IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

Award No. 901

OPINION AND AWARD

Introduction

This case concerns the union's challenge of the company's right to assign certain welding work to employees outside the USWA bargaining unit, Local 1010. The case was tried on April 10 and 11, 1995 at the company's offices in East Chicago, Indiana. Attorney Dwight Pancottine represented the company and District Representative Jim Robinson presented the case for the union. Both sides filed pre-hearing briefs, post hearing briefs, and post hearing reply briefs, which I received in early July, 1995. (Arbitrator's Footnote: In accordance with my usual custom, I tape recorded the hearing in order to assist my note taking. Unfortunately, one of the tapes was badly garbled and, therefore, unusable. Nonetheless, I had detailed notes from that portion of the hearing.

Because this case involves a dispute concerning work assignments, and because two different unions represent the affected employees, the opinion sometimes mentions "USWA or Local 1010 employees" or "Local 6 or Masons employees." I am aware of the fact that these employees do not work for the union and that this method of identification is not entirely accurate. Nonetheless, these designations are sometimes used merely as a shorthand method of identifying employees who are represented by the two unions.)

Appearances

For the company:
D. Pancottine.....Attorney
B. Smith.....Arb. Coord.
B. Price
R. Eicke
L. Hernandez
W. Banasiak
S. Boguchi
T. Kinach
D. Houpt
E. Krzyston

For the union:
J. Robinson.....Staff Rep.
M. Mezo.....Local Pres.
L. Aguilar
M. Bradley
N. Flesher
J. Pillar
T. Hernandez
B. Gilbert
B. Stephens
J. Fernandez
T. Hargrove

Background

The collective bargaining agreement between the company and USWA recognizes the union as the exclusive representative of all hourly employees involved in production, transportation, construction and maintenance, but excluding "bricklayers" and some other workers. Included among the construction or maintenance employees of the company are welders and mechanics, some of whom work out of central locations and some of whom are assigned to particular areas. The bricklayers are represented for purposes of collective bargaining by the Local 6 of the Masons Union. At issue in this case is whether the company may assign to masons the work of welding on or attaching by mechanical means certain refractory anchors that hold brick or other refractory materials in place.

No one questions that the work of laying brick or employing other refractory material -- much of which was described in some detail at the hearing -- belongs to the masons. Nothing in this case questions their

right to do the work. The dispute is whether the installation of the anchors that hold the refractory in place is to be performed by USWA employees or whether it can be assigned to masons.

The testimony showed that masons have been installing anchors by mechanical mean -- e.g., by bolting them into place -- since the early 1960's. Despite the prevalence of this practice, there was no testimony that the USWA ever objected or otherwise claimed that such work belonged to its members. Of more recent origin is the company's decision to assign masons to attach the anchors by welding, work that has been going on at least since the late 1960's and early 1970's, but which was never assigned to masons until 1980, and not in significant quantity until the late 1980's.

All of the grievances at issue in this case question the company's right to give such work to the masons. Most of them center on welding and claim that the company had no right to assign this work across bargaining unit lines because the parties had traditionally recognized that it "belonged" to the Steelworkers. Unlike some cases in which employees disagree about who should do certain work, there is no issue in this case about whether one or another group of welders is entitled to the work. Rather, the union says that the work cannot be sent outside the bargaining unit.

The union's first witness was Louis Aguilar, who has been a welder for 26 years, though he has worked full time in the union hall for the last four years. Aguilar said his many years of experience in the weld shop took him to every area of the plant. On occasion, he has welded around masons, work which typically involved putting up crow's feet or other anchors for refractory. Although he described this work as "tack welding," Aguilar also said that all welding -- whether tack or structural -- involves the same skills. In addition, he said the tack welding he did for refractory was the same, no matter where in the plant he did it. Although he performed welding so that masons could apply refractory, Aguilar said he has never seen a mason weld. In fact, he testified that when the welders came to the job, the masons typically left the area. On cross examination, Aguilar acknowledged that he spent little of his time as a welder working around the masons and, therefore, could not say what the masons did for most of their work day.

Although he has not seen masons weld, Aguilar has been aware of complaints made by other employees. In fact, he said he encouraged welders to file grievances when someone else performed welding work. In his years in union office, Aguilar said he has had a particular interest in Inland's welders. On cross examination, Aguilar said he first heard such complaints from other welders around 1987 or 1988. Between that time and the time he went full time to the union hall in about 1991, Aguilar said he heard more than a few complaints, a number that he estimated as "more than 5 to 7."

Grievances 1-T-77 and 1-T-78 concern the union's claim that masons were improperly assigned to perform welding work on emissions covers and pugh ladles at the plant 2 blast furnace. The union called Michael Bradley, a welder from that department. Bradley testified that the basis of the union's complaint was that masons had been welding crows feet or wiggles on emissions covers and pugh ladles. Although he said that masons were doing no such welding in plant 2 blast furnace at the time of the hearing, they were when the grievances arose. Both grievances were filed in 1991. Bradley said that he had been assigned to plant 2 blast furnace since 1975 or 1976 and that welders had always done the disputed work until 1989 or 1990, which is when masons began performing it.

Bradley said he could remember assisting the masons as early as 1968-69, when he was assigned to the boiler-weld shop. He also assisted the masons in plant 4 from 1972 to 1975. In neither area, he said, did the masons do any welding. Bradley also described the time from 1972 to 1975, when he had worked as a floater in field forces. During that time, he said he was often assigned to assist the masons with any welding work they needed. He said that he worked with the mason more than 85% of the time during that period. He never saw masons do any welding, air arcing, grinding, or burning, all of which was done by the welders. In fact, he said he never saw masons do any welding until 1989 or 1990, when they began performing the disputed work.

On cross examination, Bradley acknowledged that, except for his period as a floater, he typically spent very little time working with the masons -- less than 1%. However, he said he saw them "all the time" and did not see them welding. Bradley said he now spends most of his time fabricating emissions covers. A small one takes about 12 hours, of which 2 to 4 hours consists of welding on crows feet. Large covers take about 32 hours, with about 8 hours of the work devoted to the crows feet.

Grievance 4-T-61 and 4-T-62 involves the union's claim that masons are doing work belonging to the mechanics at 4BOF. Nick Flesher has been a mechanic in 4BOF since 1972, principally in the ladle reline area, where he said he worked on ladle relines "every day." The disputed work involves burning off old 6 inch angle clips, crows feet and bolts and replacing them with new ones, which are bolted on with an impact wrench. Prior to 1989, the work was always done by 4 BOF mechanics. At that time, however,

masons began performing it, which led to the filing of the grievance. Flesher said that prior to 1989, he never saw masons do this work and also never saw them do any burning or use an impact wrench. He said that from 1962 to 1972, he performed similar work around the masons at both no. 2 open hearth and the no. 4 slabber and that masons did no welding or burning in those areas and also no work involving use of an impact wrench.

The union also called Joe Pillar, a welder at 4BOF, to testify about grievance 4-T-62. Pillar has worked in the ladle reline area on and off for about 20 years, including one and one-half years exclusively in the pit, which takes care of the ladle reline area. He said that crows feet are bolted into steel ladles -- which is what Flesher testified about -- but are welded into iron ladles. Prior to 1989, he said such welding was performed exclusively by Local 1010 welders. Since that time, masons have been welding crows feet inside the iron ladles. Pillar he never saw masons do any welding prior to 1989, which is when the grievance arose. On cross examination, Pillar said it takes about 2 to 4 hours to weld crows feet in an iron ladle, which is one of the last steps in the reline.

Part of grievance 4-T-62 involves a claim by the union that masons were improperly welding crows feet on new tundishes. The union called Tony Hernandez, a 4BOF welder to testify about that part of the grievance. Hernandez testified that he worked in the tundish repair area beginning in December 1988. He and other local 1010 welders welded crows feet in the run out spout and also around the top of the tundish. However, masons began performed both jobs in 1989 and welders have not done it since. Hernandez also said that when he worked out of the weld shop in the early 1970's, he sometimes did refractory welding for masons. He said the masons never did that work. On cross examination, Hernandez said that he has done refractory welding all over 4BOF and that it all involves the same skills.

Grievance 27-T-60 involves the union's claim that the company improperly assigned welding work to the masons in the 12" mill reheat furnace. Bob Gilbert, a plant 4 welder, testified that since he began work in the area in 1980, welders did all welding work associated with steel clips on water cooled skip pipes. Around 1992 or 93, however, masons began performing the work, which led to the grievance. Gilbert said that masons then stopped doing the work for about a year, though recently they have started doing it again. On cross examination, Gilbert said the furnace had been down during that one year period. He said he has seen masons doing other types of welding, though he is aware that they did some burning and grinding in the reheat furnace. Gilbert also acknowledged that the work of welding the clips involves the same skills used in welding crows feet.

Grievance 8-T-6 involves welding work done by masons at the 28" mill. Bonnie Stephens is a welder who works in that area. She testified that the grievance concerns the masons welding the tabs that hold the insulation on the water cooled pipes. She said the masons started this work in March of 1990 and that, prior to that time, it had always been done by Local 1010 welders. In fact, Stephens said that the masons never did any welding in the area prior to the filing of the grievance. In addition to the tabs on the water cooled pipes, she said the masons have also been welding 6" stainless studs to hold the insulation on furnace doors. The latter job, she said takes about 3 to 3 1/2 hours. Tabs on a 9' section of pipe would take about 30 minutes. Both jobs use the same skills.

Grievance 31-S-39 and 31-S-40 involves similar claims of improper welding work by masons, this time at no. 7 blast furnace. James Fernandez, a welder at no. 7 blast furnace, testified that the masons were installing crows feet (or, as he called them, squiggles) and brick retainers in the chutes. The masons have been doing such work both in the blast furnace and in the raw materials area. He said the masons did not do the work exclusively and that sometimes welders were asked to do it.

Fernandez' testimony about timing was somewhat confusing. Initially, he said that masons had been performing the disputed work in the blast furnace for about 8 or so years and that they had done it in the raw materials area for about 10 years. However, he later said that he filed the grievance when he became aware that the masons were welding. The grievances at issue here were not filed until 1988. Although the matter is not entirely free from doubt, I understood Fernandez' testimony to mean that he filed the grievances when he became aware the masons were welding, which was in 1988, not 1985. Later, on redirect, he said that prior to 1988, masons did not do any welding in the raw materials area. Rather, that work had been done by local 1010 welders.

The last grievance at issue is 25-T-37, which involves a claim that masons improperly welded anchors on furnace doors at the 80" hot strip. Tom Hargrove, a welder from that department, said that he first saw the masons do this in April of 1990, which is when he filed the grievance. Previously, local 1010 welders had always done the work. Hargrove, who started in the weld shop in 1963 said that in his 32 years as a welder, he had not seen masons do any welding work, prior to the events complained of in this case. He

acknowledged on cross examination that the company had sometimes contracted out work to a company called Simco, and that Simco had sometimes welded anchors. He could not remember when the subcontracting took place.

Finally, the union called local president Mike Mezo to testify about company concern over the delay in taking these cases to arbitration. Mezo testified that when he became president, the union had a mandate to concentrate on contracting out cases, which it did until early 1991. Thereafter, he said the company's and union's arbitration resources were exhausted over cases generated by the company's ATQ program.

The company's evidence was intended to establish several facts. First, the company contends that its right to make the disputed assignments is protected by the management rights clause and not by any notion of jurisdictional claim to the work. Nevertheless, the company says that the union could only establish such a claim by showing that its members have performed the work to the exclusion of the masons. Much of the company's evidence, then -- and in my view its most important proof -- dealt with company claims that masons have previously performed similar work without complaint by the union. The company also introduced evidence that its actions were taken in good faith (which is to say, not with the intent of raiding or attacking the bargaining unit) and for purposes of efficiency. The union raises no question about either claim.

Local 6 masons are supervised by three mason supervisors, each of whom is responsible for a separate area of the plant. All three of the mason supervisors testified at the hearing. Bill Price described how the mason work force has declined since the early 80's from 275 employees to the current number of 94. He also described the evolution of refractory materials from brick -- which is still in use -- to the current practice of castibles, plastics, and gunnite. He also described the shift in refractory anchors away from bolted anchors (which are still used) toward materials that must be welded on. Currently, the old anchors are burned off, the surface is prepared by burning or grinding, and new materials are welded on.

Price said that masons have performed refractory welding at No. 7 blast furnace since it first went on line in 1980. He said the work included welding anchors in covers in the cast house and in the mason building. He said that similar work went on in the raw materials area, where masons have welded flat stock or anchors since 1980. He said that to his knowledge, Local 1010 welders have not welded refractory anchors at no. 7 blast furnace since it went on line in 1980. Price said that at no. 7 blast furnace, it was not until 1981 that there was a repair that required the replacement of flat stock, a system of brick retainer. Then, between 1981 and 1988, masons did the same job 12 to 15 times. Local 1010 welders were in the area at least in 1981 and 1982. Price also described the welding training that masons receive as part of their apprenticeship program.

Price also discussed the specific grievances that affect his areas of responsibility. Grievance 31-S-91, he said, was the first time masons had done a major bin repair. The work was similar to what they had done before, but of a much larger magnitude. Price said that between 1985 and 1988, there were seven instances when the masons had done repair work inside the bin. Grievance 31-S-40 involved preparing walls and putting on new flat stock. The masons had done this 12 to 15 times before this incident, Price testified. He also described how having the masons do the work is more efficient and said that it takes only minimal amounts of time.

Grievance 1-T-77 concerns blast furnace emissions covers. Price said that the new covers came in and that he told the masons to weld the crows feet in. In addition, he told the masons to put the anchors in pugh ladles. Price said that the masons had done both jobs before. The masons welded all the anchors on covers for the 1990 reline of no. 5 blast furnace and they did similar work in 1990 for covers for no. 2 and no. 3 blast furnaces. Prior to 1990, there were sporadic occasions when masons replaced anchors on the pugh ladle heat shields. This latter work was done in the mason building. I understood this to mean that local 1010 welders may not have been in the area. Price also disputed testimony from the welders about how long it takes to weld anchors on emissions covers. He said a 4 by 6 cover shouldn't take more than 45 minutes.

Ron Eicke, another of the mason supervisors, testified that masons bolted anchors in place at the reheat furnace and no. 4 slabber as early as 1963, work which continues at no. 4 slabber. Eicke said that in his area, refractory materials used include anchors that are bolted on, skid pipe insulation, which is "stick" welded, and stud welding, which is performed with a Nelson stud gun. He said that mason have been doing stud welding of anchors at the no. 3 Cal line since February of 1988. Prior to that time, the work was done by Local 1010 welders. Although Local 1010 welders continued in the area after the work was transferred to the masons in 1988, no grievance was filed. Eicke also testified about work in the no. 3 cold strip. He said that in 1988, masons were assigned to use the stud gun for anchors on the no. 5 galvanizing line.

Another job on the no. 5 galvanizing line involved a rebuild of the no. 5 zone. After every 6 courses of brick the masons welded a Z anchor to the wall. Local 1010 welders had done this work previously, though no grievance was filed when the masons did it. Eicke conceded that the welding involved was "minuscule." Eicke said that masons have been doing welding for skip pipe insulation in the 76" mill since 1992 with no complaint from the Local 1010 welders in the area. In addition, masons have been doing stud welding in 5 and 6 anneal since 1988 or 1989 with no grievances, though Local 1010 welders previously did the same work. At the 80", Eicke said that masons went in during the first outage in the walking beam furnace in 1989 and welded V anchors. Later in 1989, they began installing a bolt anchor system that also involves some welding. No grievances have been filed by the Local 1010 welders, who also do some of the same work. Eicke said the masons have also welded tabs at the 100" since 1992 with no grievance from local 1010.

Eicke also testified about the background of grievance 8-T-6, which involved welding V clips and pre-cast shapes to the skid pipe at the 28" mill. Eicke said that the masons had just completed welding training at plant 1 in 1990 (which the company's brief but not Eicke's testimony described as a "refresher course") and that he wanted them to do what they had been trained for. Previously, the masons had taped the insulation to the pipe and then waited for a welder to come and do his work. It was more efficient, however, for one of the masons to hold the insulation in place while the other did the welding. Eicke offered a similar explanation for the company's action that resulted in grievance 27-T-60, which concerned preparing surfaces and doing welding for skid pipe refractory at the 12" mill. Eicke described the amount of welding as minimal, though it produced the same efficiencies as in the 28" mill. Finally, Eicke testified about grievance 25-T-37, which involved the union's claim that the company improperly assigned masons to do stud welding on anchors on the discharge doors of the pusher type furnaces at the 80" hot strip. Eicke said that although masons did not do "structural" welding, they did use stud guns to repair refractory anchors as they became damaged.

Lou Hernandez was a day supervisor at the 80" hot strip from 1985 to 1990. Like Eicke, he discussed grievance 25-T-37, which involved the furnace doors at the 80" hot strip. Prior to 1989, Hernandez said the work was done by Simco, he contractor who supplied the doors and had the exclusive right to repair them. That subcontracting was stopped in about 1990. Although the doors were removed by mechanical employees in the local 1010 bargaining unit, masons would make all repairs associated with the refractory.

The last of the three mason supervisors who testified was Wally Banasiak. He testified that masons have tightened bolts and done similar work on refractory anchors for many years, going back to the days of the open hearth. Banasiak testified about grievance no. 4-T-62, which involves having masons weld crows feet on new tundishes every time they brick in the caster. In a matter of some dispute between the parties, Banasiak said that there was no welding on the tundishes prior to November of 1989 (except for one experimental project) because that is when the new tundishes came in. He said there was no welding associated with the old tundishes, a contention denied by union witnesses. Banasiak also testified about grievance 4-T-61, in which the company is alleged to have violated the contract by assigning masons to bolt clips on the top ring of the steel ladles and burning steel in the steel ladles. Banasiak said this work began in about 1989, when 4 BOF management asked if is was possible for the masons to do this work, which was formerly done by local 1010 welders. The masons began doing the work as they completed their welding training. The work is not done until the rest of the work on the ladle is complete and amounts to very little time. Finally, Banasiak said he has had responsibility for the no. 2 blast furnace since 1991 and that he has only seen the masons weld studs on the emissions covers once since then. Similarly, company witnesses Nick Gheaja and John Clendenen testified that there was no refractory welding on 4 BOF tundishes until October of 1989 and that Local 1010 employees have never performed the work. Clendenen also said that he was the first mason trained to do the refractory welding work on the steel ladles in 4 BOF, which was in February 1989, right after he completed welding school.

The company called Sheila Boguchi to testify that there were no welders laid off as a result of the work at issue in this case. On cross examination, she acknowledged that there has been substantial attrition in the welding and mechanical crafts since 1988.

Labor Relations representative Tim Kinach testified about the manning agreement for the new RHOB facility, introduced into evidence as Union Exhibit 1. At base, the manning agreement allowed local 1010 employees to do gunning work associated with the new facility. Kinach said the quid pro quo for the masons' relinquishment of the gunning work was Attachment E to the agreement, which allowed them to do some ordinary production work, including fork lift and crane operation and "welding." Kinach described this as a "one shot deal" which had no applicability elsewhere in the plant. Interestingly, Kinach said the

agreement was necessary because the masons had to agree that the gunning work could be given to employees outside their bargaining unit. Kinach did not explain why the company did not retain the same right to assign the gunning work as it claims it has to assign the welding work. That is, if the company's right to manage the business includes the right to make work assignments across bargaining unit lines, the company has not explained why the manning agreement was necessary.

As to the mention of "welding" among the duties that would be given to the masons, Kinach said that this was to signify the company's intent that the employees would assume "more welding than masons typically do." There was, however, no testimony about whether the masons assumed more welding duties or whether in fact, they had done any prior to the agreement. In that regard, I note that the agreement was effective in 1986 and, for the most part, the company's testimony about welding duties performed by welders in other areas of the plant relates to 1988 and afterwards.

Finally, the company called Dean Houpt, a former official of the mason's union. He testified about the welding portion of the apprenticeship program and indicated that other steel companies regularly assigned such work to masons. He also said that he performed welding work as a mason contractor at Inland.

The union called two witnesses on rebuttal, both of whom testified that they had welded on tundishes prior to November of 1989, a matter the company continued to deny.

Discussion

Interestingly, each side accuses the other of principal reliance on the concept of exclusivity, though each also asserts that, if applied, the exclusivity principle protects its position. The company claims that its action is sanctioned by its right to make work assignments, rooted in the management rights clause. The union, on the other hand, argues that its claim is protected by Article 5, section 1, the recognition clause that excludes, among others, "bricklayers." The company cannot assign welding work to the masons, the union argues, because it is the type of construction and maintenance work allocated to those employees represented by USWA. As evidence of this intent, the union argues that the work has historically been performed by USWA members and cannot now be removed from that unit and transferred elsewhere.

The company asserts that nothing in Article 5 -- which merely recognizes those employees represented by the USWA -- restricts the company in its ability to make work assignments, which is expressly acknowledged in Article 3, section 1, along with the right to "introduce new and improved methods" and the right to "change existing methods." I understand that arbitrators -- including me -- have sometimes recognized an employer's right to change work assignments, to abolish jobs, and to assign work outside the unit when new technology or processes cause significant changes in the way work has traditionally been performed. Those cases, however, are inapposite here. The company does claim, with justification, that refractory technology has changed over time and that refractory anchoring systems have changed with them. But the company has not convinced me that those changes resulted in the work assignments made here. Thus, the testimony established that in the late 70's, new anchoring systems were developed to accommodate the new types of refractory materials. But most of the work assignments complained of in these cases began around 1988. There is no doubt that welders -- and not masons -- had done almost all of the work of welding refractory anchors prior to that time, the single significant exception being work at no. 7 blast furnace that began in 1980. But, of course, the union grieved those work assignments, too, although it later chose to withdraw its claim without prejudice.

In short, I cannot agree with the company's argument that its actions in and after 1988 were prompted by new methodology, new technology, or any other changed, new, or improved methods. There was no convincing testimony that there were significant advances in the way the work was performed at that time. Rather, the testimony establishes only that that was about the time the company trained the masons to weld and that it sought to achieve greater efficiencies by exploiting that knowledge. Of course, the company claims that those efficiencies are also a defense to its action, a matter I will address below. But I find nothing in the evidence which supports the company's claim that it was free to reassign the welding work because of change in the way the work was performed.

As noted, the company's defense is not restricted to changes in assignments made as the result of new methods or technology. Also inherent in the company's case is its claim that its rights under the management rights clause are not restricted by a general recognition clause, which is all it says Article 5, section 1 amounts to. While Article 3 expressly recognizes that management has the right to direct the work force "except as limited by the provisions of this agreement," the question, the company says, is whether Article 5 somehow limits management's rights. The company urges that it does not since Article 5 contains no express limitation on the company's ability to assign work, citing Olin Matheson Chemical Corp. 42 LA 1025 (Klamon, 1964).

That case does say that a recognition clause gives rise to no implied restriction on management's right to assign work. Even so, I find little in Olin Matheson to be of use in consideration of this case. Most of the peculiar 18 page award is taken up with a verbatim transcription of the company's brief. That document -- to which the arbitrator expressed his allegiance -- does discuss management's right to make work assignments, as does the company's brief in the instant case. There are, however, distinguishing features between the two cases. In Olin Matheson, the arbitrator was faced with the transfer of work away from some bargaining unit production clerks to other, non-bargaining unit clerks. The company's brief asserted that these non-bargaining unit clerks "performed the same duties" as the bargaining unit clerks, though the non-unit clerks also served as secretaries.

A significant issue in the instant case was, then, conceded at the outset in Olin Matheson. Here, the union claims that, by virtue of the parties' practice and the recognition clause, the parties understood that the Local 1010 bargaining unit had jurisdiction over the welding work involved in refractory installation. The union's claim is that, with few exceptions, the parties have recognized this fact by the company's consistent assignment of the welding work to Local 1010 employees. By contrast, in Olin Matheson, the parties understood that duties of exactly the same type were already performed by non-unit employees, a fact which, if proven will carry the day for the company in the instant litigation as well. In addition, in Olin Matheson, the company argued that it had repeatedly claimed and exercised the right -- without challenge by the union -- to change various work assignments across bargaining unit lines. There is no similar claim in this case. Finally, in Olin Matheson the company was able to show that the union had tried repeatedly to secure a contract clause that limited the company's right to remove work from the bargaining unit, strong evidence that the union understood that the contract, as written, did not curtail the company's freedom. There is no comparable evidence in this case.

In addition to its claim that the general recognition clause does not limit the company's right to assign duties outside the bargaining unit, the company also argues that the exclusion of bricklayers from the unit allows the company to assign typical bricklayer duties to the masons without recourse by the USWA. Thus, the company says that the exclusion of "bricklayers" obviously manifested the parties' intent to "exclude the work of the company's mason employees from coverage under the agreement." No one questions this. But the upshot of the company's argument is that since refractory welding is part of the masons' responsibility, the USWA cannot complain when the company assigns that work to the bricklayers.

Of course, this assumes what the union's case denies. That is, the union does not claim that bricklayers never weld, it just says that had not done so at Inland. The word "bricklayer" has no meaning in the abstract. Rather, the union says that the question is what these parties meant when they excluded "bricklayers" from the agreement. According to the union, that meaning can be discovered only by recognizing what the parties understood the bricklayer work to be. But they didn't mean for it to encompass welding refractory anchors, the union says, because that work was typically assigned not to the bricklayers, but to the USWA welders.

I understand that Article 5 places no express restriction on the right of the company to assign work. But it is fair to believe that the recognition clause carries some restriction on managerial freedom. If the Steelworkers are to represent the employees who perform production, transportation, construction and maintenance work, can it be said that the company is free to assign that work to clerical employees, or to others excluded from the unit? I understand that there are arbitrators who have described the recognition clause as merely an acknowledgement of the status quo which, of itself, carries no independent force. I disagree with those cases. And, while its formal argument may differ, even the company acknowledges that some expectation of the work to be performed accompanies the inclusions and exclusions mentioned in a recognition clause.

Although the company argues broadly that the designations mentioned as inclusions and exclusions from the bargaining unit in Article 5 carry little baggage, its other actions demonstrate that its belief in that doctrine is limited. Thus, the company introduced evidence about its agreements with the Masons Union concerning the meaning of the RHOB agreement. At the hearing, I indicated that I intended to admit that document solely for the purpose of showing that the company had notice of the union's position concerning certain work assignments. But the company actually introduced evidence that made the agreement relevant for a broader purpose. For example, the company's representative elicited testimony from Tim Kinach that the company thought the agreement was necessary because the gunning work at issue otherwise belonged to the masons. But the company pointed to nothing in the Local 1010 agreement that said that Steelworkers could not do gunning. And it pointed to nothing in its contract with the masons that says that only masons can do that work. Overt or not, then, the company obviously understood that the designations of included

and excluded employees in Article 5 carry with them some notion of what those employees do. In short, the work "belonged" to the masons -- and they had to be traded out of it -- because the USWA agreement excludes "bricklayers," which the parties have obviously understood to mean not just that the USWA does not represent them; the exclusion also signifies their understanding that USWA represented employees will not do the work ordinarily assigned to bricklayers. (Arbitrator's Footnote: I recognize, as the company argues, that the RHOB agreement was to be without prejudice "to any other course of action either party may choose in the future." Nothing in the instant case suggests that the agreement binds the company to anything other than what the agreement includes. That does not mean, however, that Kinach's testimony cannot be used to help understand the meaning the company attributes to such contract provisions as a recognition clause.)

A similar understanding must accompany the bargaining unit's inclusions. At the very least, the recognition clause means that the work the parties have ordinarily understood to be performed by the included classifications will not be given to employees who are excluded from the unit. Of course, the parties could also have an understanding that no unit has the exclusive right to perform any work and that the company retains the right to assign it as it sees fit. Evidence of this understanding could be shown by demonstrating that the company has typically assigned work of the same kind to more than one bargaining unit. That is, in fact, what the company claims with respect to the welding of refractory anchors. If it is able to prove that, then the union would be hard pressed to establish an understanding that a particular body of work "belongs" only to those it represents.

An acknowledgement that the parties understood the recognition clause to limit the kinds of work that may be assigned to various classes of employees does not, by itself, resolve this case. Article 5, section 1 may say that the company will not assign bricklaying duties to the USWA employees and will not assign construction and maintenance work (other then bricklaying) to the bricklayers. But the issue here is how the parties understood the welding of refractory anchors. Is that welding work which they understood would go to the USWA welders or is it part of what bricklayers are typically expected to do? In that regard, the fact that bricklayers install refractory anchors elsewhere, and the fact that they have attached them mechanically without challenge at Inland are relevant facts. They help shape the parties' understanding of the work typically performed by bricklayers.

The difficulty is that the understanding is not expressed in the agreement itself. That does not mean, however, as the company would have me rule, that it has retained the freedom to assign the work as it sees fit, a understanding that it obviously did not share when it negotiated the RHOB agreement. In general, I agree with former permanent arbitrator McDermott, who observed in a similar context in Inland Award 810 that the best way to "grope one's way" though this problem "is to be guided ... by the parties' joint handling of this matter over the years." (Arbitrator's Footnote: McDermott made a similar observation in COEX 12, a contracting out case where there was also an issue of whether certain work fell within the USWA bargaining unit. In holding that the company was free to subcontract certain jurisdictional work, McDermott observed that it was not bargaining unit work at all [and, therefore, not subject to the contract's subcontracting restrictions] because of the "deliberate joint action by the parties." Though there was no express agreement, McDermott found it persuasive that the parties had always treated the work as falling outside the bargaining unit.

The company's brief urges that I cannot consider this opinion because it is a non-precedential expedited opinion. These parties do have some practice of citing their previous contracting out cases in similar proceedings. I need not consider that practice here, however, because this is not a contracting out case and the union does not cite COEX 12 as authority for any contracting out purpose. Rather, it is proffered merely as evidence of how another arbitrator has approached the question of whether particular work is recognized as bargaining unit work. As such, it at least has the value typically given to non-industry arbitration awards.)

The question, then, becomes whether there is evidence that the parties understood the work at issue to be properly part of the duties associated with a particular bargaining unit. If, as the USWA asserts, employees it represents have done welding work to the exclusion of other, non-bargaining unit employees, then it is fair to conclude that the parties recognized welding as a function to be performed by bargaining unit members, not to be done by employees outside the bargaining unit. Conversely, if there is evidence that this work was shared by USWA represented employees and others (not necessarily limited to bricklayers), then the union can claim no such understanding.

This is what brings the issue of exclusivity to the case. If the USWA could show that only steelworkers have done the work, then the company's shared responsibility argument must fall. Conversely, the company

has tried to show that bricklayers have been assigned these duties with sufficient regularity to demonstrate shared responsibility. This question of exclusivity is different from the one often litigated between these parties. These parties are familiar with claims by the union that the company violated local working conditions when it assigned work traditionally and exclusively performed by one seniority sequence to employees of another sequence. There are defenses to such claims, one of which turns on the question of exclusivity itself. Thus, no matter how often a particular sequence has performed the work, the company can defeat the union's claim by showing that employees in other sequences have also done the same work. In such cases, the question raised by the union is not a threat to the performance of such work by members of the bargaining unit. Rather, the question is simply how the pie will be apportioned among members of the unit. For example, does the work belong to one craft or another? And even if the crafts aren't in conflict, does it belong to department craftsmen or those assigned from a central location?

These parties have become used to arguing about how to demonstrate exclusivity, sometimes seeking advantage by broadening or narrowing the focus of the contested work, a tactic that has also found its way into this case. The matter at issue here, however, differs from the typical attempt to protect a seniority sequence, though there are some similarities. The question here does not necessarily depend on the question of "reasonable exclusivity," as that focus has developed in the seniority cases. Rather, the question is whether the parties have administered the agreement with the understanding that certain work is to be done only by members of the bargaining unit. (Arbitrator's Footnote: It bears repeating that neither side asserts that the doctrine of "reasonable exclusivity" controls this case. Moreover, when I broached the subject following opening statements and asked the extent to which that concept should be employed here, the company's representative responded that the parties sought my guidance on the issue.)

In my opinion, it is more, rather than less difficult for the company to prevail here than in the typical case in which the union seeks to protect a seniority sequence. Arbitrators have recognized that certain changes make it possible for the company to reassign work within the bargaining unit. The company is not bound to always do things in the same way, especially if the reasons that supported its original assignments have changed. But it is one thing to move work around within the unit and it is quite another to move it out of the unit altogether. In such cases, the union loses its ability to represent the employee who are doing work traditionally performed by it members, work which the parties have essentially agreed will be done by those employees.

Although the union has the burden of establishing a violation, and although it might seek to do so by demonstrating "reasonable exclusivity," the standards which apply to a removal of work from the unit are not necessarily as rigid as those applied in seniority cases. That is not to say that there is necessarily any agreement about what "reasonable exclusivity" means in those cases. But it is clear that some volume of unchallenged assignments to other sequences will defeat the union's claim. That is no doubt true here, as well. But I am not concerned only with whether the work has been done elsewhere but also with whether the union has given the company fair notice that it objects to the practice.

At the outset, one must ask which work is at issue. The testimony established that refractory anchors are attached in one of two ways -- either by mechanical means such as bolting, or by welding. If the issue is merely whether the work of attaching refractory anchors can be assigned outside the bargaining unit, then the union has considerable difficulty showing any understanding that the work would be performed only by USWA members. There was unrebutted testimony that bricklayers have installed anchors by mechanical means as far back as the early 1960's, without any complaint from the union. Moreover, there is no showing that the USWA ever objected to this practice until the late 1980's. To use the union's own argument, then, the way in which the agreement was administered does little to show that the USWA unit laid claim to this work. Rather, it was shared at least with the masons unit.

The matter of attaching refractory anchors by welding offers different considerations. I cannot hold that merely because they were able to attach anchors by tightening bolts, that masons are also able to attach them by welding. The introduction of welding skills obviously made a difference. Welding requires skills and abilities which these parties have associated with a particular craft (which is not necessarily the case with attaching anchors by tightening bolts) and, importantly, which the mason craft did not appear even to possess at the time such work began. It seems clear that when refractory anchors began to be attached by welding, it was the process involved -- and not the anchor itself --that influenced the way the work was assigned.

Thus, the testimony established that masons were not trained as welders until sometimes in the mid-1970's. And, when welded refractory anchors began to be used at Inland, the company did not turn first to its masons but rather assigned the work to the welders, who had traditionally performed that function

throughout the Harbor Works. The parties recognized, then, that whatever the anchors might be used for, the method of attaching them made a difference in who would do the work. (Arbitrator's Footnote: This resolution is also consistent with the company's argument that it is the skill involved -- and not merely the end result -- which forms the appropriate focus. Similarly, the company's focus on skills negates its claim that some of the grievances involve "new" work.)

Although I think the welding associated with refractory anchor installation is the appropriate focus, I do agree with the company's assertion, however, that the work must be viewed plant wide, and not merely on a departmental basis. I recognize that these parties sometimes dispute whether department activities form the appropriate body of work when the matter at issue involves craft skills and seniority sequences. But the union's claim here is that welding is work associated with its bargaining unit, not merely a particular department within the unit. To the extent that the union claims an agreement that welding is for Steelworkers, it is surely relevant, then, to look at whether they have remained silent while masons were assigned to weld at the Harbor Works.

Because I think the way in which the parties have administered the work is important to the issue of how it might be assigned, I find it significant that the company never assigned any welding to the masons until 1980, when it did so at no. 7 blast furnace. (Arbitrator's Footnote: I understand that contractors did refractory welding during the construction of No. 7 blast furnace in the late 1970's. The fact that contractors -- including masons -- have welded at Inland does not, by itself, support the company's case. There are some circumstances in which work that is otherwise recognized as bargaining unit work can be contracted out. The fact that work has been done by a contractor without challenge (if, indeed there was no challenge here) does not necessarily mean that the parties agree that the work is outside the bargaining unit, though, of course, it could mean that. See e.g., Inland Award 810.) And, though there were sporadic instances of such assignments in later years, it was not until 1988 -- at about the time that the instant grievances arose -- that the company began assigning welding work to masons in earnest. Up until then, the company and union understood that this welding work was to be performed by welders. The company argues, however, that though some of its work assignments were grieved, several of them were not. Thus, the company argues that the union's inaction showed its acquiescence in the company's assignments, a sign that the union understood that such welding was shared by both unit and non-unit employees.

There is no doubt that the union did not grieve certain instances in which masons performed welding work. Although company witnesses testified that the work was done in full view of local 1010 welders, the union's witnesses maintained that they filed grievances when they learned of alleged violations. In some instances -- such as the work inside the bins at no. 7 blast furnace -- the circumstances, as well as the testimony of union witnesses, raise some question about whether the union actually knew the masons were welding. I can accept the company's contention, however, that some instances went ungrieved. Does that mean, then, that the union waived its right to challenge the company's practice of assigning welding work to masons?

No one should question the company's argument that the union cannot seek redress for alleged violations that go ungrieved. But the issue here is not so narrow. The company claims that the union's failure to grieve does not merely preclude recovery in particular cases, it also claims that the failure to grieve amounts to acquiescence in the assignments. Thus, the argument goes, the union cannot seek redress in the cases it did grieve because it also failed to grieve some other instances. Those failures, the company says, show union acquiescence in the way the company assigned the work. Therefore, the union cannot prevail on the grievances it filed because its failure to file other grievances admits the invalidity of the pending cases. I cannot accept this argument.

The issue of whether the union grieved goes to the question of acquiescence. The company can argue legitimately that if it has pursed a course of welding work assignments to employees outside the unit, and if that practice was well known to the union and accepted by it without challenge, then the union cannot now contend that only local 1010 employees can weld. The company, after all, does not have to procure express agreement from the union every time it makes an assignment. The right to manage the business rests with the company. It is the union's responsibility to pursue alleged violations. Moreover, it is reasonable to assume that a failure to object to repeated practices signifies the union's belief that the company's action is in accord with the agreement.

Here, however, the union has not rested on its laurels. It has repeatedly challenged the company's right to assign welding work to masons. And, while it has admittedly missed a few instances, the company cannot legitimately believe that those omissions signify the union's acceptance of the company's actions. The instances that were not grieved were virtually identical to those that were and, equally important, they

occurred within the same time period. It would, of course, be unfair to hold the company liable for the violations that were not grieved. The lack of a grievance denied the company the opportunity to examine its action in specific instances and to offer redress, if appropriate, at a time when remedies might have been limited. But there is a difference between precluding the union from redress for particular violations and concluding that its failure to file admits the appropriateness of the company's action. Here, though the precise scope of the relief sought by the union may have been vague, the company cannot claim that it had no notice of the union's claim that it could not assign welding work to masons.

A similar analysis applies to the work at No. 7 blast furnace. Company exhibits indicated that the union grieved the original welding assignments to the masons in 1980, only to withdraw the grievance "without prejudice" in 1983. In its brief, the union urges that this withdrawal should be understood to have been accompanied by an agreement between the parties that the welding work at no. 7 blast furnace could continue. I agree with the company's reply brief that no such agreement can be implied. The union, after all, has the responsibility of pursuing the grievance and its decision not to go forward could have been made for a variety of reasons. There is no reason to suppose that it was provoked by any agreement from the company.

But it is significant that the union withdrew the grievance "without prejudice." The original grievance was notice to the company that the union contested its right to make welding assignments to the masons. The withdrawal put the company on notice that, while the union did not intend to pursue its original claim (and was thereby forfeiting any remedy for it), it was not conceding the company's right. That is, the nature of the withdrawal preserved the union's right to contest the action at a later time without fear that the company could construe the withdrawal as an admission. Given those circumstances, I fail to see how the company can claim that the failure to arbitrate the 1980 grievance amounted to union acquiescence of the company's right to make the assignments. To the contrary, the company was on notice that the union objected and that it could raise the issue later on.

There was little reason, however, for the union to broach the issue again until around 1988, when it began to file the grievances at issue in this case. Though there was testimony about some minor work at no. 7 blast furnace, which the union denied knowing about, the company did not begin assigning refractory welding work to masons in any significant way until 1988. Given what had come before, the company could not believe that the withdrawal of the 1980 grievance was tacit consent to those assignments.

The company claims, however, that its actions were protected because they were taken in good faith and because they had only a diminimis effect on the bargaining unit. Thus, the company introduced considerable evidence about the efficiencies gained from the assignment of the welding work to the masons and also submitted proof that no welders were laid off as a result. It also cites several cases -- including some involving USWA -- which it says supports its claim.

One such case is Milton Schmidt's opinion in Continental Can Arbitration Case No. 22. In general, Schmidt's opinion voices support for the thrust of my decision in this case -- that is, he found the recognition clause to "place a restriction upon the company from assigning work included within the regular jobs of bargaining unit employees to non-bargaining unit employees." Nevertheless, he found an exception when the duties transferred by the company were "too limited and inconsequential." Essentially, only 180 hours of bargaining unit work was taken from the unit and assigned to six non-unit employees. The company urges that the 2800 hours at issue in the instant case are equally inconsequential, given the number of employees involved, 215 welders and 94 masons. However, it is not clear to me that any such comparison formed the basis of the arbitrator's opinion in Continental Can. Indeed, the opinion does not disclose how many bargaining unit employee were involved in the case or what percentage of their overall work 180 hours amount to. In addition, the company urges that other factors noted by the arbitrator in Continental Can are equally relevant here. Thus, the arbitrator noted that the 180 hours of work were performed at irregular intervals and that scheduling difficulties would preclude assignment of a unit employee to do the work.

The other factors cited by the company are equally problematic. It is true that the work at issue here is performed at irregular intervals, but I fail to see how the company can argue that scheduling difficulties preclude assigning a welder to do the work, when it had done so with regularity until 1988.

Although the arbitrator minimized the effect of changed conditions in Continental Can, he also noted that technological change had made it possible to accomplish in 180 hours work that had formerly taken over 1800 hours. Thus, in that case there had been a change in the way the work was done which prompted the company to exploit the greater efficiencies of technology, something the arbitrator allowed given a minimal impact on the bargaining unit. But the same thing cannot be said here. Nothing changed in the way the

work was done. There was no new technology that suddenly made the masons more efficient than the welders had been. The company merely trained the masons to do the work and then assigned it to them. It is one thing to conclude in Continental Can that it made no sense to purchase new machines for the non-unit data processing group and then assign a bargaining unit clerk to lurk in the background, ready to pounce on 180 hours of work each year. Here, however, the company merely took the same work and had it performed in the same way by a different group of employees. In short, I do not read Continental Can (or its more generous counterpart, Award No. 42) to mean that the company has freedom to ignore bargaining unit lines in the assignment of work, merely because one group might perform more efficiently than another. Rather, the case recognizes that sometimes changes occur which allow employers to exploit efficiencies, provided there is no significant impact on the bargaining unit. There are, however, no such changes here. (Arbitrator's Footnote: The company also cites Arbitrator Stren's opinion in Consolidated Papers, 89 LA 1164 (1987) as evidence of a case in which the "grievance [was] denied where removal of work did not weaken the security of the union." I think this is not an accurate summary of the case, even though the arbitrator did say that the company's action did not reduce the number of employees in the union. It is not fair to read the opinion to mean that the lack of impact was the basis of his decision. Rather, the lack of impact would not have mattered had the company tried to transfer skilled work out of the unit. Implicit in the case is the recognition that the company could not transfer work traditionally done by skilled crafts to unskilled employees in other bargaining units. However, the arbitrator recognized that other arbitrators had already held this practice inapplicable to the transfer of unskilled work. That finding -- and not the lack of impact -- is what influenced the arbitrator's decision.

The company also cites Joy Manufacturing, 49 LA 1083 (1967) as authority that employers have the right to assign work out of the bargaining unit when there is only a minimal impact on the unit. There are, however, two important differences between that case and this one. First, there was some change in the way the work was performed, including the elimination of a IBM card that a member of the grieving unit had filled out. More important, the record keeping tasks were transferred to another bargaining unit that already had similar functions. Thus, while the union could complain that its members had performed a discreet task, they could not claim that they were the only employees who had ever performed such work. Rather, another unit had shared responsibility for the same type of work. But, of course, that is not true in the instant case. The masons did not have welding responsibility until the company took it away from the welders.

Similarly, Arbitrator Fischbach's opinion in Material Service Corp., 98 LA 152 (1991) also offers little support for the company's position. Unlike this case, the arbitrator there found that the disputed work had been performed without complaint by members of another bargaining unit since 1977. Thus, there was no meritorious clam that the work belonged only to one unit.

The company also finds no support for its action in Arbitrator Keltner's opinion in E.G.&G. Idaho, Inc., 72 LA 927 (1979). In fact, the arbitrator noted that "transfer of work customarily performed by the bargaining unit to those outside the bargaining unit is generally denied by the collective bargaining agreement." In that case, however, there was a specific clause that gave the company the right to assign work of a "similar or ... physically identical nature" to certain employees outside the unit. There is no comparable provision in the USWA-Inland agreement.)

I have no question about the company's good faith or about its claim that the disputed assignments allowed it to work in a more efficient manner. It is not necessarily the case, however, that the contract allows the company to pursue its most efficient course of action. I need not decide whether efficiency alone is a sufficient defense to the union's claim, for even the company does not make that argument. Rather, it argues that it has the freedom to purse greater efficiency when the effects on the bargaining unit are no more than diminimis.

In a different context, these parties have understood that such concepts sometimes give the company freedom of action it otherwise might not have. For example, changes in the way work is performed might leave employees with only diminimis and insubstantial duties. In such cases, arbitrators have recognized the company's right to assign work elsewhere. But there is no claim here that a change rendered the residual duties diminimis. In fact, though there was some disagreement about how long it takes to weld refractory anchors, the company has not even claimed that the amount of the work has been significantly reduced. It merely says that it is more efficient to have masons do it.

Testimony from company witnesses indicated that the mason foremen have been assigning almost 2800 hours of welding work to bricklayers each year. I realize that this amounts to only a small amount of the work that the 94 masons do. Moreover, I understand that there are 215 welders, all of whom are apparently

fully utilized. Nor are there any welders on layoff as a result of these assignments. The union points out, however, that even without layoffs, the numbers of welders has been shrinking by attrition.

Because the issue is not before me, I cannot say whether there is a level so inconsequential that a company assignment outside unit lines could be ignored. Here, however, the hours at issue are not diminimis. There are more hours than an employee typically works in a year. By any measure, then, 2800 hours is a significant amount of work.

The Grievances

Because I agree with the company's assertion that the issue depends on whether the union established a general objection, and not a department by department claim, I need not review all of the grievances in detail. All but one of the grievances protested the performance of welding work by masons. Because I think the parties recognized that welding was to be performed by Local 1010 craftsmen, I will sustain those grievances. However, the company did establish that masons have regularly, and without protest, attached refractory anchors by mechanical means. Thus, there was no understanding between the parties that this work was reserved for local 1010 employees. I will, therefore, deny those portions of grievances no. 4-T-61 and 4-T-62 that relate to the masons bolting on refractory anchors. The other grievances are sustained.

AWARD

Those portions of grievances no. 4-T-61 and 4-T 62 that relate to masons bolting on refractory anchors are denied. All other grievances are sustained. The company is ordered to provide make-whole relief.

s/s Terry A. Bethel

Terry A. Bethel

August 31, 1995