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In the Matter of the Arbitration between

INLAND STEEL COMPANY
EAST CHICAGO, INDIANA

and

UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL 1010

OPINION
and
AWARD

Grievance Involving
Article V, Section 5, Subsection 5
Grievance No. 16-C-320

The Hearing in this case was held on November 6, 1951, at the offices of the Inland Steel Company, Indiana Harbor Works, East Chicago, Indiana, before Pearce Davis, serving as Sole Arbitrator.

The Union's presentation was made by Mr. Thomas Harris, General Counsel, United Steelworkers of America, and Mr. J. B. Jeneske, International Representative, United Steelworkers of America. They were assisted by the following:

William Maihoffer, President, Local 1010
Don Lutes, Chairman, Grievance Committee
James Stone, Member, Grievance Committee
Fred Gardner, Member, Grievance Committee
August Sladcik, Member, Grievance Committee

The Company's presentation was made by Mr. W. F. Price, Attorney, with the aid of the following Company representatives:

R. E. Hoover, Superintendent, Labor Relations
W. T. Hensey, Assistant to Superintendent, Labor Relations
T. F. Plimpton, Assistant General Superintendent, Industrial Relations
J. M. Helme, Administrative Assistant, Industrial Relations
H. C. Lieberum, Assistant to Superintendent, Labor Relations
J. A. Keckich, Assistant Superintendent, Cold Strip
J. I. Herlihy, Assistant Superintendent, Industrial Engineering Department

3/5-5-51

The provisions of the presently existing contract between the parties that are pertinent to the issue to be determined are the following:

ARTICLE V WAGES

"Section 5. Incentive Plans. Wherever practicable, it will be the policy of the Company to apply some form of incentive to the earnings of the employees when their efforts can readily be measured in relation to the overall productivity of the department or a subdivision thereof, or on the basis of individual or group performance. In this connection, the Union recognizes that the Company shall have the right to install incentive rates in addition to existing hourly rates wherever practicable in the opinion of the Company. It is also recognized that the Company shall have the right to install new incentives to cover (a) new jobs, or (b) jobs which are presently covered by incentives but for which the incentive has been reduced so as to become inappropriate under and by reason of the provisions of the aforesaid Wage Rate Inequity Agreement.

In such cases, or in cases where an incentive plan in effect has become inappropriate by reason of new or changed conditions resulting from mechanical improvements made by the Company in the interest of improved methods or products, or from changes in equipment, manufacturing processes or methods, materials processed, or quality or manufacturing standards, the Company shall have the right to install new incentives, subject, however, to the provisions of the aforesaid Wage Rate Inequity Agreement. Such new incentives shall be established in accordance with the following procedure:

1. The Company will develop the proposed new incentive.

2. The proposal will be submitted to the grievance committeemen representing the employees affected for the purpose of explaining the new incentive and arriving at agreement as to its installation. The Company shall at such time furnish such explanation with regard to the development and determination of the new incentive as shall reasonably be required in order to enable the grievance committeemen to understand the method by which the new incentive was developed and determined, and shall afford to such grievance committeemen a reasonable opportunity to be heard with regard to the proposed new incentive.

3. If agreement is not reached within thirty (30) working days after the meeting at which such incentive is explained to the grievance committeeman, the matter shall be reviewed in detail by an International Representative of the Union and the Company for the purpose of arriving at mutual agreement as to the installation of the incentive. Such meeting shall be held promptly upon the request of either party.

4. Should agreement not be reached, the proposed new incentive may be installed by the Company at any time after fifteen (15) days after the meeting between the Company representative and the International Representative of the Union, and if the employees affected claim that such new incentive does not provide equitable incentive earnings in relation to other incentive earnings in the department or like departments involved, and the Previous Job Requirements and the Previous Incentive Earnings they may at any time after thirty (30) days but within one hundred-eighty (180) days following such installation, file a grievance so alleging. Such grievance shall be processed under the grievance procedure set forth in Article VIII of this agreement and Section 9 of this Article. If the grievance be submitted to arbitration, the arbitrator shall decide the question of equitable incentive earnings in relation to the other incentive earnings in the department or like department involved and the Previous Job Requirements and the Previous Incentive Earnings and the decision of the arbitrator shall be effective as of the date when the new incentive was put into effect.

5. Until such time as the new incentive is agreed upon or, in the event a grievance is processed to arbitration, until an arbitrator's decision has been rendered, the average hourly earnings of incumbents of the job as of the date the new incentive is installed shall not be less than the average hourly earnings received by such incumbent under the incentive plan in effect during the three (3) months immediately preceding the installation of the new incentive.

Where an incentive plan becomes inappropriate because of new or changed conditions resulting from mechanical improvements made by the Company in the interest of improved methods or products, or from changes in equipment, manufacturing processes or methods, materials processed, or quality or manufacturing standards, and the Company does not develop a new incentive, the employee or employees affected may process a grievance under the provisions of Article VIII of this agreement and Section 9 of this Article, requesting that a new incentive be installed providing, in the light of the new or changed conditions, equitable incentive earnings in relation to other incentive earnings in the department or like department involved, and the Previous Job Requirements and the Previous Incentive Earnings."

The Issue

The issue to be determined by the Arbitrator is the following:

Under the collective bargaining agreement between the parties dated May 7, 1947, as amended, is the Company required, where a new incentive is installed, to guarantee and pay currently each payroll period hourly earnings at least equal to the average hourly earnings under the prior incentive from the date the new incentive is installed until the date agreement is reached with respect to such incentive

rate, or until the final incentive rate is established by an arbitrator's decision?

Factual Background

The arbitration involved in the present case grew out of a strike settlement agreement of October 18, 1951. This agreement provides:

STRIKE SETTLEMENT MEMORANDUM

"WHEREAS, the Company and the Union desire to settle the present strike and to restore industrial peace, employment and sustained high production as soon as possible and in the hope that a spirit of mutual cooperation, such as herein evidenced, will prevail at all times in their joint relations;

NOW THEREFORE, it is agreed as follows:

1. All employees shall return to work as required by the orderly resumption of operations as determined by the Company.

2. When the employees return to work:
   (a) The International Union assures Inland that it will make every effort to increase the rate of production on the No. 3 Pickle Line, and will so state publicly.
   (b) The pending grievances involving (1) the propriety of the No. 3 Pickle Line incentive rate, and (2) the meaning and application of Article V, Section 5, Subsection 5, will be arbitrated immediately under and pursuant to the current contract.
   (c) The arbitrator as to Issue 1 shall be a recognized industrial engineer to be mutually agreed upon within one week from the date hereof, and in the event of failure to agree within that time, Cyrus Ching, Director of the Federal Mediation and Conciliation Service, shall be requested to appoint a recognized industrial engineer as arbitrator. The arbitrator so appointed shall be requested to render a decision within two weeks from the close of the arbitration hearing. The arbitration hearing on such issue shall begin at the offices of the Company at East Chicago, Indiana, not later than Monday, November 5, 1951.
   (d) The arbitrator as to Issue 2 shall be a recognized industrial engineer to be mutually agreed upon within one week from the date hereof, and in the event of failure to agree within that time, Cyrus Ching, Director of the Federal Mediation and Conciliation Service, shall be requested to appoint a recognized industrial engineer as arbitrator. The arbitrator so appointed shall be requested to render a decision within two weeks from the close of the arbitration hearing. The arbitration hearing on such issue shall begin at the offices of the Company at East Chicago, Indiana, not later than Tuesday, November 6, 1951.
   (e) The previous average earnings on the No. 3 Pickle Line (rate paid prior to September 12, 1951) shall be maintained from September 12, 1951, to date of the arbitration decision as to Issue 1 based on each payroll period.

3. There will be no further discipline against employees for participation in the strike. However, nothing herein shall be construed to limit the right of the Company to impose discipline in the future as provided in the current contract.

4. Nothing herein shall be construed to prejudice or support the position of either party to the arbitration with respect to the meaning and application of the contract as applied to the grievances involved.

DATED at East Chicago, Indiana, October 18, 1951

INLAND STEEL COMPANY

By H. W. Johnson (signed)
H. W. Johnson, Vice President

UNITED STEELWORKERS OF AMERICA, CIO

By Joseph Germano (signed)
Joseph Germano, District Director

Joseph B. Jeneske (signed)
Joseph B. Jeneske, International Representative"

The grievance which gave rise to the dispute was filed on October 12, 1951. It read as follows:

"You have installed an incentive rate on #3 Pickling Unit which is paying less than the rate that was in effect prior to the installation of Rate No. 77-0232.

"You are in violation of Article V, Section 1 which says, 'All incentive plans used in computing incentive earnings (Including all methods, bases and guaranteed minimums under said plans) in effect on November 30th, 1950, shall remain in effect for the life of this agreement.'

"Article V, Section 5 also states, 'Until such time as the new incentive is agreed upon or, in the event a grievance is processed to arbitration, until an arbitrator's decision has been rendered, the average hourly earnings of incumbents of the job as of the date the new incentive is installed shall not be less than the average hourly earnings received by such incumbent under the incentive plan in effect during the three (3) months immediately preceding the installation of the new incentive.'

"Aggrieved request you pay them the rate that was in effect prior to the installation of rate File No. 77-0232; also retroactively to September 12th, 1951, and pay employees their average hourly earnings as has been the practice in the past."

By agreement the various steps in the grievance prior to arbitration were waived and the Company made one answer to the grievance. That answer reads as follows:

"This grievance requests the Company to guarantee previous total average earnings ($2.79½ per hour--Operator) to employees on the No. 3 Continuous Pickle Line after the installation of Incentive Rate No. 77-0232 on that line on September 12, 1951, and that such guarantee be applied each two-week pay period. Article V, Sections 1 and 5 of the Collective Bargaining Agreement are cited in support of the above request.

"While Section 1 of Article V provides that 'guaranteed minimums' under incentive plans in effect on November 30, 1950, shall remain in effect (with certain exceptions), it does not specify those minimums. Such minimums are found in the Wage Rate Inequity Agreement of June 30, 1947, and Section 5 of Article V of the Collective Bargaining Agreement. The former agreement provides that the Standard Base Rate Wage Scale shall be a guaranteed minimum for all incentives except where a higher guaranteed minimum is elsewhere provided. Section 5 of Article V provides two additional guarantees. Sub-paragraph 4 of Section 5 provides a guarantee that the final rate determined under the grievance procedure, after a test period, will be made retroactive to the date of

installation of the new incentive. Sub-paragraph 5 of Section 5 provides a further guarantee that during the period from the date of installation of the new incentive until the final rate is agreed to or determined by an arbitrator, the average hourly earnings of incumbents over the period referred to shall not be less than their average hourly earnings under the incentive plan in effect during the three months immediately preceding the installation of the new incentive. In other words, sub-paragraphs 4 and 5 of Section 5 provide that when a new incentive is installed, the employees will be paid currently (each payroll period) on the basis of the installed new incentive rate, and that when the rate is agreed to by the employees or is agreed to by failure to process a grievance within the time limits set forth in the grievance procedure or is established by an arbitrator's decision, the Company will at that time pay the difference, if any, between the earnings resulting from the finally determined incentive rate and the former total average earnings rate, averaged over the period from the installation of the incentive rate until agreement or an arbitrator's decision. The only circumstance under which the Company would not so pay would be if the arbitrator would decide that the reason for reduced earnings resulted from a slowdown in violation of the agreement and specifically directed the Company not to pay any rate difference which might exist.

"This interpretation is in accord with the language of the Collective Bargaining Agreement and the past practice under it since it was signed in May, 1947. Since that time numerous grievances of a similar nature have arisen and in each instance the employees involved have been paid their current earnings under the newly installed incentive rate each payroll period, regardless of whether they were above or below their previous total average earnings rate paid prior to the installation of the new incentive. Furthermore, this issue here has been raised by prior grievance and settled contrary to the claim of the instant grievance. Section 4 of Article VIII precludes its further consideration.

"In light of the above facts, the payment of earnings under the new incentive rate until Grievance 16-C-321 (challenging the propriety of that rate) is determined conforms to the language of the contract and the past practices of the parties under it. Accordingly, the request of this grievance is denied."

The background of the dispute which gave rise to the strike and present arbitration proceeding is approximately the following:

In the early 1930's, Inland Steel Company built three continuous pickling lines in the Cold Strip Mill, namely, the "A", "B" and "C" lines. They operated successfully for many years. Gradually, the "A", "B" and "C" lines wore out and pursuant to a program of modernizing and enlarging the Cold Strip Mill, the Company planned to replace all of the worn out units with three new units of modern design to be known as the #1, #2, and #3 Pickle Lines.

Because the space available in the cold strip pickling house was limited, it was decided to try an experiment to increase the speed of pickling and at the same time decrease the length of line required. For this purpose, a preheating furnace was placed just ahead of the first pickling tank on the #1 Line.

The #1 Line was built in the same building as the three old lines and equipped with a preheating furnace. This line went into operation in November of 1948. Because this was not a conventional pickling line, and because no such unit had ever been built with a preheating furnace, no attempt was made to install an incentive rate.

The #2 Line was built shortly afterward, but because the preheating furnace on the #1 Line had not worked out well neither a furnace nor an incentive was installed on the #2 Line.

In October, 1949 the average earnings of each occupation on the "A", "B" and

"C" Pickle Lines combined were determined and the rates thus derived were used to pay the crews assigned to #1 Line from the time that line went into operation in November, 1948, to date. They are to be continued until a conventional pickling line is developed. The same average earnings were also paid the crew on #2 Line from the date that line started in January, 1949, until about a month ago when it was shut down to be revamped into a conventional pickling line.

Because of the low tonnage being produced on the #1 and #2 Pickle Lines, it became apparent that it would be necessary to alter plans and rather than build #3 Pickle Line in the present cold strip pickling building, it was built in what was the old cold strip shipping building in order to have sufficient space for the #3 Line and to be able to continue the operation of the "A" and "B" lines. This new #3-60" Continuous Pickling Line is similar to other modern coil pickling lines that have been built since the war.

On February 19, 1951, the operators on the #3 Line were transferred from the old Continuous Line "A" to work with the construction people on the new line in order to learn the control board and the makeup of the equipment.

On March 15, 1951, the #3 Pickle Line was ready for operation. Two or three days prior to March 15, 1951, the crews had made "dry runs"--run strip through the hot water box in order to synchronize the entry end and the delivery end of the line. Production actually started on March 15, 1951. Since it was recognized that some time would be required to work the "bugs" out of the line in order to get it operating properly, the crews were guaranteed their former average earnings under the incentive on the "A" Pickle Line until an incentive rate could be developed and installed. These average earnings were based on their performance during their last 90 days on the "A" line incentive and covered the occupations of Welder Operator, Shearman, and Feeder.

On July 13, 1951, a meeting was held with H. N. Schumacher, Superintendent of the Cold Strip Department; E. G. Mullen, Industrial Engineer; L. R. Barkley, Divisional Supervisor of Labor Relations, and James Stone, Grievance Committeeman, attending. At this meeting a proposed incentive for the #3 Continuous Pickle Line was presented. The grievance committeeman stated that he would talk to the employees concerned and would notify the Company as to whether or not it would be accepted by the Union.

On August 14, 1951, another meeting was attended by H. N. Schumacher, Superintendent; W. T. Hensey, Jr., Assistant to Superintendent of Labor Relations; E. G. Mullen, Industrial Engineer; J. Stone, Grievance Committeeman; and ten employees from the #3 Pickle Line. At this meeting the proposed incentive rate was again discussed in detail and rejected by the Union. At the conclusion of the meeting, it was agreed that a letter be directed to the International Representative requesting a meeting with him for the purpose of agreement to the installation of the incentive.

A letter to this effect was sent and a meeting was held August 28, 1951, with H. N. Schumacher, W. T. Hensey, Jr., E. Mullen, L. E. Davidson, Industrial Engineer, L. R. Barkley, J. B. Jeneske, International Representative, D. Lutes, Grievance Committeeman, J. Stone and eight crew members attending. The Company proposal made at this meeting was rejected by the International Representative, and the incentive rate was installed, after expiration of contractual time requirements, effective September 12, 1951, were discontinued.

During the period in which average earnings were paid (February 19, 1951 to September 12, 1951), and after the installation of the incentive, the departmental supervision of the Company repeatedly requested the crews to step up production because it was their belief the employees were restricting production. On September 21, 1951, a letter was directed to all #3 Line crew members by the Company departmental superintendent requesting them to increase production and to adjust any grievances they might have under the contractual procedure.

On several occasions the crew members demanded that their previous average earnings be paid currently (each payroll period). This demand was denied by the Company, and on October 11, 1951, at approximately 12:30 A.M., the members of #3 Pickle Line crews walked off the job...Shortly thereafter the crews on the other pickle lines ("A", "B", and #1) left their jobs in sympathy with #3 Line employees. By the second turn (8-4) the entire force of the Pickling Division had joined in a work stoppage.

On October 12, 1951, while the employees involved were out on strike, two grievances were filed, one, #16-C-320, involving the meaning and application of Article V, Section 5, Subparagraph 5, and the other, #16-C-321, involving the propriety of the rate under Article V, Section 5.

On Monday, October 15, 1951, picket lines were established at all entrances to the plant, resulting in a strike of the entire plant. The strike was settled October 18, 1951.

Union Argument

The Union maintains that Article V, Section 5, Subsection 5 of the contract was clearly intended to guarantee that past average incentive earnings would be paid to workers, operating under new incentives, on and for each payroll period in which earnings under the new incentive system amounted to less than past average earnings. For those separate payroll periods in which new incentives earnings surpassed past average earnings, however, the intent of Subsection 5 was to give to the workers the higher current incentive returns. The Union believes the wording employed in Sub-section 5 clearly indicates that its interpretation is correct. This subsection reads:

> "Until such time as the new incentive is agreed upon or, in the event a grievance is processed to arbitration, until an arbitrator's decision has been rendered, the average hourly earnings of incumbents of the job as of the date the new incentive is installed shall not be less than the average hourly earnings received by such incumbent under the incentive plan in effect during the three (3) months immediately preceding the installation of the new incentive".

In supporting its contentions the Union makes the following points.

Where the term "average hourly earnings of incumbents of the job" is employed in Subsection 5, the normal and natural interpretation of such term must be average hourly earnings according to each payroll period. "There is no other way with which men are familiar. When the contract is otherwise silent on the point, it has always been taken to mean by payroll period." As further evidence of this interpretation, the Union cites the fact that the guaranteed base rates provided for in Article V, Section 1, have always been applied by comparing such base rates with actual incentive earnings computed for payroll periods."...That is, if during any payroll period the earnings under an incentive plan fall below the standard base rate wage scale of the job class involved then they (the incentive workers) are paid the guaranteed base rate per hour". The practice with respect to application of these guaranteed base rates supports the Union's argument on application of the guarantee provided in Subsection 5.

The Union notes, too, that Section 4 of Article V contains a provision giving a minimum daily wage guarantee to workers on incentive plans where such earnings are computed on a daily basis. "Apparently", says the Union, "it was felt necessary to specify that in case of workers on an incentive plan where the earnings are computed on a daily basis that they should have a daily guaranteed base rate per hour". The clear implication from this fact is that other incentive workers must be paid, and have <u>their guarantee</u> based upon, earnings on two-week payroll periods. Only a very small number of employees in the plant are paid on a daily basis. Almost all employees receive compensation for two-week payroll periods.

For the foregoing reasons, it appears that the parties, when they formulated Subsection 5, must have intended that the employees should be paid their guarantee of past average earnings according to payroll periods. "It could never have occured to anyone, and certainly not the men, that this average hourly earnings was to be on some basis other than that on which the incentive pay is computed".

The practicalities of the incentive system support the Union interpretation of Subsection 5 in a number of different respects.

In the first place, if the guarantee of past earnings were not paid on a payroll basis a very real hardship to the workers could conceivably take place. If, for example, the Company put in a very low incentive--so low that the workers could make virtually nothing on it--the workers might be forced into an amount of take home pay insufficient for their normal household obligations. This situation could obtain even though the Union might eventually win an arbitration decision on a disputed new incentive rate. "We would have a period of perhaps six months, perhaps a year, when the Union men were being paid very little, by definition less than their previous average earnings, because the question doesn't come up unless they are getting less than their previous average earnings."

Secondly, if the Company were to install an unreasonably low new incentive and the workers were not paid their past earnings average by payroll period, such a low rate might have the effect of forcing the workers into exhausting abnormal physical efforts. On the other hand, if the Company did not pay past average earnings according to payroll periods and computed the average of the new incentive rate (as the Company contends it may do), then the workers would have no inducement to give the new incentive an adequate trial. This would be so because such an averaging system of new incentive earnings would bring it about that

> "earnings in excess of the previous average earnings (would be) balanced off against the payroll period for which the new incentive rate earnings fell below the previous average earnings, so that the workers (would) get no benefit from this increased production that they...put out.... "....
> The purpose of guaranteed minimum are two.... One is to give the workers the same pay as they got before, so that they won't have to cut their standard of living, or go into debt during this period when the propriety of the new incentive is being tried out. The other is by guaranteeing them the same take as they have been getting in the past to put them in a position where they will give the new incentive a fair shake so that at the end of this period it may be possible to make some judgement on the basis of experience as to whether the incentive is fair or not. Now, both of those reasons for the guaranteed minimum would be thrown in the ash can by the Company position".

In rebutting the Company's argument on past practice the Union makes the following points:

(1) The Union, at any early date, made it perfectly clear to the Company that it thoroughly disagreed with the way in which the Company proposed to guarantee past average earnings of employees placed upon disputed new incentive rates. The Union disagreed with both the time and computation aspects of the Company method of guarantee. The Union never at any time acquiesced in the Company-sponsored methods of guarantee.

(2) Because the Company has violated the provisions of Subsection 5 on several past occasions--namely, the seven past practice examples cited by the Company at the Hearing--does not lessen the fact that the Company seeks to guarantee past earnings in a manner that was, and is, in violation of the provisions of Subsection 5. Such past violations do not make the action of the Company right in past instances nor make correct the proposed action of the Company in the most recent instance.

(3) Because the Union has not previously protested the guaranteed earning procedure of the Company all the way to arbitration does not preclude it from doing so at the present time.

(4) The case histories cited by the Company in its endeavor to establish past practice do not accomplish the end sought. Time limits on grievances and grievance steps have never been enforced by either the Company or the Union. The Company admits this fact. Of the seven precedents cited by the Company, the five recited in Company Exhibits F, G, I. J, and M represent grievances that are still in one stage or another of the grievance procedure. Since they are still open grievances, they can not be used as valid precedents.

With respect to Company Exhibits A, B, and C--all of which state that past average earnings will be used until new incentive rates are established--the Union argues they prove nothing more than the fact that past average earnings were paid before new incentive rates were established. This procedure was not and is not in conflict with Subsections 4 and 5 of Section 5, Article V, and the Union therefore had no reason to protest the position taken by the Company.

The two cases cited by the Company in Company Exhibits P and Q were instances in which the Company paid past average earnings as the Union contends it was required to do by the terms of Subsection 5.

At the Hearing, the Union cited four cases in which past average earnings were paid currently each payroll period, as the Union contends always should have been done under Subsection 5. On the whole, the Union estimates that past average earrings have been paid currently, each payroll period, about as often, in the past as they have not been paid. Thus, no prevailing past practice can be established on the basis of the full facts.

The Union underscores the fact that the one thing the Company has never done, by its own admission, is to give "to Subdivision 5 the construction which it, as distinguished from the Union, urges. There is no case in which they have regarded the entire period between the institution of the incentive and the arbitrator's award as a single pay period and paid prior average earnings on that basis".

Additional rebuttal points made by the Union are the following.

The Company argument that a new incentive rate could not ever be considered installed if previous average earnings were guaranteed and paid is not valid, Article V, Section 1, provides for a series of guarantees under the heading Standard Base Rate Wage Scale. If the existence of guaranteed rates that might be paid cause incentive rates not to be installed, then most incentive rates in the plant are not yet installed since practically all carry the guaranteed rates provided in Article V, Section 1.

Employees going on new incentive rates were always told by the Company they should give the new rates a trial because their past earnings were guaranteed and, consequently, they had nothing to lose if the new rates didn't prove to be good ones. Thus, the men were not led to ask for past average earnings at the outset of the installation of new incentive rates. They always agreed to give the newly established rate a trial.

Company Argument

The Company's position is the following. Paragraphs 4 and 5 of Section 5, Article V, clearly contemplate and provide that when a new incentive is installed the employees will be paid currently each payroll period, on the basis of the installed new incentive rate and that when the rate is either agreed to by the employees, or is agreed to by failure to process a grievance within the stated time limits, or is established by an arbitrator's decision, the Company will at that time pay the difference , if any, between the earnings resulting from the finally determined incentive rate and the previous average earnings rate, averaged over the period from the installation of the incentive rate until the date of agreement

or of arbitrator's decision. The Company argues, further, that if there is any ambiguity in the provisions of the agreement it is resolved against the Union by the consistent past practice under the contract since 1947.

The Company maintains that it is entirely correct in paying after a new incentive has been installed, each payroll period, only the earnings yielded by the new incentive rate. However, the Company admits that at the end of the period of dispute concerning the new rate it is obligated to make certain that over the period of dispute the workers receive earnings at least equal to previous average hourly earnings.

The Company bases its argument on a series of propositions. The more important of these are the following.

The obvious intent of Subsections 4 and 5 of Section 5 is to provide a trial period for a new incentive rate after it has been tested and installed.

All the provisions of Section 5 must be read in sequence.

An incentive could not be considered installed if previous average earnings were paid each payroll period. One of the tests to be applied to the new incentive is its relationship to previous average incentive earnings. This test could only be applied by operation under the new incentive and payment currently at the new incentive rates. "Incentive effort can not be attained if the minimum to be received currently is the average amount of earnings on a prior incentive."

The language of Section 5, taken as a whole, clearly indicates that the parties intended to provide a fair trial period and at the same time protect the employees from an erroneous rate. The guaranteed Standard Base Rate Wage scale operates to protect the workers from severe reduction of earnings during the period of rate dispute.

The language of Subsection 5 must be construed to mean a guarantee over a fixed period of time and not as a current rate of pay. From the installation of the new incentive until the final new incentive rate is determined, by agreement or arbitrator's decision, the Company must over that period guarantee previous average hourly earnings. No period of guarantee other than from the installation of the new rate to its final determination can be found in the language of Subsection 5. No where in this section is a payroll period mentioned. The use of the words "average hourly earnings" twice, once referring to the disputed period and once to the definite period of the last three months under the prior incentive, clearly indicates that a period of time over which earnings would be averaged was intended. The use of the word "until" in Subsection 5 indicates a connecting link between installation of the new incentive rate and the agreement or arbitrator's decision. Therefore, the time period over which the earnings are to be averaged must be from installation of the rate to agreement or arbitration. If a payroll period had been intended in Subsection 5 the parties would have used such a term in Subsection 5.

In addition to its argument from the language employed in Section 5, Article V, of the contract, the Company contends that its position is sustained by consistent past practice.

In explaining its argument on past practice the Company submitted numerous exhibits and case histories.

Company Exhibits A, B, and C are Company memoranda of meetings, held with Union members present, concerning start-ups of production lines. Exhibit A carries the statement that previous average earnings "shall be used until such time as new incentive rates are instituted". Company Exhibit B provides that previous average earnings shall be "For the initial break-in period until an incentive rate is established". Company Exhibit C provides that previous average earnings will be paid "until a new incentive rate is established".

The Company cites seven cases in which it contends past practice of the Company supports the Company's interpretation of Subsection 5. In five of these cases the Union filed grievances challenging the equity of the rate. In only one was the Company practice of paying currently on the basis of the installed rate challenged. This grievance, in the opinion of the Company, was settled adversely to the Union. In two cases additional to the seven, a guarantee was paid currently by payroll periods but in these two instances special arrangements were made to do so. On the basis of this case history the Company maintains that the Company's interpretation of Subsection 5 has been consistently applied over a four-year period.

The Company believes the Union's interpretation of Subsection 5 can only be arrived at by reading the words "for each payroll period" into the language of Subsection 5. Such additional language is not in Subsection 5 and can not be read in by construction, in the Company's view.

Discussion

The findings of the Arbitrator as the following.

Subsections 1, 2, 3, and 4 of Section 5, Article V, provide for and permit development and installation of new incentive rates by the Company. Such rates clearly may be instituted or installed by the Company without agreement of the Union. Installation of a new incentive rate obviously implies Company computation of worker earnings on the basis of the new incentive rate. Pursuant to the provisions of Subsection 4 of Section 5, the Union may challenge the propriety of the new incentive rate "after thirty (30) days but within one hundred-eighty (180) days following such installation". A grievance so filed by the Union will eventually lead to determination"...of equitable incentive earnings in the department or like department involved...." This may be accomplished either by way of an arbitrator's decision or by eventual agreement by the parties. Subsection 4 specifically provides that the incentive rate finally determined to be equitable in relation to other incentive earnings shall be retroactive to the date the new incentive rate was installed. Thus, the terms of Subsection 4 actually provide for determination of the final level of earnings of all employees working on the new incentive rates for the period from date of installation to date of agreement or arbitrator's decision.

The first paragraph of disputed Subsection 5 reads in part as follows:

> "Until such time as the new incentive is agreed upon or, ...until an arbitrator's decision has been rendered, the average hourly earnings of incumbents of the job as of the date the new incentive is installed shall not be less than the average hourly earnings received by such incumbent under the incentive plan in effect during the three (3) months immediately preceding the installation of the new incentive". (Emphasis supplied).

With respect to interpretation of the opening, and key, phrase of Subsection 5, the Arbitrator is of the settled opinion that the meaning of such phraseology--as it stands in the contract--clearly contemplates the period of time from the date the new rate is installed to the date of arbitrator's decision or agreement of the parties. The Arbitrator can not see that the plain and obvious meaning of the terminology employed could indicate any other interval of time.

Subsection 5 next makes reference to the earnings of the employees working on the newly installed incentive rate--for the stated period of time. The exact wording is"...the average hourly earnings...shall not be less than the average hourly earnings received...during the three (3) months immediately preceding the installation of the new incentive". The Arbitrator particularly notes the use of the words "earnings...shall not be less than". Clearly, if it is provided that earnings can not be less than a minimum figure, the parties, when they formulated this Subsection, must have contemplated that the earnings of the employees during this period might be greater than the minimum. If it was contemplated that

earnings could be greater, in this period, than the past average the parties must have anticipated that the greater earnings would arise from application of the new incentive rate, There could be no other source of earnings greater than the past average. Actual earnings arising from application of the new incentive rate were always and are always paid currently, each two-week payroll period. The fact that the parties contemplated, in Subsection 5, actual earnings paid currently by payroll period under the new incentive rate seems, to the Arbitrator, to be conclusive evidence that guaranteed current earnings, i.e., guaranteed earnings paid by payroll periods, were also contemplated by the parties when they formulated the provisions of Subsection 5. Thus, the Arbitrator finds that the apparent intent of the terms of Subsection 5 was to establish minimum current earnings for each and every payroll period intervening between the date of new rate installation and the date the appropriateness of the new incentive rate was decided.

If the foregoing apparent intent of Subsection 5 was not the true intent of the parties, it is difficult to imagine what objective the parties could have had in mind when they framed Subsection 5. The certainty that the newly established incentive rate would be appropriate and set in equitable relationship with other existing incentive rates was established by the terms of Subsection 4--providing for agreement or arbitrator determination of the final level of the incentive rate itself. The retroactivity provision of this Subsection insured that the finally determined incentive rate would be applicable from the time of its installation. Thus, Subsection 4 actually determines and guarantees the absolute level of earnings of the workers on the new incentive from the day of installation to the final day of the rate dispute period. If the function of Subsection 4 is long-run determination of the level of earnings of the workers on the new incentive, then Subsection 5 must have been included in the contract to provide for the level of actual earnings, payroll period after payroll period, during the interim period prior to final determination of the new incentive rate. The very wording used in Subsection 5 strongly supports this conclusion. Subsection 5 says "Until such time...average hourly earnings shall not be less than..." Under the provisions of Subsection 5, incentive workers were to receive actual incentive earnings unless they fell below their previous average on their preceding incentive in which case their payroll period compensation would not be less than the amount yielded by their preceding incentive job.

The Arbitrator's interpretation of Subsection 5 is entirely consistent with the points made by the Company that: (1) the newly established incentive rate must be used as a basis for the computation of incentive earnings, and (2) that the workers should be paid each payroll period on the basis of their earnings on the new incentive (subject, of course, to the Subsection 5 provision for a "floor" of past average hourly earnings for each interim payroll period).

The Arbitrator has been unable to discover any basis in the contract provisions of Article V, Section 5, or elsewhere, which appear to substantiate the Company-suggested averaging method of fulfilling the Subsection 5 guarantee of past average hourly earning. In this connection, the Arbitrator notes that the Company itself did not claim that any such "averaging-at-the-end" method had ever been utilized in actual practice (Transcript, pp. 163-164).

The Arbitrator seriously doubts that there is any actual ambiguity in the intent of provisions of Section 5, Subsection 5. If there is no real ambiguity in the meaning of its provisions the issue of Company past practice is not crucial. Nevertheless, the Arbitrator has carefully examined the evidence submitted by the Company to buttress its contention that past practice does not call for a guarantee of previous average earnings on a current--payroll period by payroll period--basis. After such an examination the Arbitrator is not convinced that the evidence submitted establishes the Company's contention. It is true that in seven instances the Company paid employees on the basis of new incentive earnings yielded by the new incentive rate. The employees did not receive past earnings when the new

incentive rate yielded less than past earnings. It is also true that on only one occasion did the Union formally protest--in its grievance statement--the Company's failure to pay past average earnings. However, it seems to the Arbitrator that other facts offset at least a portion of the weight of this evidence and consequently makes it inconclusive.

There appears to be no convincing evidence in the entire record of this case that the Union ever formally or tacitly agreed with the Company procedure in applying the terms of Subsection 5. Company Exhibits A, B, and C represent Company actions not incompatible with the provisions of Subsections 4 and 5 of Section 5 and could not reasonably be expected to have been protested by the Union. Company Exhibits F, G, H, I. J, K, and M represent the seven precedents upon which the Company bases its contention of established past practice. The Arbitrator would have been heavily influenced in the Company's favor by these case histories except for one crucial fact. The Union contended at the Hearing and the Company agreed that the time limits on presenting and processing grievances have not been enforced. Therefore there exists strong reason for believing that the Union may be entirely correct in its contention that five of the seven precedent cases cited by the Company to prove past practice are, in fact, still in process of disposition. If this is true, in whole or in part, as appears likely from the record made, it is at least possible that in some or all of these five instances the Union may already have, or may yet grieve the Company's nonpayment of past average earnings by payroll periods. At least, there is nothing in the record to warrant a conclusion by the Arbitrator that such eventuality may not or can not occur. In view of this fact the Arbitrator is of the opinion that he certainly can not give conclusive weight to the Company argument of established practice. In order that there be no misunderstanding of the basis of the Arbitrator's reasoning on this point, the forthright statement of the Company on the status of existing and uncompleted grievances is repeated. The record on this point reads as follows:

"MR. HOOVER: I think I had better clear this up on the time limits. About the first of this year we became considerably concerned because there were a fairly large number of grievances which were old, many of them dating back as far as 1948, which had not been processed. There had been a general looseness on the part of both the Company and the Union in the observance of time limits, each recognized that the other sometimes required more time than set forth in the contract to fully prepare the case. So we don't strictly enforce them.

When we ran into grievances as old as 2 and 3 years we became seriously concerned about them, because we wanted a disposition of them. And we had been attempting to work out with the Union a process whereby all those grievances are to be reviewed. As a matter of fact, a very large number of them have been reviewed. In that review, some have been withdrawn by mutual consent, and some it has been decided to receive answers, and then dropping them, and on some it has been decided to process them further. That is why we get into the confusion over the time limits.

THE ARBITRATOR: I see. In other words, from what you say, Mr. Hoover, I take it that time limits have not been rigidly enforced either by the Company or by the Union.

MR. JENESKE: We are working towards the end of getting everything cleared up.

THE ARBITRATOR: I see.

MR. HOOVER: Both sides are equally anxious to enforce them."