Award No. 889
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
May 6, 1994
OPINION AND AWARD
Introduction
This case concerns the union's claim that the company violated a past practice protected by Article 2, Section 2 when it required certain field forces employees to remain in the plant until the end of their scheduled turn. The case was tried in the Company's offices in East Chicago, Indiana on March 18, 1884. Brad Smith represented the company and Bill Carey presented the case for the union. Both sides called numerous witnesses and presented a total of almost 50 exhibits. Each side filed a pre-hearing brief and submitted the case on final argument.
Appearances
For the company:
B. Smith -- Arb. Coord., Union Relations
M. Krueger -- Constr. Mgr., Mfg. Maint.
M. Tolbert -- Project. Eng., Mfg. Maint.
J. Colon -- Core Supervisor, Mfg. Maint.
C. Lamm -- Hum. Resc. Gen., Mfg. Maint.
W. Stallard -- Retired
A. Monanteras -- Section Mgr., Acct. Services
For the union:
B. Carey -- Griever
M. Mezo -- President, Local 1010
J. Robinson -- Rep., Dist. 31, USWA
P. King -- Contracting Out Comm.
T. Allen
G. Spudic
J. Schultz
D. Pariso
D. Rios
D. Ahlfield
Background
The parties agree that, within the IRMC/Field Forces, <FN 1> there exists a so-called wash-up practice under which employees are released from work some period before the end of their shift. Although this practice exists throughout the field forces, there is not necessarily complete uniformity from location to location. Thus, for ease of reference, and to avoid getting bogged down in non-essential details, the parties agreed that the practice is to allow employees to enter the locker room twenty minutes prior to the end of their turn. Prior to the change complained of here, management then made time cards available to employees fifteen minutes before the scheduled end of the turn. The dispute in this case involves whether employees were free to leave the plant after receiving their time cards or whether they had to remain on company property until their turn ended. Because of a significant change in the way employees enter and leave the mill, employees no longer receive daily time cards. Now, they use a magnetic card to swipe in and out. This case arose when the company began docking employees who swiped out prior to the scheduled end of their turn.
The union asserts the existence of a long-standing practice under which employees were permitted to leave company property when they received their time cards. It does not claim that all employees took advantage of the practice or that it benefitted all employees equally. That is, some employees took showers and remained in the mill until the scheduled end of their turn, or even later. Also, employee locker rooms were varying distances from the gates, so that even employees who left the locker area prior to the end of their turn would not necessarily arrive at the gate at the same time. Nevertheless, the union contends that

employees were free to leave and that they often did so with the knowledge, if not the blessing, of management.

The company argues that it has never accepted the practice of allowing employees to leave company property prior to the scheduled end of their turn. In fact, the company claims that management officials did not even realize that employees were leaving the grounds early, knowledge that became available only after the installation of the new electronic swipe-in system, which gives the company greater ability to control when employees enter and leave the mill. The company reminds me that the union has the burden of establishing the existence of the practice, a task that includes proving acceptance by the parties. It asserts that the union is unable to carry this burden and claims that it offered nothing but allegations and generalizations. <FN 2>

Both sides submitted substantial testimony. Union witnesses claimed that they regularly left the mill after receiving their time cards. They testified that in some areas, employees were already washed and dressed and ready to go when the card racks were opened. They also testified that employees would bang on walls, whistle, or use similar tactics if supervision was late opening the card racks. Employees said their supervisors saw them leave, waved to them, and often even gave them rides to the gate. Indeed, on some occasions, supervisors would drive through the gates with employees in the car prior to the scheduled end of the turn, relinquishing the employees' time cards to the gate guard on the way out.

There was additional testimony, both about the existence of the practice and supervision's knowledge of it. Phil King testified that he sometimes complained to supervision if the bus got employees to the gate less than five minutes before the scheduled ending time of the turn. Employees always exited the plant as soon as they got off the bus. Mike Mezo pointed out that the card racks were next to the supervisors' office and the supervisors could see employees take their cards fifteen minutes early and start the five minute walk to the gate. Tom Allen testified that he served as a safety tech and had his desk in the manager's office. He left everyday fifteen minutes before the scheduled end of the turn. George Spudic testified that prior to 1962, which is when the company inaugurated the time card system recently replaced by the swipe system, employees were required to punch out and did so regularly fifteen minutes early. The same practice continued, he said, after 1962, though employees were no longer required to punch out.

In all of these instances, employees claimed, supervisors were aware of their activities, yet no one ever told them that leaving early was improper. In addition, no one was ever docked or disciplined for leaving during the fifteen minute period after time cards became available. The union concedes that not all employees took advantage of the ability to leave the mill early. This option, however, was available to them all and many did use it.

The company put on supervisors and managers who denied the existence of the practice, claiming that they had never even heard of it until the instant dispute arose. In addition, most of the company's witnesses said they were not aware that employees were leaving early, explaining that they had numerous duties to attend to at the end of the turn and were not able to monitor the gates. This allegation was questioned by union witnesses, who said that supervisors often left at the same time as the employees.

It is true that the prior gate control system would make it difficult for the company to know exactly when employees were leaving. That system, explained in more detail in Inland Award 878, generally allowed employees to enter and leave the plant during the so-called open gate period with no record of the exact time they came and went. Rather, when employees came to work they received a time card in the clock house, which they presented to their supervisor when they arrived at their work station. The supervisor kept the card during the day and relinquished it to employees at the end of their turn. Employees then surrendered the card to the gate guard when leaving the plant. Certainly, the company could have monitored the exact time when employees left, but since employees could not leave without a card, and since the supervisor kept the cards until the employees' work was finished, it was not really necessary to do so.

There is no question that under the old system, there were different practices around the plant. Thus, Inland Award 878 describes the situation in 4 BOF/CC, in which employees were not given their cards until they had actually been on the job for eight hours, thus insuring that they did not leave early or, for that matter, even travel to the gate on company time. By contrast, field forces employees got their cards fifteen minutes before the turn ended and were allowed to travel to the gate on company time. The question is whether they were allowed to leave early if they got to the gate before their scheduled quitting time.

There was no testimony that guards were instructed to keep employees at the gate until a particular time. Indeed, such a system probably would not have been feasible, given the numerous starting and ending times in the mill. The guards would have had no way of knowing who could leave at what time. Instead, the

guards simply depended on the time cards. If employees had one, they could leave. Of course, the introduction of the new swipe system has changed all this, since the company is now able to monitor exactly when employees enter and leave company property.

Discussion

The parties agree that the issue in the instant case is narrow. In most such cases, the question is whether a protected practice existed and, if so, whether the company was justified in changing it. In this case, however, only the former matter is at issue. The only question before me is whether there was a protected practice which allowed field services employees to leave the mill any time after receiving their time card fifteen minutes prior to the scheduled end of the turn.

I believed the testimony of the company witnesses, up to a point. That is, I believe that none of the company's witnesses was aware of any express agreement allowing employees to leave the mill prior to the scheduled end of their turn. But I cannot believe that they were ignorant of the employees' actions. Despite Mr. Smith's characterization of the testimony as "an occasional ride," the union's witnesses testified without contradiction that employees frequently rode to, and through, the gate with supervisors. There was also no disagreement with union testimony that many of the employees were dressed and ready to leave when they got their time cards and that company officials saw them head toward the gate. Management could not reasonably have believed that the employees would congregate at the gate, waiting for permission to leave. There was, in fact, no one at the gate to give permission. Even Wayne Stallard testified he would not have expected employees to wait by the gate until quitting time. In addition, supervisor Mike Krueger testified candidly that he was aware that employees were leaving early, but that he did nothing about it. Any such action, he said, would have adversely affected employee morale. <FN 3>

The standard to be applied in this case is familiar to the parties. Article 2, Section 2 provides, in relevant part:

Should there be any local working conditions in effect which provide benefits that are in excess of or in addition to the benefits established in the agreement, they shall remain in effect for the term of the agreement. . . .

This provision has been the subject of frequent construction by steel industry arbitrators, though perhaps Sylvestor Garrett's decision in U.S. Steel N-146 best captures the requirements:

A custom or practice is not something which arises merely because a given course of conduct has been pursued by management of the employees on one or more occasions. A custom or practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to the underlying circumstances presented. (emphasis in original)

The company mounts several defenses to the union's claim. It asserts that management could never have accepted the practice because it had no knowledge of it. I have already determined that management knew the employees regularly left the plant after receiving their time cards. I agree with the company's argument that management never expressly sanctioned the practice, but such action is not required. As Rolf Valtin observed in Reserve Mining Co. Dec. RV-7, the requirement that the parties accept the practice "does not mean that either party expressly has to agree to it. Passive consent -- i.e., mere acquiescence -- is enough." It is not possible for me to find a lack of acquiescence. This was not merely a case in which management suspected employees were sneaking out of the mill but was unable to catch them. To the contrary, management often took them to, and sometimes through, the gate. Management knew that many employees were leaving the locker room as soon as they got their cards and it not only did nothing to stop them, it seemed unconcerned. I do not mean to suggest that management was somehow delinquent in its responsibilities. Rather, I believe the parties understood that once employees got their cards, they were free to leave, to shower, or to do whatever they wanted. In Garrett's words, the "normal and proper response" to receipt of the time card was to leave, if the employee so desired.

As Mr. Smith asserted, and as previous cases have recognized, arbitrators often look for the basis of a practice. But it does not follow that an independent basis must exist for each segment of a practice. The company does not contest the fact that a wash-up practice exists. As I recognized in Inland Award 877, these practices typically recognize the fact that some employees work in a dirty environment and that many of them will want to clean up before leaving. Certainly, management could once have insisted that they wash themselves on their own time, but that is not the way matters developed. Instead, the parties

understood -- agreed, in effect -- that some employees would be excused from the performance of their duties so that they could wash before they left.

Perhaps this was the company's acknowledgement that employees who got dirty doing the company's work should be allowed to wash on company time; perhaps the company allowed them time to wash to discourage employees from sneaking away early. At this point, it might be difficult to reconstruct the exact reasons that motivated the practice, but it seems clear that it was related to the dirty environment. The time card practice was merely part of the wash up practice. Once employees came to the locker room to wash up, their productive service for the company was finished. It was not, as Mr. Stallard suggested, a management failing if employees left after getting their time cards. It was merely a recognition that, once the employees stopped working, it was not in the company's financial or managerial interest to care whether they washed or left.

Certainly, the company could have kept employees in the mill for a full eight hours. Inland Award 878 recognizes that fact. But it does not follow that because employees could be made to stay, they were forced to or even expected to. Had management intended to control the precise time at which employees left the plant, it could have done so by withholding their time cards, as the 4 BOF supervisors did in Inland Award 878. For whatever reason, the field forces supervision seemed less interested in insuring that employees stayed inside the gates for eight hours. This may have been due to the fact that, unlike the BOF employees, the field forces worked, as one company witness put it, "in every nook and cranny of the mill." It made less sense, then, to expend supervisory time trying to control when employees walked out the gate. Once they stopped working, the supervisors gave them their time cards and then ceased to pay attention to them, at least as productive employees. I cannot ignore the fact that management made the cards available to employees fifteen minutes before the end of their shift. Why would it do that if it cared whether the employees stayed? I think it is clear to employees that receipt of time card -- their ticket out of the plant -- was management's signal that their work was finished and they were free to leave. <FN 4>

The swipe system, of course, made a matter of record what everyone knew but no one had said expressly under the old system -- the field forces employees were leaving the mill before the scheduled end of their turn. Whether this change is sufficient to allow the company to terminate the practice is not an issue I am entitled to address in this case, and nothing I say here should be thought to express an opinion. It is clear to me, however, that up until the new system was installed, management knew that field forces employees were leaving early and that it acquiesced in that action.

Mr. Smith claims that no such practice could exist because management is doing nothing more than insisting on its right to demand eight hours work for eight hours pay, a right it has not relinquished just because it has not always insisted on it. This argument, however, has little to do with the matter in dispute. The company does not challenge the existence of the wash-up period, which clearly is a concession that employees will receive eight hours pay for less than eight hours work. The practice at issue here is merely part of the wash-up practice and recognizes that, once the employees quit working, the company no longer cared whether they bathed or left. Moreover, this is not the only case in which an arbitrator has recognized the parties' creation of such a practice, see. e.g.U.S. Steel Case No. Uss-14,129 (1978). <FN 5>

Remedy

I find that a protected practice exists and, accordingly, I will order the company to make whole any employee whose pay has been docked and to remove from the employees' records any notations of disciplinary action associated with their adherence to the practice. The union also asks that I order back pay to all employees who have been affected by the company's action by giving them overtime for the time they have been required to remain in the plant. At this juncture, I am persuaded by Mr. Smith's argument that such an award would be virtually unenforceable, since not all employees availed themselves of the right to leave early, not all left early every day, and not all were able to exit the gates at the same time.

The union argues that there will be no incentive for the company to comply with my award unless it faces the sanction of overtime payments. This, however, was a good faith dispute about the meaning of the contract and there is no reason to believe the company will ignore my decision. Indeed, history is to the contrary. However, should the union allege further violations, the grievance-arbitration procedure is available to remedy them and the question of overtime payments can be raised then.

AWARD

The grievance is sustained. The company will take the action specified in the remedy section of the opinion.

/s/ Terry A. Bethel

Terry A. Bethel

May 6, 1994

<FN 1> The designation of this department has been changed in recent years. However, the parties referred to them as IRMC/Field Forces during the hearing in order to avoid confusion.

<FN 2> It is true, as Mr. Smith argued, that the union offered little documentary evidence to support the practice. That, however, does not mean there was no proof of the practice, as the company claims. Testimony is proof, though it may be subjected to more demanding scrutiny than some documents. As the opinion will disclose, I found the testimony adequate to carry the union's burden in this case.

<FN 3> Additional proof of management's knowledge of the practice comes from Spudic's testimony that in the early days of the practice, employees actually punched out early. Surely this was sufficient to put management on notice.

<FN 4> I do not find it relevant that some employees -- maybe even most employees in certain areas -- elected not to leave early. This is clearly not a case in which area managers had the discretion to let employees leave or not. Instead, all employees were free to leave when they received their time cards, though some elected to stay and shower.

<FN 5> I also reject the company's argument that the practice at issue here violates m.p. 2.2.5. Assuming without deciding that this section would apply to the practice at issue here, I find that there is no question that the practice existed prior to 1968. In fact, union testimony indicated that the practice even pre-dated 1962.