For the Union:

D. Shattuck.....Chairman, Grievance Committee
M. Mezo.....USWA Staff Rep.
D. Reed.....Secretary, Grievance Committee
G. Busick.....Griever
D. Siefert.....Steward
M. Misiukiewicz...Witness

Background

As part of the 1993 negotiations, the parties reached agreement on a document known as the Mega Maintenance Concept. Although the parties apparently intended to continue discussion concerning this concept following negotiations, the document was incorporated into the 1993 Agreement and has generally been known as the Mega Maintenance Agreement. One part of the Mega Maintenance Agreement concerned the parties' agreement to inaugurate the occupation of hourly foreman in Field Service/IRMC jobs. That agreement reads as follows:

> On Field Services/IRMC jobs working hourly foreman may be implemented in accordance with the following:
>
> 1. The Company may utilize a working foreman in IRMC who, in addition to his supervisory duties, may perform work previously prohibited by Article 13, Section 14 of the CBA. Use of such foremen is subject to the following provisions:
>
> 2. Such working foreman shall be scheduled on a weekly basis and shall not work as a craftsman during those weeks.
>
> 3. Any overtime turns worked by a working foreman shall be counted as hours worked for overtime equalization. When a working hourly foreman returns to his/her overtime group, he/she shall be credited with the actual number of overtime hours worked as a working hourly foreman or the

IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

And Award 971

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the Union's claim that the Company improperly scheduled working foremen in the Mobile Equipment Repair Sequence of the Internal Logistics Department. The case was tried in the Company's offices on April 10, 2000. Pat Parker represented the Company and Dennis Shattuck presented the case for the Union. The parties submitted the case on final argument.

Appearances:

For the Company:

P. Parker.....Section Mgr. Arb. And Advocacy
R. Cayia.....Manager, Union Relations
P. Clinnin.....Section Mgr., Internal Logistics
R. Hynes.....Reliability Engineer
C. Lamm.....Staff Rep., Union Relations

average number of overtime hours worked in his/her overtime group, whichever is greater. If the returnee is above the overtime group's average overtime hours worked, he/she shall not work overtime until the overtime hours of a member(s) of the overtime group equals or exceeds the returnee's level of overtime. However, such returnee may work overtime if the rest of the members of the overtime group are asked to work overtime for a particular turn. Any violation of the above will be paid on an hour for hour basis. Notwithstanding the above, if any working hourly foreman remains above the agreed to overtime variance due solely to overtime hours worked as a working hourly foreman, the Company will not be liable for a penalty caused by such working hourly foreman under the overtime equalization agreement.

4. If a salaried foreman is returned to his sequence he may work as a working hourly foreman. If such employee subsequently returns to the salaried ranks and again returns to the sequence the employee is permanently barred from working as a working hourly foreman.

5. Management will consult with the griever before the selection of any working foreman

6. In the event that performance issues arise concerning a working foreman, the griever and a company representative will meet with the working foreman to discuss ways to resolve the performance issues. If, in the view of the griever and the Company representative, the performance issues are subsequently corrected, the working foreman may continue to be used; otherwise he will be disqualified.

7. After six months from the effective date of the agreement the parties will meet to consider the expansion of the working foreman concept into other departments within the plant.

There is no dispute that the working foreman concept was implemented in Field Forces/IRMC and no issue about that implementation in this case. Rather, the issue involves paragraph 7, which indicates that after the initial six months, the parties would discuss expanding the working foreman concept to other departments.

Article 13, Section 14 of the Collective Bargaining Agreement already permitted the Company to utilize so-called hourly foremen or temporary foremen. Those employees, however, were limited to supervisory duties; the prohibition against supervisor performance of bargaining unit work contained in Article 13, Section 14 applied to them. The working foremen created by the Mega Maintenance Agreement, however, were not so limited, as paragraph 1, quoted above, makes clear. The issue in this case is whether the Company properly invoked paragraph 7 of the working foreman language when it extended the concept to the Mobile Equipment Repair Sequence of the Internal Logistics Department.

As noted in paragraph 7, the parties could discuss expansion of the working foreman concept six months after the effective date of the 1993 Agreement. However, Bob Cayia, Manager of Union Relations, testified that the concept was not implemented in Field Forces/IRMC immediately following the effective date of the 1993 Agreement and that the Company wanted six months of experience with the working foreman concept before it considered expansion. Cayia said he called Mike Mezo sometime in the third quarter of 1994 to discuss expansion of the concept. At the time, Mezo was President of Local Union 1010 and the fourth step grievance representative.

Cayia said the conversation with Mezo was short. He said they compared notes about how well the working foreman concept had been working and then Cayia told Mezo that the

Company wanted to expand it to other departments. Cayia said he asked Mezo how the parties could take advantage of paragraph 7. Cayia said Mezo replied that if the area griever and the department manager were in agreement on the concept, that would be sufficient. Cayia said he also asked Mezo about implementing the concept in non-craft sequences and that Mezo again replied that all that was required was agreement between the griever and the manager. Cayia said that "in my mind" the conversation meant that a "simple acquiescence" between the griever and the manger was enough to expand the concept. He also said that this was true only in those instances in which the parties wanted to adopt the concept as spelled out in the Mega Maintenance Agreement language quoted above. If those terms were to be varied, a written agreement would be required. Cayia also noted that the Mega Maintenance language does not say that a separate written agreement is required to expand the working foreman concept to other departments.

Mezo testified that he does not recall the conversation with Cayia, though he had no doubt that there was one since, as he put it, "Bob does not make things up." However, he said that Cayia's reference to his take on the conversation – "in my mind" – suggested that he had heard what he wanted to hear. Mezo said that if Cayia asked what it would take to expand the concept, he (Mezo) would have replied that agreement between the griever and area manager would suffice. However, Mezo said this merely meant that he, as president, would not have to get involved in the negotiations; it did not mean that a griever had the right to amend or waive the terms of the collective bargaining agreement. Mezo said that the procedure in the Local Union for obtaining mutual agreements was that the griever had to want it and the affected employees had to vote. In addition the agreement could not violate any Union policy. But such process,

Mezo said, did not obviate the need for a mutual agreement, signed by a representative of the International or the fourth step representative.

Mezo testified that in his experience with the Local Union, every time there has been an amendment to or an abridgment of the CBA, it has been signed by the fourth step representative of the Union. Although he said he did not remember the conversation testified to by Cayia, Mezo said he did not and could not have delegated authority to a Local Union griever to amend the contract entered into between the International Union and the Company. Moreover, Mezo said there was no way he would have agreed to extend the working foreman concept to non-craft forces in 1994, since there were production employees on layoff at the time.

Mezo went through various provisions of the CBA that provide for amendment or variation from its terms. Included was language in Article 2 which allows local working conditions to develop that are not in conflict with the CBA. If local working conditions do modify the CBA, then they must be agreed to in writing by the Manager of Union Relations and an International Officer of the Union. Mezo also reviewed the authority of grievers, which the Union says does not include the power to amend the CBA. In addition to the contract provisions, Mezo asserted that the history between the parties indicated that the approval of the International or the fourth step representative was necessary to modify the terms of the Agreement.

Mezo also denied that, as fourth step representative, he would have had the right to delegate his authority to a griever. He did not deny that grievers may have made agreements not to enforce the prohibition against supervisory performance of bargaining unit work "for a period of time." He said that the Union would not always be aware of such agreements and that, even if it was, it might have no interest in policing them. But he denied that grievers could modify the

contract by agreeing generally to adopt the working foreman concept in a particular department. Rather, the International would have to approve any such action.

In addition to the Union's claim that there was no enforceable agreement to extend the working foreman concept beyond the terms set forth in the Mega Maintenance Agreement, the Union also contends that there was a short term trial period adopted in the Mobile Equipment Repair shop that expired after a year. There is no dispute between the parties that the working foreman concept was put into effect in the Mobile Equipment Repair shop, though there is considerable disagreement about the terms of that implementation.

Mike Misiukiewicz, who was griever in Area 20, testified that he was involved in the negotiations that resulted in a trial period for working foremen in the Mobile Equipment Repair Shop. He said that the steward for the area, Don Siefert, approached him about the idea in 1995. Misiukiewicz said he asked Mezo about it, who told him that if he and the department manager could agree to terms, they could do it. Misiukiewicz said he was concerned about the selection-deselection process provided for in the Mega Maintenance language. He therefore told Lou Pisani and Robert Hynes that he would agree if they could change the language. They said they could not change it, but asked Misiukiewicz if he could agree to some of the candidates. Discussion about the candidates followed with the parties developing a list by early 1996. At that point the Company wanted to go ahead, but Misiukiewicz said he was still concerned about the selection-deselection process.

Ultimately, Misiukiewicz said he understood that the parties would agree to implement the concept for one year, with him having stronger selection-deselection rights than were provided for in the Mega Maintenance language. He said Pisani agreed to this, though Pisani told him he

couldn't get out of the agreement for political reasons. Misiukiewicz put the agreement to a vote in the department, which was a tie. Misiukiewicz said he agreed with Pisani to go forward for one year on a trial basis, with "no signatures." He also said that their agreement differed significantly from the Mega Maintenance terms. It went into effect in April, 1996.

Misiukiewicz said Pisani approached him in March, 1997, when the one year agreement was about to expire, and asked about the agreement.[1] Misiukiewicz said he was still not satisfied with the selection-deselection process, so he would terminate it. However, he suggested that they wait until after the upcoming griever elections. Misiukiewicz lost that election and his replacement notified the Company of his intent to terminate the agreement in June. By that time, however, the Company claims it was too late to do so.

In addition to Misiukiewicz, the Union called steward Don Siebert, who reviewed his notes from the negotiation process. They indicated a meeting in which the parties agreed to a one year trial and a meeting in which Siebert's notes say "boilerplate language 1 yr trial after 1 yr. Pullout option." The Company points to the term "boilerplate" as an indication that the parties agreed to a one year trial of the Mega Maintenance terms. Siebert said he wrote down the word "boilerplate" because it was used in the meeting and he did not know what it meant. Siebert was the one who apparently gave Section Manager Clinnin notice that the Union wanted to pull out of the agreement. He said that Clinnin replied that Siebert did not have the authority to do so, but that the griever did. At that point, the griever called and withdrew and the Company stopped scheduling the working foreman in the department.

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[1] The Company said that Pisani would not have approached Misiukiewicz in March, 1997, since his term in the department ended in December, 1996 and Clinnin took his place.

Craig Lamm testified that he was a Human Resources Generalist with what is now Internal Logistics at the time at issue in this case. He said that he was involved in the discussions that led to implementation of the working foreman concept in the Mobile Equipment Repair shop. Unlike the Union, he asserted that there was no variation of the terms included in the Mega Maintenance Agreement. Moreover, he said the Union's right to pull out after the one year trial period was limited. He agreed that Misiukiewicz was uncomfortable with the selection-deselection procedures of the concept. Thus, Lamm said the parties agreed to install the concept for a one year period and that if there were any problems with the Mega Maintenance terms, the Union was free to withdraw. However, he said he cautioned the Union negotiators that they could not withdraw over "political bullshit issues." Moreover, Lamm denied the Union's contention that it had to affirmatively inform the Company if the agreement was to continue after one year. He said his understanding was that if the Union did not withdraw at the end of the trial period, then it could not subsequently revoke.

Section Manager Clinnin testified that when he took over the maintenance functions of the Mobile Equipment Repair Shop in January 1997, the working foreman concept was in place. His records indicate that the working foreman was first scheduled in the department in April, 1996. Clinnin said he was not aware that of any trial period when he began supervising the department. He also said the Union raised no issue about the concept until June of 1997, when the griever said he wanted to discontinue it. Clinnin said he asked the steward (apparently Siebert) why the Union wanted to discontinue the concept, but got no response.

Clinnin said he stopped scheduling the working foreman in Mobile Equipment Repair about two weeks later. He said he did so even though Union Relations advised him that the Union

had no right to withdraw. It was at this point, he said, that he first learned of the trial period. Clinnin said he stopped scheduling a working foreman because at the time there were three employees who were regularly scheduled. Two of them – who were the ones assigned to the Mobile Equipment Repair shop – told him they felt pressured to stop and said they no longer wanted to be scheduled. The third employee was in No. 3 Cold Strip, though Clinnin said he supervised employees in the Mobile Equipment Repair Shop. He continued to schedule that employee, but stopped scheduling the other two. The Company says that it is not required to scheduled working foremen and that, therefore, no inference can be drawn from the fact that Clinnin stopped scheduling the occupation in the Mobile Equipment Repair Shop. Clinnin began scheduling working foremen in the Mobile Equipment Repaid Shop again in the fall of 1998. It was that action that led to this grievance. Clinnin said he did so because early retirements left him short of supervisors.

The No. 3 Cold Strip employee referenced by Clinnin was John Origel, a member of the No. 3 Cold Strip sequence. Union witness Daryl Reed was griever for No. 3 Cold Strip West from 1991 to 1998. He testified that Origel was a motor inspector in the mobile equipment satellite in No. 3 Cold Strip West. Reed said the Company approached him about using Origel in No. 2 Cold Strip which also was a Satellite of the Mobile Equipment Repair Shop. Because of his expertise, the Company had been moving Origel back and forth and Origel had objected. The resolution was to pay him the working foreman wage while he was working at No. 2 Cold Strip. Reed said there was no agreement to actually have him work as a working foreman or to incorporate the working foreman concept from the Mega Maintenance Agreement. It was simply a "special agreement" to pay Origel for the way he was being used.

The Company did not rebut Reed's testimony concerning the agreements that led to Origel's designation as a working foreman. However, on rebuttal, Clinnin said that Origel was actually responsible for being a working foreman and he pointed out that he was on the list of agreed-to candidates dated April 12, 1996 (about the time the concept was implemented) and headed "Authorization to Pay Working Supervisor Positions."

The Company also contended at the hearing that the working foreman concept from Mega Maintenance had been instituted without a written agreement in Plants Electrical General, Trucking Mechanical, and the locomotive shops. Siefert testified that there is no working foreman in the locomotive shop, though there is an hourly foreman there. Clinnin said the hourly foreman in the locomotive shop has also worked as a working foreman. On rebuttal, two Union grievers said they had never agreed to the working foreman concept in the locomotive shop.

The Union says the Company's case depends on a brief conversation between Mezo and Cayia which would, in effect, delegate to grievers the right to amend a contract negotiated between the Company and the International Union. It points out that the language in the Mega Maintenance Agreement does not allow the Company to implement the concept any place but Field Forces/IRMC. A decision to expand the concept and further limit the application of Article 13, Section 14 requires the approval of the International Union. In the alternative, the Union argues that the concept was implemented only for a trial period and that the Union properly ended it in June, 1997. The Company could not thereafter reimpose it unilaterally.

The Company argues that the Union's case tries to depict Misiukiewicz as a "rogue griever" who tried to amend the collective bargaining agreement without the knowledge of the International or Local Union leadership. The Company says that the implementation of the

concept was open and notorious and did not require a written agreement. It asserts that it had already paid for such a written agreement once – in the Mega Maintenance Agreement – and should not have to do so again. Nothing in the Mega Maintenance Agreement required that the parties execute another mutual agreement to expand the concept. The Company also says the concept has been implemented in other areas without a writing, which indicates that the Union recognized no further action was necessary.

Findings and Discussion

I understand the Company's claim that no further writing should be necessary if the parties merely wish to expand the Mega Maintenance working foreman concept to other areas of the plant. The terms have already been worked out and the Mega Maintenance Agreement itself contemplates the possibility of expansion. But the scope of the agreement is every bit as important as the terms that will govern the use of working foremen. Article 13, Section 14 is not ambiguous. The parties have clearly understood it to mean that, with few exceptions, supervisors will not perform work ordinarily done by members of the bargaining unit. An agreement to limit the application of this unambiguous language is clearly an amendment to the Collective Bargaining Agreement and, as such, needs to be made with the contracting party – the International or the fourth step representative.

In the ordinary case, the Company does not really question the Union's assertion that such an amendment should be in writing. Here, however, it offers two alternatives. First, that there is a writing, embodied in the terms of the Mega Maintenance Agreement; second, the International acquiesced in the amendment and is not now free to challenge it. By this latter argument, the

Company does not mean that it is free to act unilaterally and force the Union into a discovery of its conduct. Rather, in this case the Company says that the working supervisor concept was implemented with the permission of a Local Union official and that it continued to operate for an extended time without objection from the Local or the International.

I have no doubt that there was a conversation between Cayia and Mezo and I have no doubt that Mezo told Cayia that an agreement between the griever and the department manager would suffice. Moreover, I have no doubt that Cayia understood this to mean that no writing was required and that he advised management – including, no doubt, the Mobile Equipment Repair Shop – in accordance with this belief. But I also credit Mezo's testimony that this meant only that he, as fourth step representative, did not need to get involved in the negotiations. I understood this to mean that if the affected employees and the griever wanted the working foreman concept, he had no interest in interfering (save, perhaps, in non-craft occupations). But that does not mean he agreed that an oral agreement from the griever was enough to modify the contract. The parties still had to go through the exercise of reducing their agreement to writing and having it signed by the appropriate official.

Indeed, this case shows the difficulties of trying to amend a legal document that runs to almost three hundred pages on the strength of oral agreements between local grievers and managers. The parties agree that there was a trial period in the Mobile Equipment Repair Shop, but they disagree (credibly, in my view) about the terms of that agreement. The parties agree that Origel is paid as a working foreman, but they disagree about whether he was ever designated as such and about whether the working foreman concept was ever adopted in No. 2 Cold Strip. The parties agree that there is an hourly foreman (as opposed to a working foreman) in the locomotive

repair shop, but they disagree about whether there was ever an agreement to allow that individual or anyone else to act as a working foreman. This is not to suggest that a written document can never be amended orally. But I cannot accept the Company's claim that the parties could override an express condition of the contract as casually as the Company claims in this case. I recognize that the Mega Maintenance Agreement spells out the terms under which the working foreman concept would be applied in Field Forces/IRMC, but I repeat my finding, above, that the scope of their application is of equal importance. If the concept was to be extended, this was a further amendment of the CBA that required formal action between the Company and the International Union.

I need not decide the circumstances under which the Company's "open and notorious" usage argument might work an amendment to the Agreement. Although Mezo may not have known about the one year trial period in the Mobile Equipment Repair Shop, I find it hard to believe that it escaped the notice of all other high-ranking Union officials. But that fact does not help the Company's case. Although they disagree about the terms, both sides understood that the agreement was to incorporate the concept for a trial period. And, despite the spin of both parties, I am not able to find that there was a firm understanding about whether an affirmative act was necessary either to end or extend the use of a working foreman. I believe that Lamm thought the Union had to do something to end it, but I also believe that the Union thought the trial period did not expand to a permanent agreement merely because it did not say anything on the day of

expiration.[2] In fact, there is no general understanding in law or labor relations that trial periods end automatically or continue by default.

I need not decide exactly what the parties' understanding was. The importance of the trial period is that both parties recognized that the use of the concept in the Mobile Equipment Repair Shop was something of an experiment, though, admittedly, the Company may have believed that there was less to be proven that did the Union. In any event, since the parties had entered into what both sides called a trial period, Union leadership could have understood that it did not need to worry about a written agreement to amend the collective bargaining agreement. That point would be reached only as the trial period grew to a close and the question of permanent extension faced the parties. In short, the Company cannot agree that the extension of the working foreman concept was part of a trial period and then say that it was open and notorious and that the Union failed to object. Since there was at least some ability to terminate before the expansion became permanent, there was no need for the Union to object. In effect, the parties had not yet agreed to modify the contract, but merely to experiment by not enforcing its terms for a limited period of time. The modification could come about if the trial period was a success.

I find, then, that paragraph 7 of the language from the Mega Maintenance Agreement, quoted above, does not permit the Company to expand the concept to other departments without

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[2] And, of course, this Union belief could have been reinforced by the fact that Clinnin, in fact, did terminate the use of working foremen when the Union demanded he do so, except for Origel. The weight of the evidence suggests that there was some special understanding about Origel, so the fact that the Company's continued to list him as a working foreman is not necessarily evidence that the concept really continued. It is true, as the Company claims, that Clinnin was not required to schedule working foremen. But that misses the point, which is that he did not stop doing so until the Union said it revoked its permission. Moreover, even though he said credibly that the existing working foremen did not want to continue, there was no evidence that he looked for any others.

a written agreement signed by the fourth step representative and that the Company had no right to reinstate the working foreman concept in the Mobile Equipment Repair Shop in October 1998. There are two grievances in the record, both of which ask for make-whole relief. One of them references the "penalty" if supervisors perform bargaining unit work. This apparently refers to language from m.p. 13.77.6, which says that if a supervisor performs bargaining unit work, and the employee who would have performed the work is identified, the Company shall pay for the time or for four hours, whichever is greater.

As is not atypical in cases between these parties, there is not sufficient information in the record from which to devise a remedy. The record merely indicates that the Company reinstituted the working foreman concept in the Mobile Equipment Repair Shop in October 1998. It does not indicate the number of working foremen or the frequency of assignment. In its final argument, the Company urged that no monetary remedy was appropriate because the working foremen worked more as bargaining unit employees than as supervisors and because there was no one laid off from the shop. Actually, there was no evidence about the split between bargaining unit and supervisory duties, though the Union did not offer any rebuttal to the Company's assertion that no monetary remedy was appropriate. Nor did it mention the issue of remedy in either its opening statement or its final argument.

My impression is that in this case the Union merely sought a declaration about whether the Company had the right to expand the working foreman concept without a written agreement from the Union. However, these parties often do not address the remedial issue in interpretation cases. Moreover, if a make-whole remedy is deemed appropriate, they typically solve the remedial issues without further arbitral intervention. Given the history, I cannot find that the absence of evidence

or argument about the remedy means that the no monetary remedy is appropriate. But because the Union did not ask for a make-whole remedy, I will not issue such an order. Rather, I will remand the remedial issue to the parties. If they cannot solve it, they can resubmit the issue to arbitration, including the question of whether any remedy is appropriate.

AWARD

The grievance is sustained. The issue of whether a monetary remedy is appropriate is remanded to the parties as explained in the last paragraph of the Findings.

Terry A. Bethel
June 26, 2000

IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

and Inland Supplemental Award 971

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This is a supplemental proceeding limited to the proper remedy for Inland Award 971, issued on June 26, 2000. The hearing was held in the Company's offices in East Chicago, Indiana on July 19, 2000. Pat Parker represented the Company and Dennis Shattuck presented the case for the Union. The parties submitted the case on final argument.

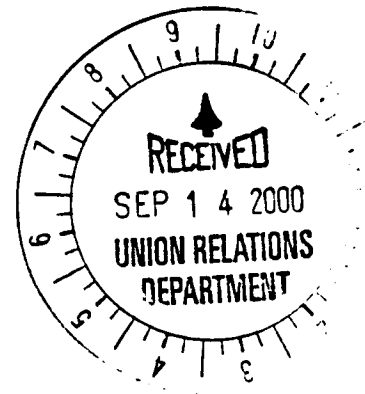
Appearances:

For the Company:

P. Parker.....Section Mgr., Arbitration and Advocacy
P. Clinnin..... Section Mgr., Internal Logistics
J. Van Buren...Student Intern

For the Union:

D. Shattuck.....Chairman, Grievance Committee



G. Busick.....Griever
D. Siefert.....Steward
S. Peterson.....Witness
W. Thompson.....Witness
G. Smith.....Witness
J. Stewart.....Witness
E. Engelson.....Witness.
M. Boon.....Witness
D. Jamroz.....Witness

Background

This case concerns the remedial issue left open in the opinion issued in Inland Award 971, issued on June 26, 2000. In that case, the Company and Union had agreed to a Mega Maintenance Agreement that included a working supervisor concept for the field forces/IRMC. They had also agreed that the concept could be expanded following a period of six months. The Union Relations Manager and the Local Union President discussed the matter and the Company believed that the result of that conversation was an agreement that the working supervisor concept could be expanded by verbal agreement of the department management and the griever. Thus, the Company expanded the concept to the mobile equipment repair shop following discussions with and agreement from the appropriate griever. The terms of that agreement were contested, though both sides acknowledged that the initial approval was for only a trial period. One issue in Award 971 was whether the trial period had become permanent. Ultimately, I found that the Collective Bargaining Agreement could not be amended by an oral agreement with area grievers but, rather, only by the written action of the Union's fourth step representative. This meant that the Company's action in expanding the working supervisor concept to the mobile

equipment repair shop had been improper. The Company stopped scheduling working supervisors in the sequence promptly on receipt of the decision.

In the Opinion in Award 971, I noted that the Union had requested make-whole relief at points in the grievance procedure, though it had requested no specific relief in the hearing itself. In cases in which the Union requests make-whole relief and prevails on the merits, the practice often followed by these parties has been to have the case remanded for determination of the appropriate remedy. In almost every case in which I have remanded the remedial issue, the partes have been able to agree on the details or, at least, they have not re-submitted the remedial issue to arbitration. In this case, however, the parties disagree about whether any monetary remedy is appropriate. In particular, the Company urges that Section 13.14 of the Agreement has no application to these facts. The Company does not contest Award 971 on the merits, at least not in this proceeding. However, it asserts that even if Award 971 correctly found that it had improperly used the working supervisor concept, the remedy provided in Section 13.14 for supervisory performance of bargaining unit work is inapplicable in this case.

The applicable language from Section 13.14 is found in marginal paragraph 13.77.6, which reads as follows:

> If a supervisor performs work in violation of this Section 14 and the employee who otherwise wold have performed this can reasonably be identified, the Company shall pay such employee the applicable standard hourly wage rate for the time involved or for four (4) hours, whichever is greater.

There is no question that this language applies to regular supervisors appointed by the Company. It also applies to temporary or hourly supervisors (foremen). The parties use the terms temporary supervisors (foremen) and hourly supervisors (foremen) interchangeably. By contrast,

working supervisors (foremen) were created under the Mega Maintenance Agreement (MMA). The remedial language of Section 13.14 does not apply to them. The MMA specifically allows them to perform both supervisory and bargaining unit work. However, in Award 971, I found that the Company had no right to expand the working supervisor concept to the mobile maintenance repair shop. The Union reasons, then, that since the employees at issue in Award 971 were not actually working foremen, they must have been temporary or hourly foremen. As such, the Union asserts that the Company must pay the penalty outlined in Section 13.14.

The Company mounts a number of defenses. First, it asserts that it operated from October, 1998 until the time of the decision in Award 971 (June, 2000) with a "colorable claim" that it had a right to expand the working foreman concept to mobile maintenance. I understood this to mean not only that the Company had acted in good faith, but also that it believed that the appropriate Union officials had entered into the requisite agreement. The Company says it would be unfair to penalize it under these circumstances. The Company also points out that even though Award 971 found that there was no right to expand the concept, the Company had nonetheless operated under the terms and restrictions of the Mobile Maintenance Agreement. Thus, because it considered the employees to be working foremen, it had somewhat less flexibility than it would have had if they had been hourly foremen.

The Company says that the Union's decision to delay the hearing in the case for a year and a half increased the potential damages, which it figures could run between $180,000 and $360,000. But, the Company argues, there has actually been no harm suffered by any employee. No employee was laid off as a result of the decision to use what the Company thought were working foremen. Moreover, it says overtime increased, partly because of the use of working

foremen, since their supervisor duties increased the demands on the remaining employees. And, the Company argues, the Union is unable to point to any specific instances in which the employee at issue performed bargaining unit work. In the typical case, the Union grieves specific instances and, if the facts demonstrate a violation, the Company pays the employee who would have performed the work. But there is no such evidence in this case, which makes it difficult to determine who the affected employees were.

The Union introduced testimony from several employees who had been working foreman and who accepted positions as temporary foremen after the issuance of Award 971. In each case, the employees said they performed the same supervisory duties in each position. One employee, in fact, testified that he had more supervisory responsibility as a working foreman than he has as a temporary foreman. Most of the employees – though not all of them – testified that they performed bargaining unit duties while they were working foreman. Most of them said they did so on a daily basis and others said it was less frequent. The Union argues that these facts are sufficient to demonstrate that a remedy is warranted. It suggested that I could order a monetary remedy and remand the case to the parties to discuss the appropriate amounts. However, the Company objected that this proceeding was to resolve the remedial issue.

The Union says that at least four hours pay are due to someone in the bargaining unit every time a working foreman performed bargaining unit work. Since a majority of the working foremen performed such work every day throughout their tenure, the Company should pay a minimum of four hours for each working supervisor for each day over the approximately twenty-one months those working foremen were scheduled. The Union also says that neither actual harm nor mitigation are factors under the formula in Section 13.14. Rather, the parties agreed that

when the Company improperly worked a supervisor on bargaining unit work, the minimum penalty applied was to be four hours pay. That remedy, it says, is appropriate in this case. Finally, the Union says that if a monetary remedy is appropriate, the incentive plan should also be recalculated to exclude the hours of the employees at issue.

Findings and Discussion

The Union's argument for application of 13.77.6 depends on its claim that, because the employees at issue were not actually working foremen, they must have been temporary foremen. And, the Union says, the Company would be liable if it had assigned temporary foremen to do bargaining unit work. There is no doubt that the Company vested the employees at issue here with the authority to do supervisory work. But I have difficulty concluding that their concurrent performance of bargaining unit work was the kind of problem the parties were concerned with when they negotiated 13.77.6

Despite its mention of identifying a particular employee who would have performed the work, I do not understand Section 13.77.6 to be limited merely to individual remedies. Rather, it seems clear that the parties intended this section to enforce the distinction between supervisors on the one hand, and bargaining unit employees on the other. The penalty imposed by mp 13.77.6 is in the nature of liquidated damages and its use does not necessarily require a showing of actual loss. Such damage provisions are intended to provide compensation, but they also serve to discourage the Company from using supervisors on bargaining unit assignments. In particular, the purpose of 13.77.6 was to insure that bargaining unit work was not eroded by allowing the Company to assign it to non-bargaining unit employees. This is the reason for the four hour

penalty, which is obviously intended to make even minor violations expensive enough so that they are avoided.

In applying fixed damage awards regardless of actual harm, like those in 13.77.6, it is important to insure that the application is warranted by the circumstances at issue. In particular, in this case it is important to determine whether the Company's conduct was of the sort the parties intended 13.77.6 to discourage. What happened in this case seems to me not to invoke this policy. The Company did not assign bargaining unit work to its supervisory force, whether regular or temporary. That is, it did not tell employees who it knew were ineligible to do so to work alongside bargaining unit employees. Rather, it assigned supervisory duties to some bargaining unit employees, believing – erroneously as it turned out – that the Union had agreed to the assignment. The Company, then, did not attempt to circumvent the policy of Section 13.14 by diverting bargaining unit work to employees who were not eligible to do it. And the Company did not necessarily regard the employees at issue principally as supervisors, a fact demonstrated by the Union's evidence in this case. Thus, almost all of the employees testified that they performed bargaining unit work on a daily basis. Moreover, the Company continued to rotate the employees in accordance with rules that applied to the bargaining unit, but not to the supervisory work force. It seems clear, then, that the Company regarded them as hybrid workers with a dual function. This was not, in short, a situation in which the Company's supervisory work force intruded on work reserved for bargaining unit employees. In these circumstances, I find that the employees in question were not temporary foremen, that application of mp 13.77.6 would be improper, and that no monetary remedy is appropriate.

I do not mean to suggest that the Company's action was proper. I have already found, in Award 971, that it had no right to expand the working foreman concept to mobile equipment repair, despite the fact that its actions were taken in good faith. The issue here, however, is not whether the Company's action was improper but, rather, what response is necessary to remedy the violation. I have already ordered the Company to cease using working foremen in the affected areas and it has complied. And, obviously, a resumption of the practice of assigning bargaining unit work to those with supervisory authority would subject the Company to the penalty provided in 13.77.6. But in the circumstances of this case, I find that imposing the penalty would be improper.

AWARD

No monetary remedy is appropriate for the for Inland Award 971.

Terry A. Bethel
September 8, 2000