IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

and Award No. 976

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the Union's claim that the Company violated marginal paragraph 13.68 of the Agreement when it terminated the employment of grievant Annette Simmons. The case was tried in the Company's offices in East Chicago, Indiana on November 20, 2000. Pat Parker represented the Company and Mike Mezo presented the case for the Union. The parties submitted the case on final argument.

Appearances:

For the Company:

P. Parker.....Section Mgr. of Arbitration and Advocacy
K. Koch.....Senior Rep., Personnel Services

For the Union:

M. Mezo.....USWA Staff Representative
D. Shattuck.....Chairman of Grievance Committee

D. Reed.....Secretary of Grievance Committee
A. Simmons.....Grievant

Background

The facts are not in dispute. Grievant was laid off for lack of work on January 11, 1991. She remained on layoff for a period of more than seven years, until her recall on March 9, 1998. At that time, however, grievant was not able to return to work because of a medical disability. The Company says it took about two months to determine whether there was any work at the plant available to grievant. When it was determined that there was no job she could perform consistent with her medical restrictions, she was terminated. The Company took this action pursuant to its interpretation of language in Article 13, the seniority provision of the Agreement. That provision – mp 13.68 – contains some language that is somewhat confusing and which is not at issue in this case. For ease of reference, I have summarized the confusing portion in brackets. The provision reads as follows:

> ...if an employee shall be absent because of layoff or physical disability, he/she shall continue to accumulate seniority during such absence for two (2) years, and for an additional period [of up to three years, depending on length of service]. Any accumulation in excess of two (2) years during such absence shall be counted, however, only for purposes of this Article 13, and shall not be counted for any other purpose under this or any other agreement between the Company and the International Union or Local Unions. **Notwithstanding the foregoing, an employee hired prior to August 1, 1993, who is absent because of layoff shall, without regard to his/her length of continuous service accumulate service during the term of the 1993 Agreement exclusively for purposes of recall....** (Bold lettering added)

The parties agree that the interpretation of this language is the only issue in the case.

The bold language in the above quotation was added by the parties in their 1986 negotiations, though, of course, in that Agreement the reference was to the 1986 Agreement.

Except for that change, there have been no relevant modifications to this paragraph since 1960. The parties also agree that the Company correctly interpreted the language prior to 1986. In brief, from 1960 through 1986, the Company added the periods of disability and layoff together and, if they exceeded five years, an employee who was unable to return either because of disability or because there was no work available, was terminated. The Union, however, says that the 1986 amendments, highlighted above, restricted the Company's ability to terminate an employee on layoff and, it claims, that is what happened in this case.

After 1986, the Union says, an employee on layoff could not be terminated for the life of the Agreement, a restriction included in the 1986, 1989, and 1993 Agreements.[1] As of that time, then, the Union says the Company could no longer "overlap" periods of absence for layoff and disability. Although recall rights for the life of the Agreement do not extend to employees off work for disability, and although those employees can be terminated after five years, a period of layoff cannot be used to help complete that five year period. But that, the Union says, is exactly what the Company did here. Grievant initially left work in 1991 because of layoff and the Company did not know that she was disabled until it recalled her in March of 1998. Nor is there any evidence that grievant was disabled before that time. Consistent with the language added in 1986, the Union says the Company cannot use any portion of grievant's layoff period in calculating the five year period for which she is protected as a result of her disability. Although it did not expressly say so at the hearing, the Union's apparent claim is that grievant had a right to a

[1] The Union's argument is not quite that broad, since it acknowledges that, under the 1993 Agreement for example, an employee hired after the effective date of the Agreement is not protected. That limitation, however, does not apply to grievant and need not be considered in this case.

five year period of disability beginning in March, 1998, when she was first unable to work because of disability. At least, the Union says that no period of her layoff can be used in calculating that five year period.

The Company reads mp 13.68 differently. It notes that the provision begins by saying that employees shall continue to accumulate seniority for a period of five years when they are absent "because of layoff or physical disability." The addition in 1986 said that employees who are absent because of layoff will continue to be protected during the life of the Agreement. But when the Company attempted to recall grievant in 1998 and found that she could not return, she was then no longer absent because of layoff; she was absent because of disability and therefore not protected by the new language. And, since she had already exceeded the five year period for which employees absent because of disability can be protected, her employment was properly terminated, even though not all of the five year absence was attributable to the disability. The Company says the Union's interpretation effectively creates two separate tracks, one for disability and one for layoff. At least during the life of the Agreement, the Union claims that employees can never be terminated for layoff and they get five years for disability. But, the Company points out, the parties left in place the language concerning absences "because of layoff or physical disability," which suggests that they did not intend to completely abandon the previous interpretation.

Before 1986, there is no dispute that the Company combined periods of disability and layoff and terminated employees after those absences reached five years. Company Exhibit 2

includes the names of 103 employees terminated in this fashion prior to 1986.[2] The Company says that for employees unable to return because of a disability, the same practice prevailed even after the 1986 revision to mp 13.68. Thus, it says that for employees like grievant, who went off work for layoff but were later unable to return because of disability, it combined the periods of absence to satisfy the five year requirement. Company Exhibit 3 is a listing of 75 employees (including grievant) who received such treatment from 1986 into July, 2000. The Company's witness testified that the employees on this list were laid off for lack of work and, when they were recalled, were unable to return because of disability. In each case, employees who had already been off for five years or more were terminated. Employees who had been off for less than five years were maintained on the roll until the expiration of the five year period and, if they were still disabled at that time, they were terminated. The Company points out that despite this consistent interpretation of mp 13.68, the Union has never filed a grievance until now and, it says, this means that the Union has acquiesced in the Company's interpretation. .

The Union questions whether all 74 employees on Company Exhibit 3 other than grievant actually had similar circumstances. It notes that one-half of the employees were terminated on the five year anniversary of going off work. The Union says this suggests that these employees initially left work because of disability and were maintained on the employment rolls for five years, as is required by mp 13.68. In short, the Union says it is reasonable to assume that for these 37 employees, no period of layoff was considered in the five year period. However, the Company's

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[2] Actually, the exhibit includes 178 employees, since it combines employees terminated both before and after 1986. The employees terminated after 1986 are also listed separately on Company Exhibit 3. I refer to the pre-1986 names on Company Exhibit 2 only to demonstrate the practice prior to 1986.

witness said that the employees initially left work because of layoff. They were recalled a year or two or so later, only to find that they were disabled and could not return. The Company then left them on the rolls until five years had elapsed and terminated them. So, the Company argues, a period of layoff was included in their five year period.

Findings and Discussion

I must say that the Company's interpretation of the language in this case is not the most obvious reading. Even so, there is some merit to the Company's argument that, had the parties intended to create entirely separate tracks for layoff and disability, they would have done so in a in a less ambiguous manner. They did not, after all, disturb the language concerning absences for layoff or disability in the first sentence of mp 13.68. Instead, they merely added a sentence that was to apply to employees who were absent because of layoff during the term of the Agreement. I recognize, of course, that negotiating parties are sometimes loath to disturb long-settled language and that adding provisos is one way of securing additional rights. That recognition is what makes this case hard, because these parties obviously intended to protect employees who had been laid off, which was not an unusual fate in this industry in the 1980's and early 1990's.

Still, I cannot ignore the fact that at the time of grievant's termination, the Company had consistently interpreted the language in the same way for twelve years. Moreover, I thought the Company's witness plausibly explained the make-up of Company Exhibit 3. That is not to say that there may not be some employees on the list who went off work with a disability. But it seems likely to me that the vast majority of the employees on that list were in situations exactly like grievant's and the Company treated them in the same way without objection from anyone.

This means that the Company has consistently interpreted mp 13.68 to mean that periods of layoff and disability can be added together for purposes of satisfying the five year period when employees cannot work because of disability. The fact that this interpretation has prevailed for so long without challenge is a matter of great significance. I do not mean to suggest that a consistent pattern would necessarily excuse an erroneous interpretation of the contract. I need not face that issue – or the Company's latches argument – in this case because the Company's interpretation is plausible, even if not as readily apparent as the Union's. Thus, at the time of her inability to work in 1998, grievant was no longer "absent because of layoff." Rather, she was off work because of a disability. The additional language, then, was not necessarily intended to protect her. The first sentence of mp 13.68 says that periods of disability and layoff can be counted together for purposes of the five year period. Grievant was unable to return because of a disability and her absences exceeded the five year period. Therefore, under the Company's consistent, frequent, longstanding, and unchallenged interpretation, her termination was proper.

AWARD

The grievance is denied.

Terry A. Bethel
January 23, 2001