Award No. 925
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
March 8, 1997
OPINION AND AWARD
Introduction
This case concerns the union's challenge to the company's decision to assign certain sample preparation work to employees outside the bargaining unit. The case was tried in the company's offices in East Chicago, Indiana on December 19, 1996. Pat Parker represented the company and Mike Mezo presented the union's case. The parties submitted the case on final argument.
Appearances
For the company:
P. Parker -- Arb. Coord., Union Rel.
S. Schuldt -- Section Mgr., Mat. Testing
L. Leonard -- Senior Staff Engineer
T. Kaiser -- Section Mgr.
W. Souronis -- Staff Engineer
For the union:
M. Mezo -- President, Local Union 1010
R. Hasek -- Griever, Steward
J. Robinson -- Staff Rep. Sub-Dist. Dir.
J. Lazauskas
Background
The work at issue is the preparation of steel shop slag in the quality control building. Prior to 1986, all such testing was performed by bargaining unit employees who used a process that began by crushing the slag, milling it, screening it, milling with a binder, pressing to a wafer, and finally analyzing it by x-ray. Each of these steps was performed by bargaining unit employees. For shorthand purposes, the parties refer to this as the wafer method. Beginning in 1986, the company began preparing some steel shop slag samples for analysis by a different method, referred to by the parties as fusion.<FN 1> The first three steps in the process (crushing, screening and milling) are the same as in the wafer method and, as with the wafers, are performed by bargaining unit employees. The next step, however, involves a fusion, which is the combination of the milled and screened powder with a molten salt. As described by company witness Scott Schuldt, the salt attacks the sample and breaks it down into atomic bits, ultimately forming a homogeneous solid solution. When the fusion process began for steel shop slags in 1986, it was performed exclusively by non-bargaining unit personnel.<FN 2>
The union does not contend that the company violated the agreement when it assigned the fusion work to non-unit employees in 1986. At that time, the fusion method was not used for all steel shop slag. Thus, furnace slag continued to be prepared using the wafer method and, as always, that work was done by bargaining unit employees. At least six other types of steel shop slag (argon, RHOB, tundish, ladle, mold, and caster) were prepared using the fusion method. From 1986 until May 1988, the fusion was dissolved in an acid solution. However, in May of 1988, the company began forming a fusion bead, a process that Schuldt said is done on the same machine that was also used to dissolve the fusion in an acid solution. This was done by non-unit personnel until April 1989, when the company changed to the wafer method for the steel shop slags that had formerly been prepared by a fusion method. As with the furnace slags that were still being prepared in wafers, this work was done by bargaining unit employees.<FN 3>
The problem that gave rise to this arbitration was the company's decision to abandon the wafer method for most steel shop slags and return to the fusion method, specifically, the fusion bead method. The company took this action in 1992 and, as it had before going to wafers in 1989, gave the work to non-unit personnel. The union's grievance alleges that the company had no right to take work away from the bargaining unit and give it to non-unit personnel, action that it says violates articles 2, 5 and 13. The union says that management cannot remove work from the bargaining unit merely because it decides to employ a new process to have the work performed. The union urges that I should consider not necessarily the process or

the material being processed, but rather the purpose of the work. The samples are prepared, the union says, as part of the production process, and as such, the work belongs to production employees represented by the union.

The union cites two previous Inland Awards, Award 810 and COEX 12, as evidence that work belonging to the unit can be removed only by agreement, which it says is what happened in both of those cases. There was no agreement to take the work away from the bargaining unit here. To the contrary, the union offered some testimony that the company assured the union when it went to fusion beads that non-unit personnel would prepare them only until the process was perfected and that it would then give the work to the bargaining unit.

The company does not necessarily assert that it can take work from the bargaining unit and assign it to non-unit employees. Rather, the union says that the work at issue here was never exclusively bargaining unit work in the first place. The company concedes that bargaining unit employees have prepared wafers exclusively, and it notes that whenever that function was required, it has assigned the work to the unit. But it says that fusions have always been done by non-unit personnel, a fact the union does not even contest as it applies to fusion solutions. The company says it makes no sense to distinguish between fusion solutions and fusion beads, since the preliminary steps are the same and the end result (solution or bead) simply depends on which button you hit on the machine. Since the union agrees that fusion solutions have been excluded from the bargaining unit's purview, the same result must follow for fusion beads. The union, however, denies this conclusion, pointing out that the technology for fusion beads had not even been developed at the time the company began preparing fusion solutions without protest from the union.

Discussion

I have some difficulty with the union's claim that its position is supported by COEX 12 and Inland Award 810, both of which it reads to mean that bargaining unit work can be removed from the unit only by express agreement. No one doubts that the parties can agree to exclude work from the bargaining unit by express agreement. And, while I understand and credit Mr. Robinson's belief that both COEX 12 and Inland Award 810 hinged on such an express agreement, the opinions are not necessarily as clear as the union might like. Although there may well have been an express agreement about the work at issue in COEX 12, for example, Arbitrator McDermott's award makes no such finding. He does say that the work was put outside the unit by "quite deliberate action," but by that phrase he clearly does not mean an express agreement. Rather, he explains his conclusion by saying "Over 30 years ago, the company had this work done by nonexempt, nonbargaining unit personnel, and the union never challenged that." (emphasis added) The "agreement," then, was merely implicit and depended principally on the lack of a challenge to management's assignment of the work.

The same failure to challenge is evident in Award 810. There, as McDermott recognized, the company assigned to non-bargaining unit personnel work that was similar to bargaining unit work. Although McDermott said that the parties had "jointly" decided to put that work outside the scope of the unit, I cannot read his opinion as having recognized an express agreement between the parties. Instead, he made his conclusion with reference to the fact that "the union did not object for 16 or, perhaps, 21 years." In both cases, the scope of the unit was shaped by practice. Thus, not only do these case not support the union's claim, but they are also consistent with the company's principal argument in the instant case, which is that the union never challenged the preparation of fusion samples by non-unit personnel until 1992, even though the work had gone on in the steel shops since 1986.

Although it raises other arguments, the union obviously recognizes the importance of practice, since it tries to limit damage from the fact that non-unit personnel have consistently prepared samples using the fusion method. Thus, the union tries to draw a distinction between the preparation of samples through fusion-solution and fusion beads. It is not easy to make this distinction, especially in light of company testimony that there is no real difference between fusion solutions and fusion beads, other than what the worker tells the machine to do. Of course, it is also true that the division of work in an industrial establishment does not always follow precise logic. Parties have sometimes -- through express agreement or through past practice -- assigned work to included or excluded employees even though the same work might have logically been placed elsewhere.

The fact that work that might be given to the bargaining unit is sometimes excluded does not mean that scope problems like this one are entirely without standards. The union argues that I must look not merely to the process or to the material being processed, but rather to the purpose of the work. It also says that the preparation of samples is a distinct body of work that has belonged to the bargaining unit and that the essential nature of the work remained the same even after the company changed from making wafers to

making fusion beads in 1992. Applying those principles recognized by the parties as appropriate to the assignment of work, the union claims that I must find this is bargaining unit work.

There are problems with this argument. Most glaring is the fact that sample preparation is not a distinct body of work that the parties have recognized as belonging to the bargaining unit. The testimony is unrefuted that non-unit personnel have regularly prepared steel shop slag samples for an extended period of time without complaint from the union. And even if the lack of an objection by the union did not establish an implicit agreement (and the union cites a case for this proposition), that is not determinative.

Importantly, union agrees that the slag preparation done by non-unit personnel between 1986 and 1988 (and the use of the fusion method since the 1950's) was not bargaining unit work. Obviously, then, neither the preparation of samples nor the use of the fusion method is a distinct body of work that the parties have recognized as belonging to the bargaining unit. Just the opposite is true.

The union's acknowledgement that preparation of fusion solution samples is appropriately outside the union also has another effect. If non-unit personnel appropriately prepared fusion-solution samples from 1986 to 1988 (and could continue to do so today), then the union must acknowledge that the purpose of the work is not determinative. The samples prepared between 1986 and 1988 were for the same purpose as those at issue here.

The union, however, claims that there is a difference between fusion-solution and fusion beads and that it contested the assignment of fusion beads outside the unit "as soon as management assigned the work of preparing slag samples on a routine production-type basis to excluded employees." This, however, does not appear to be true since the union did not protest the assignment to non-unit personnel in 1988. The union, however, says that its inaction was because management had already told union representatives that the work of fusion beads would be given to the unit as soon as the process was perfected. This evidence, if proven, would serve two purposes. First, it would explain, and maybe excuse, the lack of a union challenge in 1988, when the work began. Equally important, it would be an expression of management recognition that the work belonged to the bargaining unit.

Unfortunately for the union, its evidence is not sufficient to shoulder this weight. It is not merely because the evidence is hearsay, though these parties obviously understand the difficulty with hearsay evidence. More important, the company was able to rebut the union's account of the conversation. The union's testimony was that a now-retired union representative asked management about the fusion bead work and either Larry Leonard or Tom Kaiser told him that the work would ultimately be assigned to the unit. But Leonard and Kaiser both testified and each denied the conversation. Both company witnesses seemed credible. Since I did not have the opportunity to see the union representative who allegedly talked to one of them, there is no way I can resolve the credibility dispute in the union's favor. It is also important that the company's actions seem consistent with its previous actions. Thus, prior to 1988 it had always assigned fusion work to non-unit personnel and it did the same thing when fusion beads began in 1989.

The union's theory was obviously hampered in this case by the fact that fusion solution work has been recognized as outside the bargaining unit since the 1950's, even though there is some evidence that bargaining unit members have performed it at another location since 1994.<FN 4> All the current leadership could do was try and find some way to distinguish fusion solution from solution beads. However, in the final analysis, I cannot see the preparation of fusion beads as a distinct body of work from the preparation of samples from the fusion solution method. It is essentially the same work that the union has already agreed is outside the bargaining unit. Therefore, I must deny the grievance.

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

March 8, 1997

<FN 1>Although steel shop slag was first prepared by the fusion method in 1986, the fusion method has been used in other applications since the 1950's. The evidence indicated that fusion work had always been done by non-bargaining unit personnel.

<FN 2>There was evidence that bargaining unit employees began preparing samples by the fusion method at the number 7 blast furnace lab in 1994. There was some dispute between the parties about whether this work is as complex as that done by non-bargaining unit employees at the quality building. But that would not seem to be determinative. The company's actions after 1992 would not necessarily prejudice the assignment it made during 1992, except by inference. The union might argue, for example, that what the company did in 1994 demonstrated that it knew its 1992 assignment was improper. But that argument could

not prevail here, where there was also a consistent practice of assigning such work outside the unit prior to 1992.

<FN 3>I find it significant that even during this period, when bargaining unit employees were doing sample preparation using the wafer method, fusion samples were still done occasionally and always by non-unit personnel.

<FN 4>The acknowledgement that fusion-solution work was outside the bargaining unit distinguishes this case from most of the cases cited and relied on by the union. In Bethlehem Decision 1860, for example, the arbitrator allowed the union to challenge an assignment, even though non-unit personnel had done the work for 10 years. But that was a case in which the union did not agree that the work performed by non-unit personnel was properly outside the unit. Here, the union did agree that the preparation of fusion-solution sample was not bargaining unit work.