

INLAND STEEL COMPANY

and

UNITED STEELWORKERS OF AMERICA
Local Union No. 1010

)
) Grievance No. 16-F-156
) Docket No. IH 247-240-1/30/58
) Grievance No. 16-F-166
) Docket No. IH 248-1/30/58
) Arbitration No. 269

Opinion and Award

Appearances:

For the Union:

Cecil Clifton, International Representative
Fred Gardner, Chairman, Grievance Committee
Joseph Wolanin, Acting Chairman, Grievance Committee
John Sargent, Grievance Committeeman

For the Company:

W. A. Dillon, Assistant Superintendent, Labor Relations
J. Borbely, Divisional Supervisor, Labor Relations
R. S. Miller, General Foreman, Tandem Mills

These companion cases involve similar facts and a single basic interpretation and application of the Agreement. In both cases the grievants ask that the Company cease scheduling B. Walsh to fill temporary vacancies as Assistant Roller on the 54 inch mill in the Tandem Mill Division of the No. 1 Cold Strip Department.

B. Walsh was assigned to the 54" Mill sequence on November 7, 1955. He had previously been a Feeder on the 72" Mill where he had qualified and, as assigned, had filled temporary vacancies as Assistant Roller. When he started at the 54" Mill he had a discussion with his Foreman in which he stated that he preferred the Catcher's rather than the Sticker's job. Both occupations are joined by vertical lines on the sequence chart indicating that promotion may be effected from either without serving in the other. The Foreman stated that inasmuch as Knight (one of the grievants) permanently occupied the Catcher's job he could not appoint Walsh to it, but that if Walsh would serve as Sticker (a less desirable job from Walsh's viewpoint) he would fulfill Walsh's expressed desire to fill in on temporary vacancies in the Assistant Roller's job on the 54" Mill, one step up from Sticker and Catcher. Walsh was satisfied with this arrangement and filled a permanent vacancy as Sticker.

Walsh's sequence seniority date was March 10, 1937; the grievant Foran in the Sticker-Catcher occupation had the next most junior sequence date, October 1, 1939; and the grievant, Knight, followed Foran with December 12, 1939. The grievant Sopko was an incumbent of the Feeder job, one step below Sticker-Catcher, and he had a seniority date of January 27, 1957. Sopko was number 11 in the list of employees in the Feeder job by sequence dates.

The record establishes that when Walsh came into his 54" Mill Sticker job, he filled a vacancy previously occupied by one Meade who had a sequence date junior to Knight's. Because of his senior position in relation to Meade, Knight, for a number of years, had been given the opportunity to fill temporary vacancies in the Assistant Roller job and, in fact, filled such jobs for two days each week, three days being spent as Catcher. Despite his assurances to Walsh that if he served as Sticker he would fill temporary vacancies as Assistant Roller, and despite the fact that he carried him on his records as sequentially senior to Knight, the Foreman continued in effect the schedule of assignments that had been in force prior to Walsh's arrival. This meant that Knight, not Walsh, was assigned to temporary vacancies as Assistant Roller. The Foreman testified and the Company asserts that this was due to a clerical error not appreciated or recognized until July, 1957 when Walsh, for the first time after his conversation with his Foreman, laid claim to temporary vacancies in the Assistant Roller job. This was approximately one year and nine months after Walsh's entrance into the Sticker job.

In the intervening period (November 7, 1955 to July 30, 1957) Knight, who worked on the same turn as Walsh, "went around" him to complete 137 turns as Assistant Roller; and in that same period, Sopko completed 31 turns. Walsh concedes that he knew that these turns were worked by Knight and Sopko. The Assistant Roller, it is said, performs his work about 10 to 12 feet away from the Sticker and earns from two to seven dollars more a day.

Some time in July, 1957, Sopko, it appears, stated, or he was quoted as having stated, that Walsh had waived promotion to Assistant Roller. When this came to Walsh's attention he denied that he had waived promotion, the clerical error in making the assignments in the period referred to was acknowledged by the Company and Walsh, thereupon, as Knight's sequential senior was assigned temporary vacancies in Assistant Roller that developed thereafter. The grievants ask that these assignments cease (because Walsh should be "considered as" having waived promotion to Assistant Roller) and they also ask that they be compensated for all Assistant Roller turns to which Walsh had been thus assigned. Foran, bearing a sequence date junior to Walsh but senior to Knight, claims to have been "carried along" by Knight. Both parties asserted on the record that this conse-

quence is in accord with their understanding and interpretation of the Agreement and that Foran has a claim, as alleged, if it should be decided, here that Walsh, in effect, waived promotion - the central point at issue.

The Company states that inasmuch as Walsh had not signified his intention to his supervisor to waive and, in fact, had not been assigned to or scheduled to report as Assistant Roller, he cannot be considered as having waived. The applicable provision of the Agreement for construction here is Article VII, Section 6 (b), Paragraph 151 which reads:

"(b) Waiver of Promotions. An employee may waive promotion by signifying such intention to his supervisor or shall be considered as waiving if he fails to step up to fill a vacancy. Such waivers shall be noted in the personnel records and confirmed by the Company in writing. Employees may withdraw their waiver or announce their intention to fill future vacancies (which the Company shall also note in personnel records and confirm in writing), following which they shall again become eligible for promotion, but an employee who has so waived promotion and later withdraws it as herewith provided shall not be permitted to challenge the future higher sequential standing of those who have stepped ahead of him as the result of such waiver, until he has reached the same job level above (by filling a permanent opening) as those who have stepped ahead of him, at which time his waiver shall be considered as having no further force and effect." (Underlining supplied.)

The Company reads this as meaning that a waiver occurs only if a) the employee signifies his intention to do so to his supervisor; or, b) he refuses to fill a vacancy when assigned to do so. Here, says the Company, inasmuch as Walsh was never actually assigned or scheduled as Assistant Roller, he had no opportunity to refuse to step up and there was no waiver.

The Union, on behalf of the three grievants argues that Walsh failed to step up to fill a vacancy, and that in the circumstances here presented, he should therefore be "considered as"

waiving. The Union's theory, in effect is that there was a constructive waiver, by conduct or by failing to act.

The record, in support of the Union's position, discloses the following:

- 1) From November 7, 1955 (or from 30 days thereafter, inasmuch as Walsh had to serve as Sticker for that period before he could fill Assistant Roller vacancies) until the end of July, 1957, although clearly possessing (and knowing that he possessed) sequential rights to fill Assistant Roller vacancies, and although he was assured by the Company that he would be so assigned, Walsh permitted others, junior to him to enjoy what were his rights and did not complain that the Foreman's promise made to him was unfulfilled. During that period, as stated above, with his knowledge, Knight filled 137 turns and Sopko 31 turns.
- 2) During the aforesaid period, Walsh (according to his own testimony) on numerous occasions discussed his relationship to or interest in the Assistant Roller's job with Knight. The latter frequently went to and from work with Walsh and they spent evenings socially with each other. Knight was the Assistant Grievanceman for Walsh's sequence unit. According to Walsh, on one occasion Knight stated to him that he did not mind Knight's taking his Assistant Roller turns, occasionally, because of his considerable length of service but he resented such turns being given to Sopko (with a late sequence date of January 27, 1947). He testified that he said to Knight

" 'This don't look so bad Joe, /Knight/ that you are taking these turns away from me, because there is only a couple of years between us on the job.' I said, 'You are a lot older man than Sopko. He is only a '47 man, but it looked pretty rotten'; I said 'when they were putting Al Sopko ahead of me, a '47 man'."

He also testified that he told Knight

" 'I don't know how you can be a friend of mine when you are a griever and take that job ahead of me.' In other words I indicated to him, why didn't he go and do something about it, and he just kind of brushed me off, Mr. Knight, here."

Walsh testified that these conversations took place "Lots of times, even in the basement of my home."

Subsequently, according to Walsh, six or eight months after he went on the Sticker job

"Mr. Knight and I had an argument in the basement over this. He told me right down in my basement that he would fight hell out of me before I get that job in that Mill, and he worked in that Mill for twelve years and is entitled to that job, and he would give me the biggest battle I ever had over it."

- 3) Despite Walsh's resentment at being passed over for temporary promotions by both Knight and Sopko, and despite Knight's expressed personal interest in the job and Walsh's awareness of his sequential rights, the record makes it clear, that until the end of July, 1957, at no time did he complain of the assignments of the others or Knight's "brush off" of his concern to any representative of the Company, to the Union Grievanceman who worked about thirty feet from his post or to the Local Union acting through its general officers.
- 4) Walsh testified that eight months to a year after going on the Sticker job he had been scheduled

"to Assistant Roll four turns in one week, and it was up on the Board, and I thought that Mr. Knight was in the office and said something about it [presumably on his behalf].

"The next day, I went out. The schedule was down and they rescheduled me the same old way I was.

"* * * Mr. Doerr was foreman and I asked Mr. Doerr and he said it was a mistake of the office making out a schedule like that so they changed it back."

Walsh stated that even on this occasion he did not bring the failure of his expectations to the Foreman with whom he had his initial conversation and from whom he had received assurances of assignments as Assistant Roller.

- 5) Knight denies the truth of Walsh's statements concerning his interest in or expectation of being promoted to Assistant Roller and asserts that he had always been under the impression that Walsh had waived the job.

A close reading of the first portion of Paragraph 151 reveals two methods of waiving promotions. An employee may waive by "signifying his intention to his supervisor". There are at least three ways in which this could be done: 1) he might tell his supervisor that if any promotion should be offered, he would refuse it; 2) he might sign a writing, or execute a waiver form to the same effect as in "1)"; or, 3) he might keep his peace until scheduled for or assigned to a higher job, and then express his refusal to promote. In each case the employee unequivocally "signifies" by speech or written expression his disinclination to "step up".

Having covered situations in which an employee "signifies" his waiver by an express refusal to promote, the parties proceeded to deal with conduct not express or explicit, but tantamount to refusal or, at least, entitled to the same treatment, under the Agreement, as an express signification of waiver. They said he "shall be considered as waiving if he fails to step up to fill a vacancy". The Company argues that "fails to step up" means "refuses to step up." I do not agree. Apart from the fact that the parties did not use the word "refuse" which seems to be a natural and apt word to have been used if this was their intention, this construction would mean that the second clause following the word "or" adds nothing whatever in meaning to the first clause. It would be equivalent to having provided that an employee may waive promotion by signifying such intention to his supervisor (by signing a waiver or by refusing to promote when assigned) or shall be considered as waiving if he fails to step up to fill a vacancy viz., by refusing to step up when assigned. This is difficult to accept. The likelier construction would be that in this disjunctive sentence, the second clause describes circumstances where waiver occurs even though it might not have been "signified" in an unmistakably objective manner - by words or by the act of refusing to work as assigned. That is to say, under the first portion of the sentence one waives by "signifying" (which includes signifying a refusal to step up when assigned); in the second portion one does not waive by signifying anything, but a waiver is assumed from the circumstances. Thus, a constructive waiver could occur by conduct - or by failing to act where the circumstances would seem, reasonably, to call for action.

Here there was a constructive waiver by Walsh who "shall be considered" as waiving when he failed to step up to fill Assistant Roller vacancies for over a year and a half. It is clear

that he had knowledge a) that his juniors were getting the assignments in preference to him; b) that he had a contractual right superior to theirs; c) that he had been assured by the Company that he would get the assignments; d) that (by his own testimony) he was being "brushed off" by his Grievanceman who himself was a beneficiary of the assignments; and that when, finally, he was actually scheduled for Assistant Roller assignments, the schedule had been changed to give the opportunity to Knight. Yet he addressed no word of complaint to Management, his Grievanceman or to the higher responsible officials of his Local Union. His only explanation of his failure to do so is that he did not sign a waiver and he relied on Knight, his Assistant Grievanceman. In answer to the Arbitrator's question

"Well, if he/Knight/ didn't go to bat for you, wasn't it your responsibility to yourself to see somebody else about the problem?"

he stated

"Well, I just let it go by too long I guess."

Surely, one year and almost nine months (and 137 turns worked by Knight and 31 by Sopko, a total of 168 turns) is "too long" in this situation in which silence is equivalent to acquiescence. This is not to say that under all other circumstances a failure vigilantly and aggressively to defend one's sequential rights is tantamount to waiver. The Arbitrator's authority is confined to the case before him and the special facts therein. In this case, Walsh's failure to step up to fill the vacancy by reason of inaction under the circumstances described is fatal to his cause.

The record contains considerable testimony as to the role of Knight in misleading Walsh as to his rights and to the conflicts in his interests. As to this aspect of the case it will only be remarked that Walsh is reasonably literate and intelligent; he is reasonably well informed of his contractual rights (although he may well have misinterpreted the force and effect of Paragraph 151); he was put on notice of the adverse character of Knight's interests and ambitions; and resort to the Company or his Union officials for correction of any wrongdoing by Knight was not sought by or denied to him.

AWARD

The grievances are granted. The Company and Union will meet and seek to ascertain from the Company's records to what compensation the grievants, respectively, are entitled by reason of assignments of Walsh to fill temporary vacancies in Assistant Roller. Jurisdiction is retained to determine the back pay to be awarded if the parties are unable to do this by discussion between them.

Peter Seitz,
Assistant Permanent Arbitrator

Approved:

David L. Cole,
Permanent Arbitrator

Dated: June 30, 1958