IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

and Award No. 981

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the Union's claim that the Company violated the Agreement when it required employees to work for two years as a keeper helper at No. 7 Blast Furnace before allowing them to fill vacancies as keeper. In addition, the Union argues that a 1997 settlement agreement with the griever was a local seniority agreement and, as such, had to be signed by the Union's fourth step representative. The case was tried in the Company's offices in East Chicago, Indiana on February 21, 2001. 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 Manager of Arbitration and Advocacy
B. Black.....Section Manager, No. 7 Blast Furnace
C. Lamm.....Staff Representative, Union Relations

For the Union:

D. Shattuck.....Chairman of Grievance Committee
M. Mezo.....USWA Staff Representative
F. Godinez.....Griever
W. Reeves.....Witness

Background

The facts are not really in dispute. There are two grievances involved in the case. As the parties narrowed the issue at the hearing, the question before me is whether these two grievances are controlled by a settlement of another grievance, 31A-97-07, which protested that two grievants had not been moved up to the keeper job in the blast furnace for a week in October of 1996. The Company denied the grievance arguing that the grievants had not completed the training program, which involved working for two years as a keeper helper. The grievance also protested that the grievants were denied training for the keeper job, but the Company said two year's experience as a keeper helper was necessary before an employee could receive such training. The grievance was settled in the second step with the following understanding:

> The Company and the Union recognize that the experience and training needed to safely perform the keeper position requires significant experience at the keeper helper level. This need for experience has already been acknowledged by the parties through specific language to post internally for keeper helpers as stated in Article 13, paragraph 6. The Department contends and stipulates that employees assigned to the keeper helper position must have two continuous years of work experience at that level and successfully complete the keeper training prior to performing the keeper job. Experience is defined as working in the keeper helper position.
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> However, the Union and the Company recognize the provisions of Article 13, Section 6 of the collective bargaining agreement and the rights of senior keeper helper to fill **permanent** vacancies in the keeper position. A senior keeper helper who is entitled to a promotion, but who has not met the training and experience requirements stated above, will be paid as keeper and shown on the seniority listing as such. Employees in this situation will continue to gain experience and work as a keeper helper until prepared to fully perform the duties of the keeper position.
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> **Temporary** vacancies at the keeper level will be filled by the most senior keeper helper who has met the training and experience requirements stated above. Any keeper helper who is entitled to a

temporary vacancy promotion to the keeper position, but who is denied due to the stated training requirements, will be paid as keeper for said vacancy.

Based on this understanding, the grievance is granted. (Emphasis in original)

The settlement, reached in August of 1997, further recited that the two grievants who had claimed the right to temporary vacancies were entitled to be paid as keepers for the week in dispute. The parties agree that this settlement was reached at the second step, where the Union was represented by a griever. The fourth step representative at that time – Mike Mezo, Local Union President – was not involved in the case.

While Grievance 31A-97-07 was pending in the grievance procedure, another grievance was filed raising the same issue. This was Grievance 31-V-30. Like the other case, this grievance protested the Company's refusal to promote an employee to the keeper position prior to the completion of two years experience as a keeper helper. The Company denied this grievance, asserting that the issue had been resolved with the settlement of Grievance 31A-97-07. Subsequently, another grievance was filed – Grievance PW-V-72 – again raising the same issue. As it did with Grievance 31-V-30, the Company denied Grievance PW-V-72 because it argued that the issue had been resolved with the binding settlement of 31A-97-07. Grievances PW-V-72 and 31-V-30 are at issue in this arbitration. The only issue the parties asked me to decide in this proceeding is whether the settlement of Grievance 31A-97-07 was a Local Seniority Agreement that required the consent of the fourth step representative. If not, then the settlement is binding on the two grievances at issue here. However, if it is, then the parties may have a continuing dispute about whether the Company can require two years of service as a keeper helper before an employee can promote to keeper. That issue was not presented in this arbitration.

The Union argues that the grievance settlement at issue here was, in reality, a Local Seniority Agreement under Section 13-d and, as such, is invalid because it was not approved by the Union fourth step representative, who would have been Mr. Mezo. The provision to which the Union refers is found in mp 13.35. It says that the griever and the department manager can agree to fill vacancies in ways other than those provided in paragraphs a, b, and c of Article 13, Section 6. However,

> any such agreement to be valid and enforceable, must not unnecessarily restrict transfer and promotional rights provided by this article, be in writing and signed by the manager and the grievance committee person involved **and approved in writing by the Union Step 4 representative and the Manager of Union Relations**. (Emphasis added).

The Union argues that there can be no doubt that the grievance settlement at issue here – which the Union says is what established the two year requirement – was a Local Seniority Agreement since it changed the procedure for filling vacancies in Section 6-a, b, and c. And, since it was not signed by Mezo, the fourth step representative, the settlement could not have had the effect of changing the promotional rights of employees not actually involved in the grievance.

Union witness Mezo explained the Union's contention in this case. Article 13, Section 6-a covers the filling of temporary vacancies. There are several scenarios leading to temporary vacancies, but in most instances the vacancies are to be filled "in accordance with the provisions of Article 13." Section 6-c applies to the filling of permanent vacancies. At base, that section provides that such vacancies are to be "filled by the employee within the sequence who is entitled to the job under the provisions of this Article." In both temporary and permanent vacancies, the Union says this language means that the vacancies are to filled in accordance with Article 13, Section 1, which is headed "Definition of Seniority." The Union points out, however, that the Agreement does not merely define seniority as length of continuous service. Rather, under the

parties' Agreement, the Union says that seniority is a "concept," which includes not only length of service but also, as applied to promotional opportunity, ability to perform the work, and physical fitness.

The Union says that as the industry has become more automated, the physical fitness requirement has become less important, an argument not contested by the Company as applied to the instant case. However, the Union argues that employees are not entitled to promotions solely on the basis of length of service, but on the basis of that factor as well as ability to perform the work. Length of service controls only when ability and fitness are "relatively equal" among the employees seeking the promotion. Thus, a senior employee will not be awarded the job despite greater length of service if the junior employee has greater ability to perform the work. The Agreement also provides that management will be the judge of ability and, "where personnel records have not established a difference in abilities of two employees," the senior employee is entitled to a trial period of not less than 30 days to demonstrate that he can perform the work.

The Union says that historically, the parties have interpreted these provisions to establish that the standard for promotion is relative. The question is not necessarily whether an employee is objectively qualified, but, rather, whether he is more qualified than other contenders for the job. The most qualified contender for the job gets it, even if he is junior to the other contenders. However, if ability is relatively equal, then the employee with the greatest length of service gets the job. If the Company claims that a junior employee is the more qualified, a senior employee can contest whether personnel records establish a differential in abilities. If they do not, then the senior employee gets a trial period. The vice of the instant case, the Union says, is that the griever and the department manager decided that an employee could not be qualified to actually

do the job of keeper until he had two years' service as a keeper helper. But, the Union says, the changes the historic method of promotion, in which employees are merely judged against each other and not against an objective standard. As such, the Union says that the grievance settlement was a Local Seniority Agreement and that it cannot govern other cases since it was not signed by the fourth step representative.

During the hearing, I asked why it would matter whether employees actually worked as keepers since the grievance settlement paid them as keepers whether they did the job or not. The settlement says that senior employees who would be entitled to the promotion except for not having satisfied the two year requirement will be shown as keepers on the seniority roster and will be paid the keeper rate. Thus, there would appear to be no actual loss of income. The Union does not necessarily dispute the lack of economic consequences, but Mezo testified that the failure to actually work the job could still have a significant impact. In seniority sequences with three or more steps, an employee cannot promote to a higher job unless he works the immediately subordinate job, absent an exception not relevant here. In a three step sequence, then, an employee at level 3 could not promote to level 1 if he did not work the level 2 job. And, if there were an agreement similar to the one at issue here, an employee who could not fill temporary vacancies in level 2 could not promote to level 1, even though he might be shown as in level 2 and even though he was paid in level 2. He still would not have worked the level 2 job.

The Company points out that the sequence at issue here is only a two step sequence, so the danger pointed to by the Union does not exist in this case. But even though the Union's claim concerns the keeper sequence in the blast furnace, the Union says the issue raised by the case is broader. As discussed in its final argument, the Union's claim is that the Company cannot change

the contractual procedure for promotions merely by procuring the agreement of the griever, and this testimony concerning three step sequences was intended to reflect what might happen if the Company could do so. In addition, Mezo pointed out that the settlement agreement at issue in this case could have an impact on the two step sequence at issue here. Employees who are shown and paid as keepers, but who have not actually worked the job, might not be deemed to have the ability to perform the work for purposes of a decrease in forces. Thus, if there was a reduction, the Company might be able to argue that the senior employee who has not worked as a keeper does not have the same relative ability as a junior employee who has actually worked the job. This lack of actual work experience, then, could have an effect on the senior employee's ability to stay in the sequence, or even in the plant.

The Company argues that the Company must lose the case for either of two reasons. First, the Company says that the grievance settlement is not a Local Seniority Agreement. The Company says that for both temporary and permanent vacancies, Article 13, Section 6 says that the vacancies are to filled in accordance with the definition of seniority found in Article 13, Section 1, to which the Union also points. That definition recognizes that length of service and ability to perform the work are both factors and, importantly, it says that management is the judge of ability. Moreover, the Company says that ability has routinely been defined by management. Here, management decided – in agreement with the griever – that two years experience as a keeper helper was necessary to have the ability to do the work of a keeper. Indeed, the Company urges that it could have imposed the two year requirement unilaterally, as an exercise of management discretion to determine ability to perform the work. Thus, the Company asserts that

the settlement with the griever was not a Local Seniority Agreement since it did not modify the procedures set out in Section 6 paragraphs a, b, and c.

But even if there is a modification, the Company says that the Union's claim still must fall. The grievance procedure outlined in Article 6, Section 3 gives the griever the authority to settle grievances at the second step, in mp 6.6.2. The Company says the Agreement recognizes that such second step settlements have precedential value for future cases, an interpretation not contested by the Union. There was a second step settlement in this case, the Company points out, and it is that settlement the Company relied on to deny the two grievances at issue here. Moreover, there is no requirement that the fourth step representative sign such a settlement. Thus, the Company argues that the settlement is binding and that it controls the two grievances at issue in this case.

Discussion and Findings

The Company elected to stand on the record as developed prior to the hearing, and the evidence submitted by the Union, for its contention that the grievance settlement in 31A-97-07 was not a Local Seniority Agreement. The Company's argument, at base, is that it has the right to judge ability to perform the work and that it would not be inconsistent with Section 6-a, b, and c for it to require would-be keepers to work two years as keeper helpers. And, since the Company says that such a unilateral change would be consistent with the provisions of the Agreement, its settlement with the griever to do the same thing was not an agreement "for the filling of vacancies otherwise than as set forth in" paragraphs a, b, and c. As such, the Company says the settlement is not a Local Seniority Agreement.

The key to this argument is the Company's claim that it could have imposed a two year experience requirement unilaterally consistent with paragraphs a, b, and c. But the parties expressly agreed that I was not to decide that issue in this case. Thus, I offer no opinion about whether the Company could unilaterally impose the two year experience requirement. With respect to the two grievances at issue here, there is no evidence that the two year experience requirement had been enforced by the Company prior to grievance 31A-97-07. What the record demonstrates, then, is that the Company denied promotional opportunities to the grievants in the cases at issue here because of the grievance settlement.

Mezo testified that historically the Company had applied the qualifications element of the seniority concept by comparing the relative ability of employees, and not by measuring ability against a fixed standard. He said, in fact, that there were no other examples in which the Company had sought to measure ability for promotion purposes by requiring a fixed time period in another job.[1] The Company did not rebut this testimony. The only evidence in the case, then, supports a conclusion that, prior to the grievance settlement, employees were judged against each other, and the senior employee got the job if his ability to perform the work was relatively equal to that of the junior contenders. This is apparently how the parties understood vacancies were to be filled under Section 6-a, b, and c. Under the settlement, however, relative ability was replaced by a two year experience factor. I find that, absent proof that the Company could have imposed this requirement unilaterally without changing the procedure of paragraphs a, b and c, the Company cannot effect the change by procuring a grievance settlement with the griever. On the

[1] On cross examination, Mezo agreed that there is a break in period for employees on new jobs. But he said that was for familiarization with the job and was not used to establish ability to perform the work.

record of this case, there is no way to avoid the conclusion that the settlement in 31A-97-07 changed the historic way in which promotional opportunity had been afforded to employees under the Agreement.

The Company urges, however, that is makes no difference whether the agreement to change the manner of filling vacancies was signed by the fourth step representative, because it was a grievance settlement under Article 6, and second step settlements have precedential force. This argument misperceives the effect of this settlement. The Union has not claimed in this case that the settlement was ineffective to resolve the dispute in 31A-97-07. It may be that a griever's decision to settle a particular dispute typically has precedential force in like cases. But this settlement clearly was not intended by the parties merely to resolve the dispute in 31A-97-07. Rather, on its face it purported to set rules that would be followed in the future for promotions, something the Company had agreed it could not do unless it procured the consent of the fourth step representative. A griever's decision to settle a case and not advance it beyond the second step of the grievance procedure does not mean that he acted with the authority of the fourth step representative, who may not even have been aware of the case. Second step settlements may typically have precedential effect, but grievers cannot usurp authority that is expressly denied them by the Agreement itself. Moreover, the Company may not substitute a griever's signature for that of the fourth step representative in situations in which it has expressly agreed that the fourth step representative must consent.

I will sustain the grievance in the instant case. The parties agreed that in this case they did not want me to address their continuing dispute about whether the Company can unilaterally

impose a two year experience requirement for keepers. On the record of this case, then, the grievance will be sustained and the grievants are entitled to make-whole relief.[2]

AWARD

The grievance is sustained. The grievants are to provided make-whole relief.

Terry A. Bethel
March 27, 2001

[2] It seems likely that there will be little, if any, monetary relief, since the Company apparently paid employees as keepers, whether they worked the job or not. If there is any lost income, the make-whole award will restore the loss to the employees. Even without lost income, however, the case is not moot because of Mezo's testimony that the loss of an opportunity to work as a keeper could have affected an employee's ability to protect his standing in the sequence in the event of a reduction in force.