also that it investigated the possibility of installing automatic blowers on these cranes to prevent build-up of lead dust, but claims it was not feasible to pursue that further. All that is said to show that it did not violate either Section 1 or 6 of Article 14.

As supporting its argument that the Standard does not require what the Union urges, the Company cites a decision of the OSHA Review Commission (Nabisco, Inc.) holding that a food manufacturer could blow accumulations of food from its machinery at 80 psi, without violating the Standard for cleaning hand and portable powered tools and equipment, generally, saying that compressed air shall not be used for cleaning purposes except where reduced to less than 30 psi and then only with chip guarding and personal protective equipment.

But that provision has nothing to do with lead exposure. It deals only with the maximum allowable pressure in cleaning tools and equipment with compressed air. The present problem deals more directly with use of compressed air, at any pressure, to blow off this lead-laden dust. It is being urged here as a way to reduce the risks of employee exposure to the dangers of airborne lead which, of course, is stirred up into the employees' ingesting and breathing atmosphere by compressed air, whether over or under 80 psi.

Accordingly, the Nabisco decision of the OSHA Review Commission does not help Management here.

Next, the Company cites one sentence in a decision of the United States Court of Appeals for the Ninth Circuit (ASARCO), dealing with a lead-smelting company's obligation to pay overtime to employees, required as part of medical-removal expenses due under this Lead Standard. It says that,

"The Preamble and statement of reasons included with the Lead Standard when it was promulgated in 1978 explained the matter more fully."

This was advanced as ammunition in the Company's argument that the Standard, apparently prohibiting blowing off of lead-laden dust by compressed air, was ambiguous by reason of a latent ambiguity and, therefore, required interpretation.

The difficulty with use of the ASARCO decision is, however, that the court said the preamble and stated reasons could "explain" the Standard. It did not say it could contradict, belittle, or seriously limit it, as Management's argument here would do. Indeed, the Company's post-hearing brief says that the Standard, "While clear and unequivocal on its face . . .," makes reference to housekeeping of a kind not presented here. That is said to give rise to a latent ambiguity. But no such ambiguity inheres in the Standard. It lay so deeply hidden and dormant in the Standard as to require contrived arguments, first to create it and then to dig it out.

Moreover, the alternatives expressly allowed by this part of the Standard itself, cover only "Shoveling, dry or wet sweeping and brushing . . .," and make no provision for blowing as such an exception where ". . . vacuuming has been tried and found not to be effective." The only exception to include blowing is in the preamble, but, as it says expressly, it is only "The statement of reasons accompanying this regulation. . . ." It is clear enough that the preamble and appendix may give reasons, explain, and justify, but they cannot create or destroy obligations and rights imposed and created by the Standard. The appendix says so.

Accordingly, the Union characterization of the preamble, Standard, and appendix is accurate, when read together on this subject, as marching from the looser statement of the preamble to the much tighter prohibition of the Standard, itself, saying that "Floors and other surfaces where lead accumulates may not be cleaned by use of compressed air," and then to the tightest prohibition of the appendix, saying that, ". . . the use of compressed air to clean floors and other surfaces is absolutely prohibited." Consequently, with the Company witness saying that the law--the rule--is in the Standard, and since he could see nothing ambiguous in it, and in light of the Company's post-hearing brief agreeing that the Standard is clear and unequivocal on its face, it would appear to be more an act of creation than interpretation to read the Standard as authorizing use of compressed air to blow lead dust off these surfaces.

There can be no question that the Company has done much to ameliorate this problem, but to say it has done its best or all it could do would not be respecting the facts. Firstly, some members of Management necessarily were aware sometime ago of the airborne lead problem at No. 2 BOF. Those operations must be reasonably similar to the ones conducted at No. 4 BOF. Thus, with knowledge of this serious health problem at No. 2 BOF, it is astonishing that any significant time was allowed to elapse before Company representatives at No. 2 BOF informed those at No. 4 of their problem so that the latter could check their situation regarding this hazard. Yet it does not appear from this record that the problem at No. 4 BOF came to light by that route. The employees at No. 4 heard from those at No. 2 that there was a risk of BOF operations of unhealthy exposure to lead.

The employees who do this work at No. 4 BOF first spoke to Supervision about blowing dust off with compressed air in April and then demanded monitoring of the atmosphere. The lead hazards came to light in May, and yet vacuuming on even a catch-as-catch-can basis did not begin, says the Company, until July, and employee testimony shows that really began later, sometime in the fall, on any really reliable, scheduled basis. And the reason for that delay in regular, routine presence of the vacuum trucks was not because the process would not work. The reason was the Company says that it could not always be learned precisely when Operating Supervision would be willing to have #1 charging crane shut down. Not knowing that precise time, the Supervisors responsible for scheduling the vacuum trucks into No. 4 BOF were not willing to request them with some allowance for delayed use. Apparently, they were not arranged for until the crane was shut down and, therefore, would not always be available as soon as it went down. The result was that these Mobile Maintenance Service Department Electrical employees were ordered to blow dust

off, not because vacuuming would not work, but because the vacuum trucks were not there, since it was not thought important to try to synchronize their arrival with shutdown of the crane, even if delays would have been faced.

Moreover, although training of employees was more expeditious than the Union witness depicted, it still was geared entirely to finding free training time for these Electrical employees, whose skills apparently are in great demand, and hardly at all to the overriding necessity to comply with training and information programs for the dangerously exposed employees.

The attitude to this problem shown by those Company inactions and delayed actions cannot help but bear negatively on general conclusions about whether it really tried other approaches and actually found they did not work, even assuming that could support its position here.

It is to be noted that this is not an argument that it is physically impossible to remove this dust by other means than blowing it off with compressed air. The Company does not urge that. The defense is not that other means would be impossible, but that they would not be practicable or efficient, in the sense that they would take too much time and thus be too costly.

Let it be assumed that the Standard, as "interpreted" by the 1981 Supplemental Statement of Reasons would allow the Company to seek refuge in that position. It nevertheless would not help Management here for two reasons. The first is that it has not "demonstrated" any such premises for its conclusion, and the second is that the Supplemental Statement does not apply here. It deals with excusing use of engineering controls to reduce employee exposure to the hazards of airborne lead for the temporary periods while maintenance employees are repairing that very control equipment, which, of course, cannot operate while it is being repaired, which is not the point of this dispute.

As to the first reason, Supervisor VanAuken mentioned a number of alternatives to blowing this dust off by compressed air, but with only a few exceptions neither he nor the Company demonstrated that they were not practicable or efficient. He said only as to most of them that he knew or thought from experience that they would take too long and be too costly because this operation was so vitally important to steel-making at this plant that Operating Supervision simply would not allow #1 charging crane to be down long enough to admit of cleaning off its equipment by the other methods, such as vacuuming, or combined vacuuming-brushing, or "glove-bagging." Those reasons justify the conclusion for Management's feeling that those alternatives would be inconvenient, slower, more costly, and not as efficient as blowing, but that is not enough. The prohibition against blowing with compressed air cannot be avoided or evaded by pleas of mere inconvenience or relative lack of efficiency.

As to the second reason, above, the 1981 Supplemental Statement allows for respirator and other protection, instead of the engineering controls that routinely are relied upon to reduce airborne lead levels, but only for the period of time while the engineering controls are down because they are being repaired by these maintenance employees and thus cannot work while shut down. This is not this case. This involves a prohibition against blowing by compressed air and has nothing to do with temporary shutdowns of engineering controls. Blowing is not an engineering control that must be used to reduce airborne lead levels. It is a process that may not be used because it increases airborne lead levels.

Two concluding comments may be in order. This analysis enforces the OSHA Lead Standard by way of its having been incorporated into the Agreement by Article 14, Section 1. The result is thus to enforce the Agreement. The same result would be reached, however, if the reasoning were that the teaching of the Standard were treated, not as incorporated, but only as persuasive reasoning on whether the Company had satisfied its Article 14, Sections 1 and 6 obligations. The direct and indirect theories would seem to require like conclusions.

A Union witness suggested that, if the Company were persuaded that blowing the compressed air was necessary because vacuuming was impossible or nearly so, it should approach OSHA for a variance. The Union's post-hearing argument departed, however, from that administrative-law approach and adopted a more labor-relations suggestion. It urged, that is, that the Standard now is part of this Agreement and that this problem between these parties no longer is an interpretive question for OSHA but that its interpretation and the administration of its teachings have become issues for them and their private, dispute-resolution system. The conclusion was that, if the Company should believe it must have an exception or variance, it would not be a problem of arranging one from OSHA but of negotiating one with the Union. It is not necessary for this Opinion to embrace that view, but it surely may be helpful to the parties upon remand of this matter to them.

The result is that blowing with compressed air may not be used here, at least absent much stronger and more pertinent demonstrations of near impossibility than are in this record, and at least until airborne lead

levels have been lowered significantly by the effect to be expected gradually to occur from the cessation of charging lead-laden scrap in December of 1988. Once substantially all such lead dust has been removed from the operation by whatever means (excluding blowing) that comply with the Standard and as proven by the Company on the basis of generally acceptable scientific tests, it would appear that respirator use might no longer be required and, of course, blowing off dust with compressed air would not violate the Lead Standard if the dust no longer be lead-laden.

It would appear that the best way to deal with the present problem and with possible, future contingencies would be to declare now that, by Article 14, Section 1's adoption of the OSHA Lead Standard, blowing lead dust by compressed air should not and may not be done here under conditions that have existed at least from May of 1988, clearly continued to exist as of this writing, and very likely will continue to exist for some uncertain time into the future; to declare that use of such blowing has been in violation of Article 14, Sections 1 and 6 by way of the OSHA Lead Standard; to award to employees who requested relief under 14-6 and who were not assigned to other available equal or higher rated work the ". . . earnings . . . [they] otherwise would have received," according to the last sentence of 14-6; to remand the matter to the local parties so that they may have the initial opportunity to fashion whatever specific remedies may appear proper to them in light of all locally available facts and considerations; and to retain jurisdiction so that this arbitration procedure may remain available to deal with problems, if any, that might arise in the future until this airborne-lead hazard no longer exists, as demonstrated by the Company upon adequate monitoring of the atmosphere.

AWARD

The grievance is resolved as stated in the last paragraph of the accompanying Opinion.