INLAND STEEL COMPANY)
)
and)
)
UNITED STEELWORKERS OF AMERICA)
Local Union 1010)

Grievance No. 12-F-63
Docket No. IH-288-281-3/17/58
Arbitration No. 277

Opinion and Award

Appearances:

W. A. Dillon, Assistant Superintendent, Labor Relations
L. R. Mitchell, Divisional Supervisor, Labor Relations
J. Borbely, Divisional Supervisor, Labor Relations

For the Union:

Cecil Clifton, International Representative
C. C. Crawford, Grievance Committee, Galvanizing Department
Fred A. Gardner, Chairman, Grievance Committee

In this case, as well as in the cases involving Grievances 12-F-61 and 12-F-62, the Company challenges the ruling made in Arbitration No. 265 (Grievance 3-F-1). It takes general exception to the interpretation made by the Permanent Arbitrator and contends that this interpretation could subject it to charges of violating other overtime provisions of the Agreement and the overtime requirements of the Fair Labor Standards Act. It also resists the claim of the grievant on the ground that the days worked were pursuant to schedules mutually agreed to and, consequently, are excepted from the provisions of Article VI, Section 2 C (1) (d) (paragraph 103) upon which the Union relies in prosecuting this grievance.

The latter contention will be discussed after reviewing the general interpretation of paragraph 103 and the non-duplication of overtime provision, which is Article VI, Section 2 E (paragraph 116). The non-duplication provision is the one essentially in question in this re-examination. Sub-sections E (1) and (2) (paragraphs 116 and 117) are:

> "Payment of overtime rates shall not be duplicated for the same hours worked, but the higher of the applicable rates shall be used. Hours compensated for at overtime rates shall not be counted further for any purpose in determining overtime liability under the same or any other provisions, provided, however, that a holiday, whether worked or not, shall be counted for purposes of computing overtime liability under the provisions of Subsection C (1) (c) above and hours worked on a holiday shall be counted for purposes of computing overtime liability under the provisions of Subsection C (1) (a) above.
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> "Except as above provided, hours paid for but not worked shall not be counted in determining overtime liability."

The vital clause is: "but the higher of the applicable rates shall be used."

The agreement has a variety of overtime pay requirements. These are set forth in Section 2 C. Among them is 1 (c) (paragraph 103) calling for premium pay for "hours worked on the sixth or seventh workday of a 7-consecutive-day period during which the first five (5) days were worked, whether or not all of such days fall within the same payroll week, except when worked pursuant to schedules mutually agreed to ... "

It must be noted that a claim for overtime pay must be made, under paragraph 103, within one week after such sixth or seventh day is worked. This indicates that a degree of uncertainty remains, for the apparent purpose of enabling the employee to determine whether he is better off to ask for such overtime pay or to take the premium pay due under other overtime pay provisions. It should also be noted that an employee is not paid currently day by day. There is the normal lag between days worked and pay day, so that there is an opportunity to note in the payroll records the overtime provision which is being followed where there are alternatives. Certainly, where the employee has the specific right for a period of a week after a given workday to decide whether he desires to take advantage of a particular premium pay provision or not, this indicates that the payroll books are not closed, so to speak, on a day by day basis.

These several overtime pay provisions could result in over-lapping or pyramiding, and the non-duplication sub-section was agreed upon to avoid this.

The Company places great reliance on the award of the Board of Arbitration on which Ralph Seward acted as chairman in Case No. G-17 between the Geneva Steel Company (United States Steel Corporation) and the Steelworkers. That award related to a grievance which arose in 1948, and the 1947 agreement then in effect had an overtime provision similar to paragraph 103 of our Agreement and a non-duplication of overtime sub-section. It is most significant, however, that this non-duplication provision did not contain any language similar to that in our paragraph 116 to the effect that the higher of the applicable rates shall be used.

The inclusion of the higher of the applicable rates language presents a totally different problem from that faced by Arbitrator Seward. It reflects an understanding that it may be necessary to select as between or among overtime pay provisions, with the selection favoring the provision under which the employee will receive the higher of the applicable rates. At the same time, the Company is protected against duplicate or pyramid overtime payments. It is by no means provided, however, that the higher of the applicable rates is precluded by simply allowing overtime pay on each day in sequence as it is worked. This could well be the effect of the Company's contention in these cases, and this would render meaningless in practical terms the higher of the applicable rates provision of paragraph 116 when applied to the overtime pay due under paragraph 103.

It seems reasonable to infer that it was the absence of such a provision in the 1948 United States Steel contract that invalidated the argument of the Union in that case, as stated in paragraph 9 of the award,

"that overtime should not have been paid for Saturday, June 12, in order to permit the employees to secure the greater benefits which would then result under Section 11-C-1-d." In our Agreement there is language which anticipates the possibility contended for in the Geneva case, a contention which in that case lacked contractual support.

The Company has also raised in criticism of the interpretation made in disposing of Grievance 3-F-1 the possibility of violation of the other overtime pay provisions of the Agreement. This point was mentioned in the Geneva award of the Seward board, but in light of the contract provisions under consideration in that case.

This danger is precluded here, however, by the provisions of paragraph 116 in which the purpose is expressly to avoid duplication of payment of overtime rates and in which it is directed that the higher of the applicable rates be used. In this there is a clear implication that if the higher rate is used any claim for a lesser rate or payment must be deemed waived. Both may not be claimed, and only the higher need be paid.

If the lower has already been paid, then, as was done in Grievance 3-F-1, full credit must be allowed the Company against the amount due under the higher rate. In this manner duplication is avoided, and the purpose of the contract provision is satisfied. In Grievance 12-F-38 the Company faced such a situation in the same department in which this grievant is employed. It had already paid overtime for another day in the seven-day period because it was the sixth day in the workweek. Finding, however, that the grievant was entitled to overtime pay for two days in the same period pursuant to paragraph 103, the Company simply took credit for the amount it had already given for overtime. In 3-F-1, and again at the hearings of the current group of cases, the Union acknowledged that the Company was entirely correct in doing so.

It is evident, then, that the Company has complete assurance in paragraph 116 that when it is necessary to pay for overtime pursuant to paragraph 103, it is thereby relieved of the obligation of paying some lesser amount that would be payable under some other overtime provision but for the existence of paragraphs 103 and 116. An employee has no basis for claiming overtime pay for one of the first five days in a seven-consecutive-day period and also for the sixth or seventh day of the same period, except as specifically provided in paragraph 116 of the Agreement. And where the Company has already provided overtime pay for one of the first five days it automatically is entitled to credit against the employee's claim arising by virtue of paragraphs 103 and 116.

The requirements of the Fair Labor Standards Act must of course be superimposed on the contract provisions. It happens, however, that the statutory obligation to pay one and one-half times the regular rate for hours beyond 40 in a week is in practical terms synonymous with paragraph 101. The law imposes only a minimum requirement on the employer; the employer may elect to go beyond the statutory minimum. In this situation, because of the law, in certain circumstances the Company must give employees the minimum amount of overtime pay on a current or weekly basis. Because of paragraphs 103 and 116, however, for the reasons outlined above, the employee may be entitled to a greater amount of overtime

pay. If this is so, the Agreement, construed as I read it, will require the employer to pay to the employee only the excess beyond what has already been paid or provided by reason of the requirements of the law. This is what was clearly contemplated, it seems reasonable to hold, when the provisions of paragraph 116 were agreed upon.

Approached somewhat differently, the difference between the contract obligation to pay for hours over 40 in a workweek and that under the Fair Labor Standards Act in the context of this problem is that the latter must be allocated to the workweek in which the overtime was worked. An obligation arising by virtue of a contract may, on the other hand, be waived by another provision of the same contract under circumstances designated in the other contract provision. In the case of overtime pay due under the Fair Labor Standards Act it must be treated and allocated as such overtime pay, and if a greater amount is due by virtue of paragraph 116 (and paragraph 103) then it is clearly the intent of the parties, as expressed in paragraph 116, that the Company be given full credit for such overtime pay against the greater amount due under paragraph 103. Thus, it should be perfectly clear that it is not being held that the employee waives the amount due him under the Fair Labor Standards Act for the workweek in question, but rather that, having been given or allowed such overtime pay, he thereupon agrees to apply that amount against the greater amount, if any, which may become due under paragraph 103. I am not suggesting that overtime in consecutive workweeks be averaged, that the employee may not claim overtime in a given workweek because he will receive a larger amount in the following week, or that he is waiving the overtime pay due him under the Fair Labor Standards Act. In the sense that any overtime pay is waived, it is part of a greater amount due under a provision of the contract, not any part of that due under the law.

The Company has argued that "overtime rates" as used in paragraph 116 is not to be taken to be synonymous with overtime earnings. Overtime rates as such, however, are always one and one-half times the regular rate (excluding holiday situations which are treated separately in the Agreement), so that the stipulation that "the higher of the applicable rates shall be used" would have no practical meaning, a result which the parties could not have intended. The pertinent contract provisions read as a whole reflect the intention which I have construed as the meaning of the language used.

On the other hand, the requirement that the higher rates be used means that when the overtime rate has been paid for one of the first five days in the seven-day period and in that period only the sixth or seventh day is worked (not both) then the Company need not modify the practice it has been following and contending for in these cases. This is because the application of paragraph 103 will not produce any higher rate than that already used by the Company. Only if both the sixth and seventh day in the seven-day period are worked would it be necessary to modify the practice which has heretofore been followed.

The Company suggested in its post-hearing memorandum that it be permitted to submit this issue to the Wage-Hour Administrator and perhaps to the Secretary of Labor for a ruling. Certainly this right should not be denied. However, in order that there be assurance to both parties that the

problem is presented in its full context, this should be done jointly by the Company and the Union. If the ruling should disagree with my views as expressed herein, I shall reopen this case and the related grievances on which I have ruled for reconsideration, because such a ruling would constitute a new fact not anticipated in the making of my awards.

This brings us to the point that the hours worked by grievant on Wednesday, October 30, 1957, were pursuant to an approved schedule and therefore excluded from the premium pay benefits of paragraph 103. The Union does not dispute the Company's statement that the 6 - 2 schedule in this division was the schedule "mutually agreed to as provided for in Subsection D of Section 1" as of August 5, 1956, the date of the current agreement. It asserts, nevertheless, that on March 31, 1957 the Company changed it to 5 - 2 and continued this until December 8, 1957, thereby making 5 - 2 the approved schedule.

If the work on the day in question was pursuant to what is called in paragraph 103 the agreed upon schedule, then it is expressly excepted from the requirement of overtime pay for work done on the sixth or seventh day of a seven-consecutive-day period.

The deviation from the agreed upon schedule constituted a deviation and not the creation of a new agreed upon schedule. Not only is there support for this proposition in awards under similar contracts in the steel industry, but in the action of the Union in another grievance at Inland. The Union processed Grievance 12-F-38 in this very department in 1957. It convinced the Company that the 5 - 2 schedule then in effect was not the agreed upon schedule, that the 6 - 2 schedule was, and the Company in its third step answer on September 27, 1957 conceded this and allowed the claim for overtime pay on the sixth and seventh days under paragraph 103. Less than two months later the present grievance was filed, and one of the Union's arguments is that the 6 - 2 schedule is not the agreed upon schedule. As a simple matter of fact, it must be found that 6 - 2 is the agreed upon schedule.

For this reason, although reaffirming the earlier interpretation of Article VI, Section 2 C and E, as clarified herein, the grievance must be disallowed.

AWARD

The grievance is denied.

Dated: September 12, 1958

David L. Cole
Permanent Arbitrator