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

Grievance No. 18-F-9
Docket No. IH-368-359- 8/21/58

Opinion and Award

Arb. No. 340

Appearances:

For the Company

W. F. Price, Attorney
R. J. Stanton, Assistant Superintendent, Labor Relations Department
F. L. Corban, Assistant Superintendent, Yard Department
A. T. Anderson, Divisional Supervisor, Labor Relations Department
W. G. Bowman, Senior Engineer, Field Forces Department

For the Union:

Cecil Clifton, International Representative
Fred Gardner, Chairman, Grievance Committee
Joseph Wolanin, Secretary, Grievance Committee
M. Connelly, Grievance Committeeman
C. Bullock, Assistant Grievance Committeeman
F. Beyler, Witness

This grievance protests the contracting out by the Company of work normally performed by the operators of certain items of equipment, including various types of cranes, bulldozers, and traxcavators, the employees being in the mobile equipment sequence of the Yard Department. While the grievance requests that the Company discontinue contracting out of work "belonging to the people listed above in the bargaining unit" and compensation up to 40 hours per week "whenever they were given less due the contracting out of their work," in the course of the hearing the Union conceded that the Company is free to contract out repair and other types of work when the Company employees are working 40 hours or more, or where they lack the necessary skills, or some emergency is faced.

The Union relies on the recognition provision (Article II, Section 1) and on the seniority provisions (Article VII) of the Agreement, contending that its request for 40 hours of work for the employees it represents as a condition for using outside contractors and employees is supported by past practice; that if the Company is not so restricted it could weaken or even destroy the Union, nullify the certified bargaining rights and the seniority protection of the employees; and that other arbitrators in similar situations have so held.

The Company resists the Union's request by urging that there is no restriction in the Agreement on its normal management right to contract out; that past practice and the history of negotiations, in which the Union has several times tried unsuccessfully to have such a restriction written into

the Agreement, negative the thought that there is now any such restriction by implication; that the Union has failed to demonstrate any bad faith on the Company's part, -- on the contrary, that in each instance cited by the Union the Company has acted in good faith and was motivated by sound business reasons. The Company also cited a large number of prior awards adverse to the Union's position in this case.

There have been a host of arbitration awards on this subject. Not only are such awards listed in the paper of Donald A. Crawford: Arbitration of Disputes over Subcontracting, to which I referred the parties, but there is a compendium in the Steelworkers Handbook, and many are reviewed in the opinions in some of the cases cited by the parties in their briefs. These opinions vary so that one can find support for almost any proposition he favors, from the two extremes that there is no restriction on management's right to contract out or that any contracting out impinges on the recognition clause or the seniority provisions, to a variety of more moderate and intermediate possibilities.

Some students believe that the parties have deliberately created an ambiguity by silence on this subject in their contracts, preferring to let their arbitrators resolve the problem for them by the process of interpretation. This point is made by Slichter, Healy and Livernash in the recently published The Impact of Collective Bargaining on Management, at page 308.

Perhaps we can best approach the issue before us by narrowing the area of difference between the parties. As already mentioned, the Union does not literally maintain that all subcontracting of work of the type normally performed by employees in the bargaining unit constitutes a violation of the Agreement. If such employees are working 40 hours per week, have not been downgraded or if they lack some necessary skill, or if there is an emergency, the Union would not question the Company's right to have such work done by an outside contractor.

Management asserts that nothing in the Agreement circumscribes its right to contract out any work, holding that the management rights provisions of the Agreement (Article IV) expressly assure such right to Management. In the same breath, however, it concedes that it may not have work done by outsiders if it is prompted by bad faith, for the purpose of harming the employees or their bargaining representative.

The manner in which this problem has developed historically, and the conflicting management and labor interests which have directed the course that has been followed, with all its weaknesses, uncertainties, and frictions, are described very lucidly in Chapter 10 of the Slichter book, and I do not consider it necessary to the determination of the issues in the instant case to undertake a similar discourse in this opinion.

Our task is to determine by the accepted process of interpretation whether the acts complained of by the grievants constitute a violation of the Agreement. Since there is no one explicit contract provision which by itself clearly governs, there is no choice but to ascertain the reasonable meaning and intent of several contract provisions, particularly Article IV as opposed to Articles II and VII, as they bear on the facts presented.

This dispute grew out of work contracted out in connection with a vast expansion and improvement program undertaken by the Company. It required more than three years (1955-1958) and represented the largest and most extensive program of this kind over engaged in by Inland. Physically, it extended over a distance of more than two miles. A new cold strip mill was created, many facilities were enlarged or extended, a turning basin was developed, and a great lake front dredging and filling project was completed. At the peak, over 4500 employees of outside contractors were on the job. Of course, at the same time, normal plant operations were proceeding, with the usual kinds of services to the production and other departments being furnished by the Yard Department and the Company's Field Forces.

It is important to note that in only two weeks were Yard Department employees on a work schedule of less than 40 hours, one being the last week of 1957 which included the year-end holidays, and the other the week of January 12, 1958 when they worked 32 hours.

The Union raised a number of specific complaints, the main point being that contractors' employees were at work while some of the Company's regular Yard Department employees were working either less than 40 hours or had been downgraded into the labor pool. Some emphasis was placed by the Union on a charge that the Company was not actually using, contractors in the full sense but rather merely renting their equipment. This, however, was strongly disputed by the Company, and the evidence does not support the Union's allegation. There is no doubt but that the Company made arrangements to have work done by contractors, and that the contractors used their own employees as well as their own equipment.

The Union's contention that the Company may use contractors and their employees only when the Company's employees of the same type are working 40 hours per week and would not be downgraded because of the presence of the outside employees can be supported only by inferences or implications drawn from the recognition and seniority provisions of the Agreement. There are no explicit provisions of the Agreement which stipulate this.

The Company's argument that the recognition clause has no bearing on this subject goes too far. The Company tacitly acknowledges this by agreeing its rights to manage are subject to the restriction that they may not be exercised for the purpose of harming the regular employees or undermining their Union. Surely, the management clause cannot be read as saying in effect that the Company may use the prerogatives reserved to it for the purpose of weakening or destroying the Union or nullifying the seniority or job security rights which the same Agreement assures to the employees. The Agreement which in Article IV protects management rights is designed as a whole primarily to define and protect a collective bargaining relationship, and anything which seeks to destroy this relationship must be held to be in conflict with this primary purpose.

This interpretation finds support in prior experience at Inland. It was testified that contractors have been used since 1937, that since 1952 the number of contractor employees working at Indiana Harbor has fluctuated between several hundred and 4500. In 1947 and again in 1954 the Union questioned the Company's freedom to do this, and in both instances the Company met with the Union and stated its position in writing. On neither occasion

did it deny the Union or the employees the right to question the course it was following. In fact, in 1947, when a contruction program was underway, it agreed to protect its own employees in their classifications and earnings, and to give them overtime work equal to what was given the contractors' crews, and it spoke of "Inland's obligation to its own New Construction people." On the other hand, the Company made it clear that based on valid considerations it deemed itself free to decide whether to use outside contractors rather than its own regular employees on such projects. This was also so in 1954, when the Union flatly requested that outside contractors be eliminated when the work was of a kind which could be done by Inland's people. The Company explained that whether the work can be done by regular employees depends not only on the skills or qualifications of the men but also on the time within which the given job must be completed, consistent with other needs in the plant and coordination with other parts of the building program. But there was significance in the concluding sentence of the Company's explanation to the Union: "However, it might add that it is not the intention of the company to use the prerogative to contract work, so as to in any way work a hardship on its employees or your union."

In the case under consideration, the Company's testimony indicated that its policy has been to have construction or repair projects done by Inland employees where it has been practical to do so, depending on the magnitude of the job, the availability of qualified men and equipment, and sufficient time latitude. Some such jobs in which the time pressure was not too severe have been done in this manner although it resulted in a certain amount of delay.

The parties, although aware of the inconsistent rulings of arbitrators on this subject, and of the conflicting positions asserted by employers and unions, have nevertheless failed in their successive negotiations to agree upon the controlling theory or even any benchmarks for the guidance of their arbitrators. This has been true not only at Inland but elsewhere. Dr. Arthur M. Ross of the University of California observed recently:

> "Many disputes (of this kind) have been taken into arbitration where the hapless arbitrators, lacking any solid indications of mutual intent, have been forced to extract tenuous implications from the recognition clause, the management rights article and the seniority section."

In three contract negotiations, 1951, 1954 and 1956, the Union has proposed either a prohibition of or restrictions on, the Company's right to contract out, but the Company rejected them. This, the Company suggests, is evidence that its right is unqualified. In view of the manner in which this question has been approached in the past, however, referring to the Company's explanations, assurances and general policy, I am inclined to regard these Union proposals as susceptible to the thought they were intended to clarify the parties' respective positions and to avoid further arguments. This is so because the proposals did not call for the elimination or modification of rights previously unquestioned, nor for the introduction of a subject not previously dealt with in the agreements. The history of arbitration rulings concerning contracting out was such that each side could find some comfort and support for its position. It would have been a mark of responsibility for the parties to have cleared up the area of conflict

as between Management's generally reserved rights and the Union's reliance on the implications of the recognition and seniority provisions. But I do not regard the rejection of a proposal along these lines necessarily to be evidence that the proposing party is devoid of any of the rights which it sought to have spelled out.

What form of rule, then, may be said to have evolved in this collective bargaining relationship with respect to contracting out?

The Company's right to have outside contractors perform construction or improvement work has become well established over the years. The decision to do so has been predicated on a number of practical considerations, for in general the Company's policy has been to use its own people and equipment if this can be done without disrupting other operations or unduly delaying or burdening the program. The magnitude and nature of the program have been important considerations, because the Company has had the problem of servicing the going production operations while carrying on the new construction or improvement work, and this has required it to keep both equipment and qualified personnel available for normal production and servicing operations. In arriving at such decisions, not only has the Company taken account of its personnel and equipment resources and of the urgency of the work or the time factor, but it has given attention to the physical location of the project in relation to where its equipment is needed for servicing its regular operations, including stand-by service. As explained to the Union on a previous occasion, the Company must plan in advance whether to make arrangements with outside contractors, and it has tried to avoid building up an abnormally large force during the construction or improvement program so that when the program has been completed it will not find itself with an oversize crew which may have tc share the available normal work.

The expression "qualified employees" has led to some misunderstanding. This does not mean merely that the Company has men who could physically complete the project in question. It encompasses also the question as to how and when they could do so, as compared with outside contractors, and whether the Company has enough qualified supervisors and enough efficient equipment on hand for use in the project.

All this involves the use of judgment, and it is clear that, as a matter of practice, Management has not been denied the right to exercise such judgment when it is planning or carrying out construction or improvement programs.

This, however, is not to be taken to mean that Management is therefore free to make similar decisions with respect to maintenance or other customary operations performed by its regular workforce, in the production of steel products or in the servicing of its plants or equipment. Moreover, its judgment must be predicated on valid considerations of the kind described above, and it must be prepared to present whatever facts or evidence are available to show that this is so. This is not a technical matter of burden of proof but rather a requirement that either the Union on behalf of the employees, or the arbitrator if the matter goes that far, may have the benefit of the information upon which it can be determined that the Company was motivated in good faith by such considerations and not by any desire to circumvent the purpose or intent of either the recognition or the seniority provisions of the Agreement.

In the 1955-1958 Eastward Expansion program which gave rise to the instant grievance, the evidence supports the finding and conclusion that the Company arrived at its decision to use outside contractors, and planned the program accordingly, on the basis of valid management considerations of the kind described above.

A W A R D

This grievance is denied.

/s/ DAVID L. COLE
Permanent Arbitrator

Dated: March 2, 1961