Award No. 866
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
December 20, 1992
OPINION AND AWARD
Introduction
This case concerns the company's decision to assign to R.C. operators certain work performed by hostlers, thus reducing from eight to five the number of hostlers scheduled. The hostler and R.C. operator are in different seniority sequences. The case was tried on October 16, 1992 in the company's offices in East Chicago, Indiana. Jim Robinson represented the union and Brad Smith presented the company's case. Both sided filed pre-hearing briefs and submitted the case on final argument.
Appearances
For the Company:
B. Smith -- Senior Rep., Union Relations
D. Gerlach -- Manager, Material Handling Serv.
K. Rosenbaum -- Sec. Mgr., Material Handling Serv.
D. Perez -- Hum. Res. Gen., Mat. Handling Serv.
W. Peterson -- Project Rep., Union Relations
For the Union:
Robinson -- Grievance Comm. Chairman
M. Mezo -- Local Union President
J. Piru -- Griever
J. Velasquez -- Ass't Griever
Ken Boring
John McLarty
Gonzalo Maldonado
Rudolfo Martinez
Wendell Pate
Ricardo Palomo
Background
Field hostlers service locomotive engines by supplying fuel, lube oil, sand, and blocks. Until fairly recently, the company had scheduled eight hostlers, who are in a separate seniority sequence from other transportation department employees. In April of 1992 the company began scheduling only five hostlers. While there is no doubt that the volume of work has decreased in recent years, the company's decision to stop scheduling three hostlers is not merely a reaction to the decreased workload. Although this case does not actually concern the volume of work available for hostlers, it is fair to infer that there is sufficient work for more than five employees. That inference is justified by the fact that the company has assigned to R.C. operators the task of providing fuel, lube oil, sand, water, and wooden blocks to the engines they operate. The union complains that the hostlers have performed those duties with reasonable consistency and exclusivity and that the transfer of part of them to employees in a different seniority sequence violates Article 13, Section 3, as aided by Article 2, Section 2. It is not necessary to review the decisions on which the union's argument is based in great detail. It is sufficient to say that previous decisions have held that if a given seniority sequence has performed duties with reasonable consistency and exclusivity, the company cannot defeat the seniority rights of that sequence to the work by transferring it to a different sequence. Although many issues can surface in a case like this, the parties agree that the issue here is exclusivity. There is no dispute that the hostler occupation has performed the duties consistently. The question is whether that sequence has performed the duties with the requisite exclusivity, so that company cannot transfer the work elsewhere. Although the company voices concern about the standard of decision to be applied in this case<FN 1>, there is no real dispute about what that standard is. Previous decisions between these parties and between different USWA locals and other steel companies have established the principles outlined above. This case, then, is to be decided on the facts, with the issue being whether the union's evidence established the necessary exclusivity.

Discussion

Interestingly, in this area, the word "exclusivity" is not necessarily given its plain meaning. It does not mean that a particular sequence must have performed the work to the complete exclusion of all others. Rather, the words "reasonable consistency and exclusivity" have been understood to mean that some level of performance elsewhere will not necessarily destroy a jurisdictional claim. The real question in this case -- in which both parties concede that work done by the hostlers has also been done by R.C. operators -- is whether that level of performance has been exceeded. In short, has the union proven "reasonable exclusivity?"

There is a factual dispute about just how much of this kind of work the R.C. operators had done prior to the recent change. Everyone agrees that it was the R.C. operators (or, before the locomotives were remote controlled, the crew of engineer, conductor and switchman) who performed this work in the ingot delivery system. Similarly, the parties agree that the R.C. operators do the work for the engines assigned to No. 7 blast furnace. Beyond that, however, the evidence is in conflict.

The company claims that R.C. operators were responsible for supplying the engines in HH yard and 6 dock. It also asserts that R.C. operators did this work on the shuttle engine at No. 7 blast furnace and that R.C. operators sometimes did the work in the yards.<FN 2> Although I am convinced that some of this existed, I think the weight of the evidence supports the conclusion that no R.C. operators in those areas played any significant role in servicing the engines.

Union witness Wendell Pate, a hostler, testified that in HH yard hostlers supplied fuel, sand, and lube oil and that occasionally the fuel truck would fuel the engines.<FN 3> He said that hostlers also supplied the engines assigned to various yards, to plants 1 and 4, and to the delivery engine at No. 7 blast furnace. He acknowledged that hostlers were not assigned around the clock in each yard or area where locomotives operated, but he said the procedure was to call for a hostler from the south yard, where they were assigned around the clock. He also said that he had been called from the south yard to service engines from HH yard when no hostler was assigned there.

Ken Boring is an R.C. operator who worked in the ingot delivery system. He testified about the practice of having the crews supply their own engines in that system, and the similar practice at the No. 7 blast furnace. He said other than those two examples, there was no place else in the mill where R.C. operators serviced their own engines. This testimony was confirmed by John McLarty, also an R.C. operator.

The only witness to testify for the company was Kent Rosenbaum, section manager of rail operations. He said in HH yard and 6 dock the practice was for the operator to check the fuel level and, if fuel was needed, to call a fuel truck or to take the engine to the pit and let the hostler fill it. On cross examination, Rosenbaum acknowledged that R.C. operators always have the duty of checking the fluid levels on their engines. He said, however, that when the engine needed service, the routine was to call a hostler. Indeed, Rosenbaum candidly testified, "If I was the operator I would have called [the hostler]."

Rosenbaum also said there were occasions when operators serviced their engines in other areas, but he acknowledged that this was not the ordinary practice. In fact, his own characterization was that they might do this in order to "get through the turn." Again, on cross examination, Rosenbaum said that except for the ingot delivery system and the engines stationed at No. 7 blast furnace, the "normal response is to call a hostler" when an engine needed service.

I believed Rosenbaum's testimony that there were occasions when a hostler was not available and operators serviced their engines themselves. But it is also clear from the above testimony that the normal expectation was that the operators would call a hostler to do the work. There was no testimony about how often operators serviced the engines themselves. I am satisfied that it did not happen routinely and that Rosenbaum's characterization of it as a response to an emergency or a method of getting through the turn accurately describes what happened. I cannot find that this level of activity was sufficient to undermine the hostler's claim of exclusivity. That does not mean, however, that this case is at an end. The parties agree that operators serviced the engines in the ingot delivery system (and its continuation today in the no. 4 slab caster) and at No. 7 blast furnace. The question for decision here is whether those exceptions to the ordinary practice undermine the union's claim of exclusivity.

Both sides take refuge in previous arbitration awards, which they construe as similar to the facts at issue here. The union points to Inland Award 813, in which Arbitrator McDermott found that the union had proven the requisite exclusivity even though there was a practice of having others in the mill perform the same type of work. The case involved the company's plan to create a new job and transfer to it a bundle of duties performed by employees in other seniority sequences. The union argued, among other things, that the company could not transfer across seniority unit lines the duties of crane operation and diesel engine

switching. The arbitrator noted the union's argument that the only significant exception to the exclusive performance of switching duties by transportation department employees was the steel shops, which had "long performed their own switching on their own tracks." As I understand the evidence, those steel shops are the same ones identified in the instant case as constituting the ingot delivery system.

The union conceded, however, that there were other examples of non-transportation employees performing switching duties. Thus, there was a non-standard gauge engine in the ingot buggy shop, switching in the basement of no. 4 slabber, and switching associated with car dumping at 11 battery. The union conceded that it had not contested the company's action when employees from 11 battery took over the switching duties at that location. There, as here, the union asserted that these exceptions did not destroy the switching sequence's claim of exclusivity.

Arbitrator McDermott agreed, though there is some ambiguity in his opinion:

Without analyzing each detail in those arguments, largely because the record is long and complex, it must be concluded that, although there are some exceptions to the claim of exclusivity for the switching sequence in the transportation department, the evidence is reasonably sufficient to establish that it is the proper repository of switching duties in this plant because the parties have so administered them. The situation at 11 battery is the only real exception because [it is] the only case where above-ground switching for a department with a standard-gauge engine is done by department employees and not by the switching sequence in transportation. On balance, that is not such a departure as to destroy the claim of the switching sequence to this work.

Although McDermott characterized 11 battery as the only "real exception" it is clear that it was not the only exception. Thus, he started out by acknowledging that there were "some exceptions" (emphasis added) and he had already detailed the work of non-transportation employees at the steel shops, the ingot buggy shop, and the no. 4 slabber. I have no question about or criticism of his conclusion that no. 11 battery was the "real exception," but it is fair to observe (as he does, in fact, in the paragraph quoted above) that the opinion does not explain why it mattered that the ingot buggy shop used a non-standard gauge engine or that the switching at no. 4 slabber was below ground. Moreover, the findings themselves do not mention the steel shop, which the union had already conceded was "the only significant exception."

The company seeks to distinguish Award 813 in a number of ways. It notes that it dealt with the company's attempt to transfer all of the duties of a job to a new occupation, whereas here only part of the hostler's duties have been transferred. Hostlers are still scheduled and are still doing the work they have traditionally done. The company has merely assigned R.C. operators to do more of a kind of work they have done in the past, and which is also in their job descriptions.

Although it is true that Award 813 dealt with the company's attempt to transfer all of the duties of one job a newly created occupation, that fact would not seem to be of any significance here. As I observed in Award 865, enough to distinguish a case on the facts; there must be some reason why those factual differences are significant enough compel a different result. The issue in the instant case is whether the hostlers have met the requisite standard of exclusivity. Although Award 813 also dealt with other issues, it had something to say about the exclusivity issue. In particular, Arbitrator McDermott found that the existence of regularly assigned duties in other sequences did not necessarily defeat a particular sequence's jurisdictional claim. It was for that reason that I understood the union have cited the case here.

Similarly, while it is true that the R.C. operator's job description includes the duties of servicing the engine, in previous cases I have understood the parties to maintain that jurisdiction is not conferred merely by the job description. In this case, then, the union's position on exclusivity must stand or fall on what the R.C. operators have actually done, not on what the job description says they might do.

The company also argues that McDermott did not see the steel shops as an exception in Award 813 and that 11 battery was the only "real" exception. This is not an unfair reading of the opinion. However, as I have already explained, McDermott was aware that there were other exceptions as well. I assume that he merely found 11 battery to be the work that was most similar to that the company sought to transfer, though there is some ambiguity there.

The company urges not only that this case is distinguishable from 813 but also that it is controlled instead by Arbitrator McDermott's later opinion in Awards 823 and 824. There, the company transferred the work of two position rated jobs to two craft occupations, following significant reductions in the amount of work available. Arbitrator McDermott characterized the case as one that dealt with:

a management decision, following serious reductions in the volume of work for two position rated jobs, permanently to transfer the little that was left for them to jobs in another seniority sequence that always did

perform all or nearly all of the same work and to eliminate the jobs that did that work in the first seniority sequence. (Emphasis added)

The underscored portions highlight the issue to be decided in this case. In Awards 823 and 824 McDermott found that more than one job had been assigned all of the same duties. Indeed, McDermott said that the "great majority" of the duties of the yard equipment repairman were "duplicated by craft jobs." Thus, Award 823 and 824 represented exactly the situation the company would like me to find here: the same duties assigned to jobs in more than one seniority sequence, meaning that the company did not violate the agreement when it merely assigned to the R.C. operators more of the work they were already doing.<FN 4>

The company's principal reason for citing Awards 823 and 824 is for an analogy to an argument raised there by the union and rejected by McDermott. In 823 the union argued that there were some duties performed exclusively by the yard equipment repairman during the five turns a week he was scheduled. McDermott rejected the notion of exclusive performance on a certain turn:

But it would not be easy to see how Articles 13 and 2 principles could be focused so nicely as to pick out and preserve for this seniority unit just those few tasks, if any, that might have been done by the yard equipment repairman exclusively on the five day turns, while the very same kinds of duties were being done by the other jobs on all sixteen other turns each week. (emphasis in the original)

Mr. Smith argued that the union's claim in the instant case is similar. Just as the union in 823 tried to limit the arbitrator's focus to a particular turn, here the union tries to limit my focus geographically. It wants me to determine that the hostlers performed some duties exclusively, but to ignore the work of other employees in certain areas of the plant. Just as McDermott rejected the claim in 823, the company urges that I should reject it here.

I am not satisfied that this analogy between 823 and the instant case is apt. Although it is true that the union would have me find exclusivity without regard to the ingot delivery system or no. 7 blast furnace, this is exactly the kind of analysis McDermott applied in 813, rendered prior to his rejection of the union's claim in 823.

Although not totally free from doubt, a fair reading of 813 indicates that McDermott excluded from consideration areas that differed from the normal work performed by the switching crews (like the non-standard gauge system or the switching work below ground) and, with respect to the work at 11 battery, simply concluded that this one like exception was not sufficient to undermine the union's claim that the normal routine was to assign switching work to the sequences in the transportation department -- that this had been done with reasonable consistency and exclusivity. That is the same issue I must decide in this case. In short, are the recognized exceptions to the assignment of servicing duties to the hostlers sufficient to undermine their claim of exclusivity?

This is not a decision that can be made by reference to any predetermined scale. Although McDermott wrestled with the same problem in 813, the opinion lists the areas in which switching duties were performed by non-transportation crews, but does not identify the quantity of those duties, facts that might not even have been introduced. Despite Mr. Smith's argument to the contrary, McDermott seemed to analyze the exceptions in light of the custom that prevailed throughout the bulk of the plant. Thus, although switching duties were performed in some isolated areas, in the ordinary case the company looked to transportation department employees to render those services.<FN 5>

The same thing is true here. Although it is true that the ingot delivery system operated without the assistance of hostlers and that hostlers have not been used at no. 7 blast furnace, there is no evidence of any attempt by management to assign hostler duties to other occupations in any other area of the mill. There was no evidence about how the practice at no. 7 blast furnace originated and not much about how it operates today. That is not true of the steel shops. There was substantial testimony about how the rail operations in those areas were managed. The equipment and most of the employees were from transportation. But day to day control of the system was by steel shop supervision.

The company argued forcefully that transportation department customers commonly exercise control over how transportation services are furnished. But I think the union's characterization of the ingot delivery system as functionally separate is appropriate. Steel shop supervision -- not a yard master or other transportation employee -- controlled the day to day operation. Steel shop employees manned the fueling station, unlike the situation elsewhere in the mill. The tracks on which the engines operated were apparently used primarily only for the ingot delivery operation itself. Moreover, not even all of the railroad employees came from transportation since the switchmen were steel shop employees, a situation that apparently prevailed no where else. And the delivery engine that operated between the steel shop and other parties of the mill, was serviced by hostlers.

The ingot delivery system, then, is not representative of the typical way railroad services were administered in the plant. I don't question the company's assertion that the transportation department was ultimately responsible for the operation. Nevertheless, given the differences between what happened in the steel shops and the way rail service was administered elsewhere, one could not reasonably have thought that the exclusion of hostlers from the ingot delivery system undermined their claim to the servicing of engines. Rather, it appears to have been merely an anomaly within the rail operation of the mill.

Given the differences in the ingot delivery system, I conclude that the exclusion of hostlers from this area and the number 7 blast furnace was not sufficient to undermine the hostler's claim that they had performed locomotive servicing work with reasonable exclusivity. Except for emergency situations, everyplace else in the mill the customary response to the need for locomotive servicing was, as Rosenbaum, put it, to call a hostler. The company violated Article 13, Section 3, then, when it assigned such servicing work to R.C. operators beginning in April, 1992.

AWARD

The grievance is sustained. The company is ordered to provide a make-whole remedy.

/s/

Terry A. Bethel

December 20, 1992

<FN 1>I am not indifferent to the concerns expressed by Mr. Smith, who characterized the union's case as based on a "tired old seniority argument" that ignores the company's interest in efficient operation in a highly competitive industry. Both parties, however, have had occasion to remind me of the precedential effect of prior arbitration awards in this industry. My only task is to interpret the language of the agreement, giving due deference to what has been said about it by other arbitrators. Arguments for change must be addressed to a different forum.

<FN 2>There was also evidence that R.C. operators performed servicing work at 2 BOF, which was apparently a narrow gauge system. There was not much evidence about this operation, perhaps because another arbitrator found operations of a narrow gauge system not particularly relevant to an exclusivity claim made by employees on a standard gauge system, see, infra, discussion of Inland Award 813.

<FN 3>In his final argument Mr. Smith asserted that the performance of this duty by the fuel truck driver undermined the union's claim of exclusivity. The union's response was that the contest here is between hostlers and R.C. operators, not hostlers and fuel truck drivers. Since the issue is whether the hostlers have performed this duty exclusively, I am not convinced that the fuel truck drivers are irrelevant. But on the record before me, I am unable to give them much consideration. There was no evidence about how often they are used, and not very much about the circumstances in which an operator may summon them. I have no way of concluding whether their use is significant or only incidental. Moreover, they appear to perform none of the hostler's other duties, which include furnishing lube oil, sand, water, and wooden blocks.

<FN 4>McDermott's decision was also influenced by his conclusion that most of the work at issue had disappeared and that there was not enough remaining to keep even one employee fully occupied. Here, the company also points to the reduction in hostler duties made necessary by shrinkage of the fleet of locomotives and by the purchase of more efficient engines. Nevertheless, this is not a case in which the workload had fallen off in the same way as was true in Awards 823 and 824. There is no allegation in this case that there is no work for the hostlers to. do. To the contrary, the company still schedules five of them and it has given additional work that hostlers used to do to the R.C. operators. As I understand the issue, this case is not about whether the company has to schedule a minimum number of hostlers. Rather, it concerns whether the duties performed by the hostlers can be assigned to another sequence. This is consistent with the parties' agreement prior to the hearing that the issue is exclusivity.

<FN 5>There are also hostlers in plant 1, but their duties seem vary considerably from those at issue here.