arb-98

In the Matter of Arbitration between:

INLAND STEEL COMPANY
Indiana Harbor Works

and

UNITED STEELWORKERS OF AMERICA, CIO,
LOCAL UNION NO. 1010

March 30, 1954

Grievance 17-C-50

Herbert Blumer,
Arbitrator.

Pursuant to the authority vested in me by the Agreement between Inland Steel Company, Indiana Harbor Works, and United Steelworkers of America, C.I.O., Local Union 1010, and in accordance with the provisions of said Agreement, I award as follows on Grievance 17-C-50:

A W A R D

Messrs. Williams (15680), Beyer (15681) and Goodus (15686) shall be promoted to the position of Roller on Tandem Temper Mill #5 as of February 27, 1950.

/s/ Herbert Blumer
Herbert Blumer,
Arbitrator

O P I N I O N

Grievance

Grievance No. 17-C-50, entered on February 27, 1950, reads as follows:

> "Aggrieved contend promotions of Brown, Kuric and Hammond to tandem mill inconsistent with terms of agreement. Request promotions to be made in accordance with previous interpretations of the Agreement, in accordance with length of continuous service."

The grievance was signed by Messrs. Williams (15680), Beyer (15681) and Goodus (15686), Skin Mill rollers.

Background

In February 1950, the Company started operations on a new tandem temper mill (#5 Tandem Temper Mill). Four employees - Messrs. Brown, Kuric, Hammond and Mysliwy - were selected to fill the position of rollers on this mill out of a group of twelve Skin Mill rollers on Mills #1, #2, #3 and #4, the immediately preceding step in the promotional sequence. The Union alleges that the promotion of Brown, Kuric and Hammond was improper under the Agreement between the parties, and that Messrs. Beyer, Williams and Goodus, instead were entitled to the promotion. The length of continuous service of the twelve Skin Mill rollers is given as follows:

E. Klepsch	11-23-33
C. Beyer	11-27-33
S. Mysliwy	1- 9-34
C. Williams	1-10-34
P. Goodus	4- 34
J. Brodie	11- 34
J. Kuric	6- 4-35
R. Hammond	1-31-36
H. Tolman	5- 1-36
J. Greenberg	5-14-36
L. Brown	5-28-36
H. Klassen	6-11-45

The action of the Company in promoting Mysliwy, Brown, Kuric and Hammond was taken on the ground that these four employees had relatively greater ability than Beyer, Williams and Goodus to perform the work of Tandem Temper Mill roller.

The provision of the Agreement governing promotions reads as follows:

"Section 1. Definition of Seniority. Employees within the bargaining unit shall be given consideration in respect to promotional opportunity for positions not excluded from said unit, job security upon a decrease of forces, and preference upon reinstatement after lay-off, in accord with their seniority status relative to one another. 'Seniority' as used herein shall include the following factors:

(a) Length of continuous service as hereinafter defined;
(b) Ability to perform the work; and
(c) Physical fitness.

It is understood and agreed that where factors (b) and (c) are relatively equal, length of continuous service as hereinafter defined shall govern. In the evaluation of (b) and (c) Management shall be the judge; provided that this will not be used for purposes of discrimination against any member of the Union. If objection is raised to the Management's evaluation, and where personnel records have not established a differential in abilities of two employees, a reasonable trial period of not less than thirty (30) days shall be allowed the employee with the longest continuous service record as hereinafter provided."

Position of the Union:

As presented in the record on the instant case the Union has protested the action of the Company on the following three grounds:

(1) The action of the Company violates the intent of Sections 5 and 6 of Article XIV of the Agreement. The relevant portions of these Sections are:

"The Company shall have the right to make and enforce reasonable Company rules and regulations consistent with the terms and conditions of this Agreement and a copy of new rules and regulations, when issued, shall be furnished the Union." (Section 5, Article XIV)

"This agreement shall not be deemed to deprive employees of the benefit of any local conditions or practices consistent with this agreement which might be in effect at the time it is executed and which are more beneficial to the employees than the terms and conditions of this agreement." (Section 6, Article XIV)

The Union contends that the local practice in the case of pr[illegible]s was to promote the employee next in line with the longest continuous service providing the[illegible] possessed the ability to perform the work satisfactorily. According to the Union, this [illegible] been the policy of the Company in applying the terms of the Agreement to cases of promotions. This practice was not followed in the instant case. Instead, the Union holds that the action of the Company was equivalent to inaugurating a new rule on promotions.

(2) The Union contends that the Company has not established that the aggrieved employees did not possess ability relatively equal to that of the three employees it chose to promote. An examination of the personnel records of the Skin Mill rollers (Union Exhibit #2) submitted by the Company in support of its action fails to sustain the Company's claim. Thus, these records show that Beyer, Williams and Goodus were as good as the rollers promoted.

(3) The Company, further, failed to give the aggrieved employees a trial period on the job of not less than thirty days, as provided in the Agreement. Had the Company met this contractual requirement, the aggrieved would have qualified for the job, since they have shown fully their ability to perform satisfactorily the work of roller on the #5 Tandem Temper Mill.

The Union is forced to conclude that the Company made its choice of the employees to be promoted on the basis of personalities and other matters outside of the terms of the Agreement. The Union asks that the aggrieved employees be given the promotions to which they were entitled, with full restoration of wages lost by them through the Company's action.

Position of the Company

The Company declares that its promotion of Messrs. Mysliwy, Brown, Kuric and Hammond was strictly in accordance with the terms of the Agreement. The Agreement (Article VII, Section 1) defines "Seniority" to include the following three factors:

> "(a) Length of continuous service as hereinafter defined;
> (b) Ability to perform the work; and
> (c) Physical fitness."

The Agreement specifies further:

> "It is understood and agreed that where factors (b) and (c) are relatively equal, length of continuous service as hereinafter defined shall govern. In the evaluation of (b) and (c) Management shall be the judge; provided that this will not be used for purposes of discrimination against any member of the Union."

The aforegoing provisions, the Company indicates, clearly spell out that length of continuous service governs only in the event that ability to perform the work and physical fitness are relatively equal. In the instant case, employees Brown, Kuric and Hammond were found through careful consideration by Management to possess relatively greater ability than the aggrieved to perform the work of Tandem Temper Mill roller. Thus their promotion was made in strict accordance with the terms of the Agreement.

As designated in the foregoing contractual provision and as consonant with the recognized rule followed by labor arbitrators in handling comparable cases, the judgment of Management governs in the evaluation of "relative ability," providing that its judgment is not capricious or made with the purpose of discriminating against employees because of membership in the Union. No charge of such discrimination has been made, nor is there anything to suggest any discrimination. The Company's judgment was not capricious but was made after a careful review of all pertinent records by a group of Management officials familiar with the work of the employees.

The Company submits two groups of objective records of ... ork of the Skin Mill rollers (Company Exhibits "C" and "D"). The first - a summary of comme... tions, warnings, reprimands and discipline statements - show the gravity of warnings, reprimands and discipline statements for Beyer, Williams and Goodus as contrasted with Mysliwy, Brown, Kuric and Hammond. The second - a record of production and earnings for the twelve Skin Mill rollers for 1949 (the year preceding the promotion) - shows that in earnings record, Brown was first, Kuric was second, Hammond was third, Goodus was fifth, Beyer was sixth, and Williams was tenth. These records of earnings are a reliable expression of the work abilities of the rollers since all are working under the same incentive plan. The two sets of records, the Company holds, substantiate objectively Management's judgment that the three employees chosen had relatively greater ability to perform the work of the job to which they were promoted.

The Company denies the charge of the Union that it has violated Article XIV, Sections 5 and 6. The Company declares that Article XIV, Section 5, concerned with Company rules and regulations, has no application to the present dispute. Further, under Article XIV, Section 6, the alleged "local conditions or practices" must be consistent with the Agreement; obviously, an alleged practice (which the Company does not admit existed) of promoting an employee solely on the basis of length of continuous service providing that the employee is able to perform the work, is inconsistent with the clear terms of the Agreement which provide that length of continuous service governs only if ability to perform the work, and physical fitness are relatively equal.

Discussion of the Issues

The first major issue raised in the current dispute is set by the Union's contention that in applying the terms of the Agreement a promotion must be made on the basis of length of service providing that the employee is able to perform the work. This contention of the Union must be denied. The relevant clause of Article VII, Section 1, reads:

> "It is understood and agreed that where factors (b) and (c) are relatively equal, length of continuous service as hereinafter defined shall govern."

Factor (b) refers to "Ability to perform the work" and factor (c) to "Physical fitness." There is no ambiguity of meaning in the quoted clause. The clause spells out clearly the single condition under which length of continuous service governs. If this condition does not prevail, that is to say in the event of a more than relative equality in ability to perform the work, or in physical fitness, length of continuous service <u>does not</u> govern.

The clarity of the provision requires this Arbitrator to disallow similarly the Union's contention that the action of the Company in the instant case violates Article XIV, Section 6. This section reads:

> "This agreement shall not be deemed to deprive employees of the benefit of any local conditions or practices <u>consistent with this agreement</u> which may be in effect at the time it is executed and which are more beneficial to the employees than the terms and conditions of this agreement." (Underlying supplied)

The practice alleged by the Union of promoting employees solely on the basis of length of continuous service providing that the employees were able to perform the work, is clearly inconsistent with the unambiguous declaration of Article VII, Section 1, as explained above.

This Arbitrator finds that Article XIV, Section 5, referring to Company rules and regulations, has no relation to the present dispute.

The sole remaining issue of substance in the present dispute is, accordingly, whether the aggrieved employees, Beyer, Williams and Goodus, were relatively equal to Mysliwy, Brown, Kuric and Hammond in ability to perform the work of Tandem Temper Mill roller (factor b) and in physical fitness (factor c). Inasmuch as the Company made no claim of a difference in physical fitness between these seven employees, our consideration is confined to the issue of "factor b".

The Agreement specifies in Article VII, Section 1, that:

> "In the evaluation of (b) and (c) Management shall be the judge; provided that this will not be used for purposes of discrimination against any member of the Union. If objection is raised to the Management's evaluation, and where personnel records have not established a differential in abilities of two employees, a reasonable trial period of not less than (30) days shall be allowed the employee with the longest continuous service record as hereinafter provided."

The clear implication of the quoted clause is that the judgment of Management of a difference in the relative ability of employees to perform the work, may be subject, contractually, to challenge and thereupon must be established by personnel records. The Company, through its representative at the Arbitration hearing of the instant case, has acknowledged this obligation as follows:

> "...there is no question in our minds that we must be able to substantiate the moves that we make in a situation like this in accordance with the provisions of the contract..." (Page 90 of Transcript).

The personnel records of the aggrieved employees and the promoted employees which the Company has submitted to substantiate its judgment consist of (a) a record of commendations, warnings, reprimands and discipline statements for the calendar year, 1949, and (b) a record of production and earnings for 1949 as rollers on the Single Stand Temper Mill on which the employees were working for that year. It is recognized by the Company (Transcript, p. 93) that contractually the only relevent records are for the year preceding the selection of the employees for promotion. Also, it to be noted that under Article VII, Section 1, as quoted above, only materials contained in the personnel records are relevant to the substantiation of Management's judgment on differential ability.

A careful and fair examination of the record of commendations, warnings, reprimands and discipline statements issued to the aggrieved employees and to the promoted employees shows it to be markedly inconclusive. Thus, Williams' record is clearly superior to that of Mysliwy, about the same as that of Hammond, and only slightly below that of Kuric and Brown. Goodus' record seems significantly better than that of Mysliwy, and inferior to that of Hammond, Kuric and Brown. Beyer's record is clearly inferior to that of Kuric, Hammond and Brown but only slightly inferior to that of Mysliwy. Thus, the record of each of the aggrieved is either superior to, equal to or only slightly inferior to at least one of the promoted employees. The picture is obviously not conclusive. The record of commendations, warnings, reprimands and discipline statements becomes even less meaningful when one takes due note of the following testimony of Mr. Walsh of the Company,

> "...as Foreman there are many things that men do that you don't put in writing. In other words, if I were to sit down as a Foreman and write citations or commendations, these records would be twice as large as they are." (Transcript, p. 92.)

It is evident that the record of warnings, reprimands and discipline statements has at the best only a limited value and in the case of narrow differences a highly dubious value.

The record of average tonnage per 8-hour produced by [illegible]ployee and of average hourly earnings of each employee is, in its turn, not conclu[illegible]. The Company, itself, discounts the significance of the tonnage records and depends instead on the average hourly earnings as the true reflection of relative performance ability. The average hourly earnings for the promoted employees, the aggrieved employees, and one other employee (Klepsch) are as follows:

Brown	- 3.33
Kuric	- 3.26
Hammond	- 3.22
Mysliwy	- 3.22
Goodus	- 3.21
Beyer	- 3.18
Williams	- 3.14
Klepsch	- 3.05

Since the four promoted employees rank above the three aggrieved employees, it would seem that the Company's position is sustained. However, this cannot be granted, since the Company has declared that Mysliwy, Goodus and Williams were judged equal in ability (see Transcript, pp. 86-87), even though there is a spread of 8 cents between Mysliwy and Williams. The Company has also stated that Beyer and Klepsch were judged equal (see Transcript, p. 157) despite a difference between them of 13 cents per hour. In the light of these declarations by the Company, such respective differences as 5 cents between Kuric and Goodus, 1 cent between Hammond and Goodus, 4 cents between Mysliwy and Beyer, 8 cents between Kuric and Beyer, and 8 cents between Hammond and Williams cannot be taken in themselves as establishing differences in performance abilities. We are forced to recognize that differences in average hourly earnings within the ranges indicated cannot be taken in faithful regard to consistency, as establishing differences in relative ability.

The foregoing discussion makes clear that because of the inconsistency in application neither the record of discipline, in itself, nor the record of average hourly earnings, in itself, can be said to establish the differences in relative ability claimed by the Company. While each record used <u>by itself</u> is thus suspect, it may be contended that a <u>combination</u> of the two records brings out and sustains the differences which the Company declares existed. Thus, while the differences in discipline record may be either slight or pronounced as one compares each grievant with each employee promoted, and the differences in earning similarly slight or pronounced as one makes such comparisons, in each instance the employee promoted has the better combination of records compared to any grievant. This is seen in the following table of paired comparisons:

Employees Compared	Discipline Record	Earning Record
Beyer - Mysliwy	Slightly in favor of Mysliwy	Slightly in favor of Mysliwy
Beyer - Kuric	Greatly " " " Kuric	Greatly " " " Kuric
Beyer - Hammond	Greatly " " " Hammond	Slightly " " " Hammond
Beyer - Brown	Greatly " " " Brown	Greatly " " " Brown
Goodus - Kuric	Greatly " " " Kuric	Slightly " " " Kuric
Goodus - Hammond	Slightly " " " Hammond	Slightly " " " Hammond
Goodus - Brown	Slightly " " " Brown	Greatly " " " Brown
Williams - Kuric	Slightly " " " Kuric	Greatly " " " Kuric
Williams - Hammond	Slightly " " " Hammond	Greatly " " " Hammond
Williams - Brown	Slightly " " " Brown	Greatly " " " Brown

While the above table of paired comparisons is impressive suggesting superior ability of the promoted employees in comparison with the aggrieved employees, it cannot be regarded as conclusive. First, as has been explained previously, slight differences in disciplinary records cannot be given weight. But of much more importance is the fact that several of the differences used by the Company to sustain its claim of differences in ability are no greater than differences found to exist between employees whom the Company declares to be equal in ability. One cannot use a difference in disciplinary record and earning ability in one instance to establish a difference in ability, when such a difference exists between employees who are treated as equal in ability. Yet, the evidence indicates that this has been done in several instances. Thus:

(1) Beyer and Klepsch are regarded by the Company as relatively equal in ability (Transcript, p. 157). The difference between them in disciplinary record is slight (Beyer, 6 reprimands, 1 discplinary statement and 1 warning; Klepsch, 5 reprimands and 4 warnings), but the difference in average hourly earnings is very large - 13 cents in Beyer's favor.

Yet the Company regards Mysliwy as relatively superior in ability to Beyer, even though the difference between them in disciplinary ability is slight (Mysliwy, 6 reprimands and 1 warning) and the difference in average hourly earnings only 4 cents, in Mysliwy's favor. Clearly these two positions are inconsistent and contradictory.

(2) Whereas, again, the slight difference in disciplinary record between Beyer and Klepsch and the 13 cents greater earning record of Beyer is declared not to establish a difference in ability between these two men, nevertheless Williams is regarded as inferior in ability to Hammond, even though there is little difference between them in disciplinary record (Williams, 2 reprimands, 1 warning; Hammond, 1 reprimand, 2 warnings) and only 8 cents less earnings by Williams. Here, again, the two positions are inconsistent.

Indeed, the difference between Williams and Kuric (the Company regards Kuric as superior in ability) is seemingly no greater than between Beyer and Klepsch. Thus, there is a slight difference in disciplinary record(Williams, 2 reprimands and 1 warning; Kuric, 1 reprimand) and Williams has 12 cents less hourly earnings than Kuric, whereas Klepsch had 13 cents less hourly earnings in comparison to Beyer.

(3) The Company regards Goodus as inferior in ability to Hammond and at the same time it regards Goodus as equal in ability to Mysliwy. Hammond and Mysliwy have the same average hourly earnings figure, $3.22. Goodus has $3.21, one cent less. Thus, the difference turns here on a difference in disciplinary records. These records show that Goodus had 3 reprimands and 1 disciplinary statement, Hammond had 1 reprimand and 2 warnings, and Mysliwy had six reprimands and 1 warning. Thus, a difference between Goodus and Hammond of 2 reprimands and 1 disciplinary statement (offset by Hammond's 2 warnings) is used to establish greater ability on the part of Hammond. However, Goodus has three less reprimands and 1 less warning (offset by his 1 disciplinary statement) than Mysliwy. Whereas, a given difference in disciplinary record is used to justify a superior ability of Hammond over Goodus, a seemingly comparable difference of Goodus over Mysliwy plays no role. This Arbitrator sees clear inconsistency in these two cases, in the use of what constitutes essentially the same kind of difference.

Examination of the disciplinary and earning records of the eight employees shows other indications of inconsistency between the differences therein which are used to sustain alleged differences in ability, and the differences in discipline and earnings among the employees who are regarded by the Company as alike in ability. However, the above cited instances are sufficient. After careful scrutiny, with due regard to consistency in application, this Arbitrator is forced to find that the combined disciplinary and earning records do not establish a superior ability of Mysliwy to Beyer, of Kuric to Williams, of Hammond to Williams, and of Hammond to Goodus. In terms of the records, only Brown stands clearly superior to each of the grievants.

In arriving at these findings this Arbitrator is not seeking to substitute his judgment for that of Management with regard to the relative ability of the employees. At this point, the issue is confined solely to what is shown by the personnel records of the employees for the year prior to the promotion. It is evident from the testimony (see Transcript, pp. 88-89, 92) that in making its decision on the relative ability of the employees Management went beyond the personnel records, taking into account many things which are not contained in the records and which extend over more than the year in question.

A finding that the personnel records do not establish differentials in ability between Beyer and Mysliwy, Goodus and Hammond, Williams and Kuric, and Williams and Hammond means under the Agreement that Beyer, Williams and Goodus were entitled to a trial period on the job of roller on the No. 5 Tandem Temper Mill. The wording of the contractual provision is given again:

> "If objection is raised to the Management's evaluation, and where personnel records have not established a differential in abilities of two employees, a reasonable trial period of not less than thirty (30) days shall be allowed the employee with the longest continuous service record as hereinafter provided." (Article VII, Section 1)

Management's action of promoting the employees was clearly based on an alleged differential ability in favor of the promoted employees. The grievance which challenged the Company's action thus constituted similarly a challenge of the grounds of the Company's action. As a contractual protest the grievance must be recognized as an "objection" to "Management's evaluation." This Arbitrator finds, accordingly, that Beyer, Williams and Goodus were entitled to the trial period on the job of roller on Tandem Temper Mill #5, as provided in the Agreement.

There is no possible way at the present time, some three years later, of ascertaining what would have been the degree of performance of these three employees during the trial period and how the performance would have been judged by Management in making its evaluation. However, we must note two matters. (1) The work of Roller on Tandem Temper Mill #5 was not functionally different from the work of Roller on Mills, Nos. 1, 2, 3 and 4, which the grievants had been performing for years, the chief differences being a combination of previously separate stands and increased speed (see Transcript, p. 96). (2) Since the grievance each of the three aggrieved employees has performed satisfactorily the work of Roller on Tandem Temper Mill #5 -- Beyer was promoted to a regular position as Roller on this Mill in 1951, and Williams and Goodus have worked as Rollers frequently on relief spells and during vacation periods. In the light of these two matters one must conclude that there were reasonable probabilities that the performance of these three employees during the trial period might have earned for them promotion to the Roller positions.

Obviously, the error in contractual procedure by the C[illegible] had the effect of depriving the three aggrieved employees of their contractual right [illegible]ualify for promotion. There is no evidence or substantial reason to lead one to believe that they might not have gained promotion through their performance during the trial period. These conditions force this Arbitrator to recognize that the aggrieved have suffered a real harm as a result of the contractual error in procedure committed by the Company. He finds that the promotion of Mysliwy instead of Beyer, Kuric instead of Williams and Hammond instead of Goodus was improper. Under the circumstances he rules that Beyer, Williams and Goodus are entitled to the promotion.

It will be noted that the present grievance is so worded as to be protest against the promotion of three named employees -- Brown, Kuric and Hammond. No mention is made in it of Mysliwy, the fourth employee who was promoted. However, the grievance has to be taken obviously as a claim to the positions that were to be filled through promotion. Consequently, Beyer who is a grievant has a just claim to the position filled by Mysliwy, inasmuch as he had more continuous service than Mysliwy and inasmuch as this Arbitrator has found that his personnel records have not established him as inferior in ability relative to Mysliwy.

Certain equities, particularly the extended delay in getting the present grievance to arbitration, suggest strongly that limits ought to be placed on the retroactive application of the ruling. This Arbitrator is distinctly sympathetic to these equities. However, the language of Article VIII, Section 5, makes mandatory a retroactive application to the date of the grievance:

> "...In any case where the arbitrator determines that the award should be retroactive, the retroactive date shall be as follows:. . . (b) Seniority cases; the date the employee notifies his supervisor that he is entitled to the job under the provisions of Article VII or the date of filing a written notice in Step 1 of the grievance procedure, whichever is earlier."

Accordingly, this Arbitrator is required by the contract to make the promotion of Beyer, Williams and Goodus retroactive to February 27, 1950, the date of the grievance.

Summary

1. This Arbitrator denies the contention of the Union that the Company violated Article XIV, Sections 5 and 6.

2. This Arbitrator disallows the contention of the Union that the meaning of Article VII, Section 1, is that continuous service governs if the employee is able to perform the work; instead, he affirms the clear meaning of Article VII, Section 1, that continuous service governs only if "Ability to perform the work" and "Physical Fitness" are relatively equal.

3. This Arbitrator finds the personnel records (disciplinary records and records of average hourly earnings) submitted by the Company do not establish - in the light of consistency in their application - that Mysliwy had superior ability relative to Beyer to perform the work of Roller on Tandem Temper Mill #5, or that Kuric had superior ability relative to Williams, or that Hammond had superior ability relative to Goodus.

4. This Arbitrator finds, accordingly, that Beyer, Williams and Goodus were entitled to a trial period on the job of Roller on Tandem Temper Mill #5 in accordance with the provisions of Article VII, Section 1.

5. This Arbitrator finds that because of the failure of the Company to apply this contractual procedure the promotion of Mysliwy, Kuric and Hammond was improper and that Beyer, Williams and Goodus were deprived of a contractual right and suffered real harm.

6. This Arbitrator rules, consequently, that Beyer, Williams and Goodus are entitled to the promotion, retroactive to the date of the grievance in accordance with the mandatory provisions of Article VIII, Section 5.

A W A R D

Messrs. Williams (15680), Beyer (15681) and Goodus (15686) shall be promoted to the position of Roller on Tandem Temper Mill #5 as of February 27, 1950.