Award No. 921
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
USWA LOCAL UNION 1010
Arbitration of Stipulated Issue, App. PP
Arbitrator: Terry A. Bethel
November 3, 1996
OPINION AND AWARD
Introduction
This is an interesting dispute concerning an interpretation of Appendix PP of the parties' 1993 collective bargaining dispute. The case was tried in the company's offices on October 31, 1996. Jim Robinson represented the union and John Skonberg presented the company's case. The parties submitted the case on final argument and, in accordance with the provisions of Appendix PP calling for a bench decision, asked that I communicated my decision not later than November 1. I spoke with the representatives by conference call on November 1, 1996 and, pursuant to their agreement, tender this opinion in fuller explanation of my decision.
Appearances
For the company:
J. Skonberg -- Attorney
R. Cayla -- Manager, Union Rel.
W. Boehler -- Dir., Union Mgt. Rel.
J. Hanak -- VP Human Resources
P. Parker -- Arb. Coord., Union Rel.
S. Gardner -- Mgr., Workforce Control
D. Byrne -- Dir. Human Resources
W. Boos -- Senior Rep., Union Rel.
For the union:
J. Robinson -- Sub Dist. Dir.
J. Parton -- District Dir., Dist. 7
M. Mezo -- President, Local 1010
A. Jacque -- Grievance Comm. Chair
D. Shattuck -- Grievance Comm. Secy.
T. Margrove -- VP, Local 1010
Background
USWA Local 1010 represents the production and maintenance employees at the company's harbor works in East Chicago, Indiana. There is one other bargaining unit on site comprised of masons. The company's office and technical employees, also known as non-exempt salaried employees, are not represented for purposes of collective bargaining. The union mounted an organization campaign in 1992, but failed to garner sufficient employee support. The dispute in this case involves certain communications from the company and the union in the course of a second organizational effort directed at the office and technical employees. In their 1993 negotiations, the parties added Appendix PP to the collective bargaining agreement which, the union says, requires the company to remain neutral in such contests. In addition, Appendix PP prevents, among other things, misrepresentation by either party. In this case, the union charges that the company violated its neutrality pledge in a letter to employees dated October 10, 1996 and the company charges that an October 2, 1996 leaflet from the union contains a misrepresentation.
The parties submitted the case to arbitration pursuant to a stipulation that reads as follows:
Stipulation of Issues
Appendix PP of the 1993 Collective Bargaining Agreement (CBA) is a letter agreement reached during the 1993 negotiations concerning conduct of the parties in the event the union seeks to represent any non-represented employees of the company.
The union is currently conducting an organizational campaign among non-exempt, non-represented employees of the company. In the course of this campaign, two disputes have arisen concerning the conduct of the parties governed by Appendix PP. These disputes are submitted to the Permanent Arbitrator in accordance with the requirements of the Appendix

1. The company distributed a letter dated October 10, 1996 . . . which expresses a message which the union contends violates the company's commitment to neutrality as embodied in Appendix PP. The company disagrees. The issue before the arbitrator, therefore, is: Does the company's letter, as written, violate Appendix PP, and if so what shall be the remedy?
2. The union also distributed a leaflet . . . which expresses a message which the company contends violates the union's commitment to refrain from certain conduct in its organizational activities, as embodied in Appendix PP. The union disagrees. The issue before the arbitrator, therefore, is: Does the union's leaflet, as written, violate Appendix PP, and if so, what shall be the remedy?
Appendix PP covers several pages of the parties agreement but, because of the importance of the entire document to the parties' arguments, I will reproduce all of it here:
This letter will serve to confirm certain understandings reached in our 1993 negotiations.
A. Neutrality
Over the years the Company and the Union have developed a constructive and harmonious relationship built on trust, integrity and mutual respect. The Company places high value on the continuation and improvement of its relationship with the United Steelworkers of America, as well as with all of its employees.
We also know from experience that when both parties are involved in an organizing campaign directed at unrepresented Company employees, there is a risk that election conduct and campaign activities may have a harmful effect on the parties' relationship. Therefore, it is incumbent on both parties to take appropriate steps to insure that all facets of an organizing campaign will be conducted in constructive and positive manner which does not misrepresent to employees the facts and circumstances surrounding their employment and in a manner which neither demeans the Company or the Union as an organization nor their respective representatives as individuals.
To underscore the Company's commitment in this matter, it agrees to adopt a position of neutrality in the event that the Union seeks to represent any non-represented employees of the Company.
Neutrality means that the Company shall neither help nor hinder the Union's conduct of an organizing campaign, nor shall it demean the Union as an organization or its representatives as individuals. Also, the Company shall not provide any support or assistance of any kind to any person or group opposed to Union organization.
Consistent with the above, the Company reserves the right:
1. To dispute to the extent permitted under the law any issues relating to the scope and makeup of the unit sought by the USWA.
2. To communicate fairly and factually to employees in the unit sought concerning the terms and conditions of their employment with the Company and concerning legitimate issues in the campaign.
For its part, the Union agrees that all facets of its organizing campaign will be conducted in a constructive and positive manner which does not misrepresent to employees the facts and circumstances surrounding their employment and in a manner which neither demeans the Company as an organization nor its representatives as individuals.
The Company's commitment to remain neutral shall cease if the Union or its agents intentionally or repeatedly misrepresent to the employees the facts and circumstances surrounding their employment or conduct a campaign which comments on the motives, integrity or character of the Company or its representatives.
B. Access to Company Facilities
Upon written request, the Company shall grant access to its facilities to the Union for the purpose of distributing literature and meeting with unrepresented Company employees. Distribution of Union literature at entrances and exits of Company facilities shall not compromise safety or disrupt access or egress. Distribution of Union literature inside Company facilities and meeting with unrepresented Company employees inside Company facilities shall be limited to organizing tables in non-work areas during non-work time. Union representatives shall notify appropriate Company labor relations officials before engaging in the above organizing activities to schedule access to Company facilities and arrange for organizing tables in non-work areas and shall not disrupt the normal business of the facility.
In situations where an election is scheduled pursuant to NLRB representation procedures for the purpose of determining whether employees, as defined above, desire representation by the USWA for collective bargaining purposes, the Company agrees that it will not engage in an election speech on Company time to groups of twenty or more employees within seventy-two hours before the scheduled time for conducting

the election. This provision shall not be construed in any fashion to confer upon the USWA a right to engage at any time in an election speech on Company time or on Company property.
Notwithstanding the foregoing, the Company reserves the right:
1. To engage in an election speech on Company time within seventy-two hours before the scheduled time for conducting the election, where not otherwise prohibited by law in response to Union misrepresentations or acts of coercion relating to the election, the employees' terms and conditions of employment or any aspect of Union representation.
2. To engage in discussions on Company time regarding the Union or the election within seventy-two hours before the scheduled time for conducting the election (a) with individual employees on a one-to-one employee to Company representative basis of (b) with groups of employees where such discussions are initiated by the employees with members of management.
C. Dispute Resolution
Any disputes involving this letter shall be brought to a joint committee of one Headquarters representative of the Company and Union. If the alleged violation or dispute cannot be satisfactorily resolved by the parties, either party may request that the permanent arbitrator resolve such dispute. The arbitrator shall resolve such dispute by means of a bench decision to be rendered at a hearing to be held within fourteen (14) days of the making of the request at a site mutually agreeable to the parties.
Appendix C of the agreement prohibits the parties from introducing evidence concerning the discussions held during collective bargaining. However, the parties have not interpreted this to prevent explanation of their goals or motivations in proposing or agreeing to changes in the agreement. The parties offered such evidence in this case, with each advancing a goal that, not surprisingly, supports its interpretation of Appendix PP.
Mr. Mezo testified about the union's goals as it entered the 1993 negotiations. Through him, the union introduced the Basic Steel Policy Statement, developed by the Industry Conference, in preparation for 1993 bargaining. That document contains a provision headed "New Directions Bargaining Program" which includes what the union calls the twelve points of light. I need not discuss those proposals in great detail. Generally, as explained in Mezo's testimony, these bargaining goals were developed in recognition of the problems that have faced -- and continue to face -- the basic steel industry. The union felt that neither the industry nor the union could continue to exist and prosper without long term bargaining goals that included each side's recognition of the other's right to "exist and flourish."
The 12 points of light to be pursued by the union in 1993 negotiations included one called "neutrality and recognition," which the Policy Statement describes as follows:
The company must agree to abandon opposition to union organizing efforts at unorganized facilities in which it has an ownership interest and to recognize the union at those facilities on the basis of an authorization card majority.
Mr. Mezo explained that the company had notice of the union's goal because the union furnished it with a copy of the Policy Statement. From the union's perspective, this goal was realized by the negotiation of Appendix PP. Mezo said that the union agreed to several of the company's goals during the negotiations -- consistent with the union's view that the company has a right to pursue its self-interest and flourish -- and that, in return, the union got the company's declaration of neutrality which, the union contends, means that the company is not to take a position about whether unrepresented employees should unionize.
The company did not deny that it received the Policy Statement and it did not claim that it was unaware of the union's goal. But it sees Appendix PP as motivated by different considerations. Mr. Boehler testified that the 1992 campaign produced hard feelings because of some of the information communicated to the employees. Although none of those documents were introduced, anyone familiar with representation campaign propaganda understands that it sometimes includes material that would be offensive to anyone of normal sensibilities. Boehler said he believed the problem was the manner in which the parties campaigned in 1992. Thus, in his view, Appendix PP was intended to regulate the way in which the parties could campaign in the future. In particular, neither side was to demean the other and neither was to engage in misrepresentation. In addition, the company agreed to limit its right to deliver captive audience speeches. However, the company says that it did not agree that it would not campaign at all and, it says, part of campaigning is the ability to state an opinion.
The particular facts at issue are not complicated. On October 2, 1996, the union distributed a leaflet to office and technical employees headed "It's Time to Talk Union." The next line of the leaflet says, in bold type YOUR JOB IS ON THE LINE. Following that is a rectangular box. In the center of the box is a diagram of a hand holding a pen signing a piece of paper. On one side of the diagram are the words "No

Contract" and on the other side are the words "No Job." The leaflet concluded by informing the employees of a "Solidarity Meeting" and giving the time and location of the meeting. The company claims that the phrase in bold face type reprinted above and the material in the box are misrepresentations in violation of the union's commitment in Appendix PP.

On October 10, 1996, Inland President Dale Wiersbe sent a letter to the company's non-exempt salaried employees who had received the union's leaflet. The letter contains two passages that the union finds objectionable. The first is in the first paragraph where Wiersbe tells employees to feel free to attend the union meeting and then says "but we believe your decision . . . that you did not need a union in 1992 . . . is as correct today as it was then." The union also objects to a similar comment in the last paragraph:

In summary, we believe your decision . . . that you did not need a union in 1992 . . . is as correct today as it was then. If you attend the "solidarity" sessions at the union hall or otherwise come into contact with someone with a genuine understanding of the collective bargaining process, ask whether of not the union can prevent force reductions where studies regarding that option are already underway. In 1992 YOU BELIEVED THEY COULDN'T by a vote of 645 NO (against unionization) to 273 YES (for unionization). The rules haven't changed . . . nor should your opinion of unionization.<FN 1>

The union does not claim that the manner of the company's presentation is improper. That is, the union does not say (at least in this arbitration) that there is anything wrong with the way the company expressed its opinion. Rather, the union says that, under Appendix PP, the company has no right to express an opinion about whether employees should support the union.

Discussion

1. The company's letter

From the unions perspective, both the language and the context of Appendix PP support its claim that the company has no right to express an opinion about whether employees should or should not support the union. In particular, the union points to the third paragraph in section A, where the company "agrees to adopt a position of neutrality . . ." The work "neutral," the union says, is not ambiguous -- it prevents someone from taking sides. In this context, the union says that the company's neutrality pledge prevents it from communicating its opinion about unionization to employees, something it clearly did in the October 10 letter.

The union recognizes that the next paragraph of the appendix says that "neutrality means" that the company is neither to "help nor hinder" the union's campaign. But it says that this sentence must be read in light of the recognized meaning of "neutral." It makes no sense, the union says, to suggest that the parties used the word "neutrality" and then decided to have it mean something completely different.

The union also says that its interpretation is consistent with the 12 points of light it adopted in preparation for 1993 bargaining. The points of light -- each of which appears in the agreement in some form -- highlighted a new relationship between the parties, one in which each was to acknowledge the right of the other to exist and prosper. In that context it makes sense, the union says, to believe that the company promised not to take a position about whether unrepresented employees would choose to engage in collective bargaining. The union would not have made the concessions it made merely in return for a company promise to campaign in a less forceful manner.

I have some sympathy for the union's position. Like the union, I understand the concept of neutrality to mean that one does not take sides. Nonetheless, I am unable to read Appendix PP in a way that convinces me that the parties embraced that meaning. As often happens in collective bargaining, each of these parties understood Appendix PP to do something different. Since I believe that they did not necessarily share a common vision, there is no way I can provide an interpretation that reconciles their views. The most I can do is interpret the words they agreed to.

The principal problem, as the union obviously recognizes, is the language that says "neutrality means that the company shall neither help nor hinder the union's conduct of an organizing campaign. . . ." This paragraph appears immediately following the sentence in which the company agrees to "adopt a position of neutrality." The inference is compelling that the fourth paragraph was intended to define the scope of neutrality as understood by the parties: the company would neither help nor hinder the union.

Although the union suggests otherwise, a commitment not to help or hinder is a significant achievement. I understand the word "help" to mean that the company agrees not to aid or assist the union; and I understand "hinder" to mean that the company will not obstruct or impede the union's effort. Any student of NLRB decisions knows that there are innumerable ways -- both lawful and unlawful -- in which an employer can hinder union organizing. In Appendix PP, the employer agreed not to engage in those tactics. The parties

have not asked me to resolve the scope of this containment and I do not do so. I find only that the employer does not "hinder" the union's effort merely by stating an opinion about whether employees should organize. Mr. Robinson's argument suggests that even an expression of opinion could hinder the union's chances for success because it might cause some employees to vote against the union. It seems obvious that some employees might be motivated to vote yes or no based on their employer's view of the union. But that is not what I understand the word "hinder" to mean. An employer who expresses an opinion is not providing an obstruction to the union's effort to carry its message or to appeal to employees for support. The union is still free to do or say whatever it pleases.

My conclusion does not depend solely on the sentence that begins "neutrality means." Indeed, I find that sentence to be consistent with other provisions of the appendix which seem to contemplate that the company can campaign during a union organizational effort. The second paragraph of section A says there is a risk of harmful conduct when "both parties" are involved in an organizing campaign and, "therefore . . . both parties" must take steps to conduct the campaign in a "positive manner" that does not misrepresent or demean. As the company argues, it makes little sense to enjoin the activities of "both parties" unless the company was to have some ability to campaign.

The next paragraph (which adopts the position of neutrality) begins by saying "To underscore the company's commitment in this matter" (emphasis added). The underscored words are important. Thus, the company's neutrality pledge is made in the context of a recognition that the company will campaign but will do so in an appropriate manner.<FN 2> And, of course, the fourth paragraph then defines what the parties meant by neutrality.

I am also influenced by one of the two express reservations of right in Section A. Immediately following the paragraph which defines neutrality, the parties agree that "consistent with the above," the company has the right "to communicate fairly and factually . . . concerning terms and conditions of employment and concerning legitimate issues in the campaign." (emphasis added). Again, I find the underscored words particularly telling. Whether the employees should choose the union as representative is obviously a legitimate issue in the campaign.

The union says, however, that the reservations of right are severely limited because they are introduced with the words "Consistent with the above," which means that the company can address issues only to the extent that doing so is compatible with its neutrality pledge. I see the words as playing a different role, though given my interpretation of the neutrality pledge, one that may not cause a substantive difference. Nevertheless, I think the words are an introduction to a reservation of right that is, in fact, consistent with the company's pledge not to help or hinder the union. Thus, I think the language says that the company has assumed an obligation not to help or hinder and that it is not inconsistent with that promise for the company to comment on legitimate campaign issues. And, I see no way of excluding the company's opinion about unionization from the phrase "legitimate issues in the campaign."

The parties also point to section B in support of their positions, though both acknowledge that there is no claim of violation of that section in this case. In part, the company points out that this provision grants the union significant access privileges that it would not otherwise have. This argument is obviously intended to counter the union's claim that an adoption of the company's neutrality interpretation would deprive the union of any benefit from Appendix PP.

The section goes on to say that when an NLRB election is set, the company will not engage in a captive audience "election speech" within 72 hours, an obvious expansion of the so-called Peerless Plywood rule through which the NLRB generally prohibits such speeches within 24 hours of the election. The section then has two reservations of right , one o which allows the company to give speeches within the 72 hour period "in response to union misrepresentation or acts of coercion relating to the election, the employees' terms or conditions of employment or any aspect of union representation." I agree with the union's assertion that this reserved right only applies in those cases in which the union has engaged in some misconduct. But I think that hurts rather than helps the union's case, for the limitations imposed by the reservation apply only when a speech is given within 72 hours of the election.

At base, the union says that the company's right to campaign under Appendix PP is limited to its ability to "correct the record." The company, it says, can respond to union assertions about wages or benefits or other conduct that misrepresents, demeans or coerces. Clearly, the language just quoted in the above paragraph says that. But there is no similar limitation in the second paragraph of section B. Thus, the reservation of right says that within 72 hours, the company can correct the record in response to union misrepresentation or other misconduct, but its right to give an "election speech" more than 72 hours before the election is not similarly constrained. That is, unlike the explicit language in the reservation of right, nothing in the second

paragraph of section B indicates that a speech more than 72 hours before the election has to be in response to union error or misconduct.

Finally, although the parties did not concentrate on it at the hearing, the second reservation of right in section B allows company officials to engage in employee-initiated discussion "regarding the union" within 72 hours of the election. Since this reservation is obviously intended to circumvent the 72 hour rule, it follows that such individual discussions would also be permissible before 72 hours. I have difficulty reading the words "about the union" to mean that the company's sole right is to respond to union errors or misconduct. It is more reasonable to believe that, consistent with the cited provisions of section A, company officials have a right to discuss the union, including the company's opinion about whether it should represent the employees.<FN 3>

2. The union leaflet.

In my mind, this is an easier issue to resolve. As noted above, the company urges that the union's statements "your job is on the line" along with "no contract . . . no job" suggests to employees that the company will fire them -- or at least that they will lose their jobs -- if they do not choose the union to represent them. This is, the company says, a misrepresentation, something the parties agreed that they would not do, despite current NLRB doctrine that ignores most cases of campaign misrepresentation.

I have grave doubts about whether the NLRB would have found the union's letter objectionable even when it applied its most rigorous standards. It is true, as the company says that one could read the letter to mean that employees will lose their jobs if they don't choose the union as representative. I have wasted too much of my life reading NLRB opinions not to recognize that the Board has sometimes reached pretty far in its speculation about the effect of an employer or union communication. But even the Board applies a test of reasonableness. Thus, the question is typically what a reasonable person would understand the communication to mean. That is the test that I think should apply here.

This is not a case in which the union lied to the employees about a matter of which the employees could reasonably believe the union had knowledge. The union, after all, does not represent (and, so far as I know, has never represented) the non-exempt salaried employees. They could not reasonably believe that the union was privy to secret information about the future of that workforce. Rather, it seems more reasonable to see the leaflet merely as a union prediction of what could happen if the employees remain unrepresented. Those kinds of predictions are the typical fodder of organizational campaigns and cannot be seen as misrepresentations merely because the union can't establish that they will come true.

The context of this leaflet is also a matter of some significance. Mr. Mezo testified that employment security had been a key issue in the union's 1992 unsuccessful campaign and that it had later been the central issue in the union's 1993 negotiations for the P&M unit. The union was successful in negotiating an employment security provision in those negotiations a form of which, Mezo said, the company later unilaterally adopted for its unrepresented non-exempt salaried employees. Although there was no testimony about this, it seems likely that this could have dampened the union's plans to organize those employees since they had already received a security benefit similar to that negotiated by the union.

However, in September, 1996, the company revoked the security plan for its non-exempt employees. Mezo testified that some of those employees contacted the union and formed a committee that drafted the challenged leaflet. Obviously, the employment security issue was central to these employees' concerns and, the union might reasonably have believed, the company's recent action made it more vulnerable to organization than it had been. In any event, this was the environment in which the union distributed the leaflet. Viewed in that context, it looks less like a representation of fact than it does an exploitation of a potentially vulnerable point. The affected employees should not have missed the implication that the company did not retract the employment security provisions in the collective bargaining agreement, which is what the union really wanted them to understand.

In sum, I cannot find that the leaflet was a misrepresentation that violated the commitment made by the union in Appendix PP.

AWARD

For the reasons set forth above, I answer the questions posed in the stipulation as follows.

1. Does the company's letter, as written, violate Appendix PP . . .? No

2. Does the union's leaflet, as written, violate Appendix PP . . .? No

/s/ Terry A. Bethel

Terry A. Bethel

November 3, 1996

<FN 1>The ellipses (i.e., . . .) are in the original. Their use in quotations from the company's letter does not indicate omissions.
<FN 2>In this regard, it is significant that the sentence which defines neutrality does not merely say that the company will neither "help nor hinder"; it also says that the company will not "demean the union," a commitment that is obviously part of its obligation to campaign in a "constructive and positive manner."
<FN 3> Although discussed only in this footnote, I have also considered the parties' other arguments. I was particularly impressed with Mr. Mezo's description of the bargaining goals adopted by the Industry Conference and I appreciate the fact that the company had notice of those goals. But it does not follow that the company shared the union's aims or that, even when it agreed, it embraced all of the union's objectives. That is apparent even in the section on neutrality at issue here. Thus, the union wanted agreement that the company would recognize it based on a card count, something that is clearly not included in Appendix PP. The bargaining goals, then, furnish important evidence about the context of the negotiations, but they do not necessarily reveal what the parties agreed to.
Because I have found that the language of the appendix is sufficient to carry the day, I need not address in any length the company's argument about section 8(c) and the waiver question. It is true, as the company asserts, that the NLRB would require a showing that the company waived its statutory right to communicate in a clear and convincing manner. Commentators have often noted that the NLRB applies a more rigid test of waiver than the one usually adopted by arbitrators. Clearly, that is because the Board determination of waiver carries with it a government declaration about the renouncement of a statutory right, something that is not at issue here. And of course, it is also clear that there is no real question of 8(c)'s application or, particularly, of constitutional rights, in this case. Section 8(c) was added in 1947 to insure that the government, acting through the NLRB, did not unduly abridge employer free speech. There is no government action in this case and, hence, no constitutional issue. Nevertheless, the company does have the right to express an opinion and, no matter what waiver standard I apply, I can find no convincing evidence that it relinquished it in this case.