AWARD 972

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