Award No. 843
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
USWA LOCAL 1010
Appeal No. 1454
Arbitrator: Terry A. Bethel
May 28, 1991
OPINION AND AWARD
Introduction
This case concerns a stipulated issue between the Inland Steel Company (the company) and Local Union 1010 of the United Steelworkers of America (the union). The hearing was held on April 12, 1991 at the company's offices in East Chicago, Indiana. Robert Cayia represented the company and Jim Robinson presented the union's case. Both sides files prehearing briefs.
Background
This case is before me on a stipulation between the parties which reads as follows:
"This understanding sets forth the parties' stipulation of the issue to be resolved in this arbitration hearing.
The issue in dispute in this case is whether Management has the unilateral right to alter the starting and quitting times of the work shifts for certain employees in the IRMC organization (those employees who were members of the Field Forces Department).
The Union contends that Management does not have the unilateral right to change the starting and quitting times of the work shifts for the subject employees and can only do so by mutual agreement of the parties. The Union contends in this regard that this matter is a scheduling practice protected by Appendix C, Marginal Paragraph AC.6 of the Collective Bargaining Agreement.
The Company denies that Appendix C, Marginal Paragraph AC.6 or any other provisions of the Agreement restricts or prohibits Management from unilaterally making changes in the starting or quitting times of the work shifts for the subject employees. The Company contends that its right to make shift time changes is preserved and embodied in Article 3, Section 1 and Article 10, Section 1.
The parties agreed that in the interests of insuring a fair and rationale resolution of this dispute, the Company would delay the implementation of any changes in the starting and quitting times for the work shifts pending the arbitrator's ruling in this case. In agreeing to present this dispute to be resolved by means of a declaratory opinion, the parties have agreed to waive the provisions set forth in Article 6 of the Collective Bargaining Agreement relative to the processing of complaints and grievances in the grievance procedure."
As is apparent from the above, the issue for decision is whether management has the right unilaterally to change the starting and quitting times of employees in the IRMC who were formerly members of the field forces department.
There is little question about the fact that, typically, management has the right to determine the work schedules of its employees, subject, of course, to any limitation that may exist in the collective bargaining agreement. In this case, for example, marginal paragraph 10.7 of Article 10, Section 1 provides that "schedules may be changed by the company at any time except where by local agreement schedules are not to be changed in the absence of mutual agreement. . . ." The company relies on this section of the contract, as well as the general management rights language contained in Article 3, to support its contention that it has the right to effect the schedule change it issued but agreed to hold in abeyance pending the outcome of this arbitration.
The union does not deny the significance of mp 10.7 and, while it makes no assertions about the extent to which Article 3 empowers the company, would presumably concede that management has significant discretion in scheduling of employees. But the union, too, relies on mp 10.7, particularly that portion that says the company can change schedules at any time "except where by local agreement schedules are not to be changed in the absence of mutual agreement. . . ." The union contends there is just such a local agreement in this case, namely paragraph 6 of Appendix C (hereinafter AC6):
"The practices with respect to the scheduling of Field Forces Department during the last year shall be continued in effect for the duration of this agreement, subject to change by mutual agreement."
A significant dispute in this case, then, is the scope of AC6. The parties, of course, disagree about its intended effect and coverage.

The company argues vigorously that the terms of AC6 were intended to address only the Field Forces Department practice of a Monday through Friday schedule. Paragraph AC6 first appeared in the contract in 1963, although there is no dispute that the parties became bound to the language in 1962. Both parties acknowledge that AC6 was prompted, at least in part, by developments following a 1953 arbitration award from John Day Larkin.

The terms of that award are not directly in point in this case, though the 1953 arbitration does help establish the historical framework of AC6. In his 1953 award, Larkin construed language which no longer exists in the agreement. The effect of his decision was to require the company to continue a practice of Monday through Friday scheduling for field forces. There is no question about the existence of that practice, which was apparently influenced in large part by the need to work alongside outside contractors who typically worked Monday through Friday.

Larkin's award was undermined in significant measure by terms negotiated into the 1956 collective bargaining agreement. It is not necessary to recite those changes in detail. Rather, it is sufficient to say that the parties replaced the language relied on by Larkin with language that is substantially identical to what is now marginal paragraph 10.7. Thus, because the 1956 agreement allowed management to change schedules unilaterally except where constrained by a local agreement, the parties in effect nullified Larkin's decision that the contract required maintenance of a Monday through Friday schedule for field forces.

The company contends with much vigor that AC6 was merely a reaction to these developments. Thus, the company's brief surmises that at some point between 1956 and 1962, union negotiators "most likely" realized that they had lost the benefit of Larkin's decision. In response, they negotiated AC6 whose "sole and exclusive purpose," the company contends, was to recapture that loss. That is, the only practice at risk -- at least the only one the historical evidence reveals -- was Monday through Friday scheduling. It must be the case, then, the company says, that AC6 responded to that, and only that, issue. In short, the company asserts that AC6 has no application to starting and quitting times of shifts.

Discussion

I can't know, of course, what the parties' actual intent was when they negotiated AC6 in 1962. Moreover, even if the negotiators were allowed to testify about such intentions, the negotiations occurred so long ago that such testimony might be of limited value.

I agree with the company's contention that an examination of the historical framework surrounding AC6 is a valuable tool to discovery of its meaning. And I have no doubt about the accuracy of the account painted by the company's witnesses and expertly detailed by Mr. Cayia's brief. History, however, is only as useful as it is complete. In this case, the passage of years has left too many gaps unfilled. Why, for example, did the parties use the word "practices" if their intent had been only to protect one practice?

This is not merely an idle question. Although the agreement was probably shorter in 1956 than it is today, it now runs to more than 300 pages, exclusive of indexes. This is not the standard 30-page labor contract that provides a basic framework and then leaves the rest to luck and the uncertain wisdom of labor arbitrators. Negotiators in basic steel quite clearly know what they're doing. Of course they make mistakes, but on the whole they choose language with some care. It is not easy, then, to ignore general language that enjoins the company from changing scheduling "practices." These parties were capable of forbidding the company from changing the Monday through Friday scheduling practice, had that been all they meant.

In addition, there is a significant gap in the two events that the company seeks to tie together. The parties effectively nullified Larkin's award in the 1956 negotiations. Yet it was not until 1962 that they agreed to AC6. The company may be correct when it asserts that it was a theat to the Monday through Friday scheduling which prompted AC6. But if so, why didn't it occur to union negotiators earlier? What was there about 1962 that created the necessity to protect Monday through Friday scheduling? I don't mean to suggest that the company should have answered these questions. Indeed, I doubt seriously that they can be answered. The point, however, is that the demise of Larkin's award and the advent of AC6 were not concurrent events. Although AC6 surely had the effect of protecting Monday through Friday scheduling, the timing does little to advance the company's claim that such scheduling was the only practice on the negotiators' minds.

In addition to its historical argument, the company also offered the opinion of three managers who testified to their belief that AC6 protects only the Monday through Friday practice. One of them -- Jim Stoddart -- was actually in field forces management at the time AC6 was negotiated. Although I don't question the credibility of these witnesses or their good faith beliefs, their opinions were frankly not of much significance. Indeed, I fail to see how their opinions about the scope of AC6 are of any more value than the contrary and equally strong opinions held by the union.

In summary, I think the company's case is simply not equal to the task. Part of its case depends on its claim that AC6 was intended by its drafters to protect only one practice -- Monday through Friday scheduling. The historical evidence marshalled by the company amounts to reasonable speculation about what might have concerned the negotiators in 1962. But the best evidence of their intent is not necessarily the surrounding circumstances, especially when the key circumstances are separated by a six year gap. Rather, the best evidence of what they thought is what they said. And, company arguments to the contrary, they didn't merely say they were protecting one discrete and easily described practice. Instead, they said in general terms that they were protecting the scheduling practices in effect the preceding year.

I cannot ignore the plain meaning of the words used by the negotiators. I can accept the company's contention that the Monday through Friday practice was among the negotiators' concerns. But I cannot ignore the plural "practices." And, of course, whatever may have been on the negotiators' minds in 1962 could have been supplemented by the intentions of the negotiators who have since reaffirmed the same language in subsequent negotiations.

Deciding that AC6 can encompass and protect more than one practice does not resolve the case. The company's argument is two-fold. It first claims that AC6 was intended to serve a quite narrow purpose, a contention I have already rejected. In that event, however, the company asserts that there is no field forces scheduling practices with respect to starting and quitting times, as the term "practice" is used in AC6. This is a more difficult issue.

Both parties cite arbitration awards dealing with the creation of practices. Most of the awards have to do with practices created under Article 2, Section 2 of the contract, a provision that I need not reproduce in full. Briefly, portions of Article 2, Section 2 protect local working conditions that provide "benefits that are in excess of or are in addition to benefits established by this agreement. The term "local working conditions" is defined to include "specific practices" reflected in written or oral local agreements.

The company rightly claims that Article 2, Section 2 does not protect an alleged practice of starting and quitting times in the field forces. Such practices, the company points out, must be consistent with the agreement. Obviously, a practice that effectively tied management's hands in adjusting starting and quitting times would be inconsistent with the provisions of Article 10 which allow the company to change schedules "at any time." The union does not contest this interpretation. It concedes that it has no rights under Article 2, Section 2 in this case. But the union asserts that its rights are protected under AC6 since starting and quitting times are scheduling "practices" as that term is used there.

The company, however, asserts that the negotiators of AC6 used the term "practices" in the same manner the term is used in Article 2, Section 2. Because starting and quitting times are not "practices" as defined in Article 2, then, the company claims there can also be no shift time practice under AC6. I disagree.

The company cites several cases for the proposition that it does not become bound by a local working condition (or a "practice") with respect to scheduling merely by adhering to the same schedule for an extended period of time. Rather, as arbitrator Valtin observed in Bethlehem Steel Award 694. such practices arise only in "a situation where management may properly be said knowingly and consciously to have tied its hands." The union, of course, claims that the company did just that in this case when it agreed to AC6. But because AC6 refers only to scheduling "practices" and because the company contends that "practices" must be interpreted as the term is used in Article 2, Section 2, the company argues that AC6 does not protect the starting and ending times of tours.

The company's argument is facially attractive but does not withstand close scrutiny. The company concedes that AC6 protects Monday through Friday scheduling of field forces. Thus, Monday through Friday scheduling would be a "practice" encompassed by AC6. But, of course, such Monday through Friday scheduling could not rise to the level of a "practice" as that term is used in Article 2, Section 2, since such a set schedule would be inconsistent with management's right to change schedules "at any time." That right, of course, is subject to restriction by local agreement and both parties agree that AC6 serves that purpose as to Monday through Friday scheduling.

The point, however, is that AC6 does not refer to Monday through Friday scheduling. Rather, it uses the general language of "practices." If, as the company contends, the term is used in the same sense in both Article 2, Section 2 and AC6, then the use of "practices" in AC6 would not capture Monday through Friday scheduling. Such scheduling is protected only because it is within the scope of AC6. I have already rejected the company's claim that Monday through Friday scheduling is the only practice so protected. Other scheduling practices can also claim protection, whether they would qualify under Article 2, Section 2 or not. Despite the company's assertion to the contrary, then, I do not believe that the parties restricted the term "practice" in AC6 to the same definition found in Article 2, Section 2.

The language of AC6 is of particular importance here. As noted, the parties did not merely say that they agreed to protect Monday through Friday scheduling. Nor did they agree to protect all scheduling practices in field forces. Rather, they agreed that scheduling practices that had been in effect "during the past year" should remain in effect "for the duration of this agreement. . . ."

During the hearing, the union asserted that I need not decide whether the phrase "during the past year" referred to the year prior to any point in time or to the year prior to the effective date of the agreement. I don't find the language to be particularly ambiguous. The issue resolved by AC6 is which scheduling practices, if any, will be protected for the duration of the contract. In 1989, for example, the question before the negotiators was what practices would remain in effect from August 1, 1989 to July 31, 1993. The answer was those scheduling practices in effect during the year prior to the negotiation. What this language seems to mean, then, is that the parties viewed a shapshot time period of the year prior to agreement. Scheduling practices consistently adhered to during that period were identified and reinforced for the term of the contract. That does not necessarily mean that scheduling practices can never be changed since, had either party objected to a particular practice, they could have discussed it specifically during the negotiations.

There is, of course, no express agreement to establish a practice of certain starting and ending times in the field forces. Nevertheless, I think the parties understood that starting and ending times of shifts could only be changed by mutual consent. The best example of that was the 1986 mutual agreement which restructured the field services department. One provision of that 18-page document dealt with the change in the lunch break for field forces employees. The parties' agreement had the effect of changing the quitting time for the day turn, though admittedly that had not been the parties' primary intention. Because the revised schedule created certain coverage gaps, company and union representatives met and agreed to issue a letter dated October 21, 1986, which announced an interim scheduling change pending "a meeting. . .at the union hall. . .to make a final decision." The final decision was to return to the old schedule. Wayne Stallard tried hard to minimize the effect of these discussions with the union. He asserted that he met merely "in the spirit" of the mutual agreement, but contended no such meetings were required.

In the company's brief, Mr. Cayia's does the best he can do with what is clearly a very damaging fact. The brief describes the episode as "a joint process to develop work shift schedules that would be agreeable to most if not all the affected employees." This is a perfectly suitable definition of "negotiation." And that, it is quite clear, is what the company did -- whatever claims it may now make about its unilateral right to act, it negotiated with the union about shift time changes and, failing agreement, let the matter lie. Perhaps Stallard really believed he had the right to act without union consent. The objective evidence, however, points to a contrary conclusion. The company recognized that it had a consistent practice of shift time scheduling that could be changed only by mutual agreement with the union.

As is true with most litigated cases, the facts are certainly not one-sided. Thus, the company was able to offer evidence that in 1980 it altered the starting and quitting times of certain field forces employees. The union grieved the change, but did not carry its claim beyond the second step. Basically, the 1980 dispute mirrors this one, with both sides adopting essentially the same positions they advance here. In addition, management introduced evidence of a schedule change affecting 12 people transferred to the mobile maintenance repair shop. This change was not grieved by the union. Although Stoddart testified that there had been other changes over the years, these two instances were the only examples of shift time changes in the field forces since at least 1962.

With respect to the mobile maintenance issue, Mike Mezo, local union president, testified credibly (with supporting testimony from Larry McMahon) that the union did not pursue the problem because the affected employees did not want it to. Indeed, he testified that the employees desired the change. Thus, the union advised the employees that they were surrendering rights they could not reclaim and let the matter go.

The 1980 grievance is, certainly, some evidence that the company had not conceded the existence of a practice for starting and ending time scheduling in field forces, at least by 1980. I draw no inference of union acquiescence from its decision not to arbitrate the case. Phil King testified credibly that only one employee actually protested the change and that Stoddart assured him the company would discuss the matter with the union if such changes were ever needed again. Stoddart did not rebut that claim. Mr. Cayia argued vigorously that it was unnecessary to do so since Stoddart had already denied the fact in his own testimony. That is incorrect. What Stoddart did was testify about his conclusion that the company had the unilateral right to change shift times. He also pointed to language purporting to reserve that right in the grievance answer itself. But he did not deny King's factual assertions that the company would discuss future changes with the union.

In any event, the company's subsequent actions are more telling. The fact is the company recognized its obligation to negotiate time changes in 1986. Since that time, at least, both parties have recognized that shift times in the field forces department are scheduling practices protected by AC6. Moreover, there is no question about the fact that this practice was in effect during the year prior to the 1989 negotiations. Finally, I understand the company's assertion that its desire to change the shift times is motivated by valid business reasons and is taken in good faith. I do not question those claims. Good faith and efficiency, however, are not always determinative. In this case, the parties have agreed that certain scheduling practices will not be changed except by mutual agreement. I need not decide how far the coverage of AC6 extends. It is sufficient to rule that it includes the practice of shift starting and ending times in the field forces.

AWARD

The grievance is sustained. Marginal paragraph AC6 is interpreted to mean that management does not have the unilateral right to change the starting and quitting times of employees in the IRMC organization who were formerly members of the field forces department.

/s/ Terry A. Bethel

Terry A. Bethel, Arbitrator

Bloomington, IN

May 28, 1991