IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

And Award 1009

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the Union's claim that the Company violated a local working condition when it raised the price of a replacement identification badge from $6 to $50. The case was tried in the Company's offices in East Chicago, Indiana on May 20, 2003. Pat Parker represented the Company and Bill Carey presented the case for the Union. There were no procedural issues. The parties submitted the case on final argument.

Appearances

For the Company:

P. Parker.....Section Manager, Arbitration and Advocacy
R. Cayia.....Manager, Union Relations
K. Vana.....Fire/Security Supervisor
R. Laciak.....Senior Staff Accountant, Payroll
L. Joachim.....Student Intern

For the Union:

B. Carey.....USWA Staff Representative
M. Mezo.....USWA Staff Representative
T. Hargrove.....President, Local 1010
S. Clark.....Finance Specialist, Payroll

Background

Prior to 1992, the Company kept track of employees within the plant by use of a card system. Employees entered at one of several gates, and then proceeded to a clock house where they received a card from the guard. They either walked or took a bus to their work area, where they gave the card to their supervisor. The procedure varied from department to department, but in each case, the supervisors would put information on the cards and then return them to the employees prior to the end of the shift. When employees left work, they gave the cards to the guards. The cards were then used by the Company's accounting department for payroll purposes. Although the Company says it was difficult for employees to leave early and still be paid under this system, a Union witness testified that employees sometimes left early and then had a coworker turn in two cards as he left in the crush of the end-of-shift exodus.

In approximately 1992, the Company installed an new entry system. This system has been the subject of other arbitration cases, although the Union did not contest – at least in arbitration – the Company's right to install the system. In brief, most employees enter the plant in private vehicles at swipe stations, where they swipe an identification card through a card reader. They then have a certain amount of time to reach their work areas, park their cars, and get to the job. Employees also swipe out at the end of the shift. This information is uploaded into a computer, which simplifies the Company's accounting and payroll system. It also allows the Company to

know whether employees are actually on the property, a determination that could take time under the old system.

Union Relations Manager Robert Cayia testified about the Company's view of the discussion with the Union that led to the start-up of the new system. He said there were no negotiations with the Union. However, his department told the project team in charge of the change that it would be "helpful and appropriate and advisable" to bring the Union leadership "into the loop" about the new system. Subsequently, there was a meeting between the project team and the Union, which Cayia attended. He said the team made a presentation about how the system would work, and then answered questions. Most of the questions were from then-Local Union President Mike Mezo. One of the questions was how much the Company planned to charge employees for an identification badge. The team leader said there was to be no charge for the first badge, but that the Company planned to charge $15 for a replacement, if employees lost their badges. According to Cayia, Mezo said he thought this was too high, and he asked the team leader – Monateras – how much the replacement badges cost the Company. Cayia said Monateras replied that he didn't know, but that he thought the cost was about $6. Cayia said Mezo then "suggested" that the Company "think about" $6 as the replacement cost for a badge and the Company "acquiesced."

Cayia said the Company was not trying to gain anything from these meetings. It wanted to educate the Union leadership. It also "wanted the Union to support a successful implementation of this new system." The Company says the Union did not give up anything in exchange for the price reduction. Nor was there any discussion about how long the $6 cost would remain in effect.

In December, 2002, the Company posted a notice that the cost of a replacement badge would be increased from $6 to $50. The policy did not apply to badges that had worn out or that had been lost or damaged without fault of the employee, as in a fire or a vehicle theft. Cayia testified that there had been an internal audit of the entry system in 2002, which uncovered a number of "loopholes or shortcomings" that made it vulnerable to abuse. One of the areas of concern was the high number of employees who had gotten replacement badges, which increased the likelihood that employees could have multiple badges. The Company's Supervisor of Security said he has seen evidence that employees have multiple badges. The Company identified two problems with this. Although only one of the badges is operative for swiping in, an employee could give his badge to someone else to be swiped in or out, and could then gain entry at the gate by showing the other pass to the guard. This would allow an employee to enter late or leave early and not be detected by the computer system. As noted, the Company says this was very difficult to do under the old system, although the Union disagrees. Also troubling for the Company is the possibility that an employee could give his replacement badge to someone not employed by the Company, who could use it to gain access to the premises. There is a picture on the pass, although a Company witness said guards sometimes do not look at them closely.

Cayia said the Company decided that the $6 replacement fee was too low to discourage employees from trying to obtain multiple passes. He said the Company hoped to instill in employees the fact that losing an ID card was about as serious as losing a credit card. He said that by taking this measure, the Company hoped to increase the overall security of the plant and to insure the integrity of the information in the computer system. The Company presented evidence that since the new rule took effect, there has been a decrease in the number of

replacement badges. For example, there were 23 badges issued in November, 2002; and 29 in December, 2002. In February, March and April of 2003, the Company issued 11, 13 and 11 replacement badges respectively.

Former Local President (now Staff Representative) Mezo testified that the Company had approached the Union about in-plant parking as early as 1991, when a manager proposed a trade the Union rejected. He also said that the swipe system and the drive-in system were not necessarily related, even though they were in the same general time frame. Each had a different objective. Mezo said the Union understood the swipe system eliminated costs by reducing the number of guards and payroll employees who took the information from the cards. It also freed up more supervisory time, since they no longer had the responsibility to fill out cards. During the meetings leading to implementation, Mezo said the Company did not raise the issue of reducing fraud by employees, although he did. Also, he said there were several meetings about the new swipe system. Mezo said in one of those meetings, the Company proposed charging $15 or $20 for a replacement badge. In response to Mezo's questions, the Company said it needed a high price so it would have a deterrent effect on employees. Mezo or another Union representative responded that there was already a deterrent because of the hassle of obtaining a new card. Mezo said he told the Company it did not need to make money off of lost cards, and that this argument proved to be convincing because the Company agreed. He also said that the agreement was to charge the cost of replacing the badge, which might increase from $6. Mezo also said there were negotiations about other facets of the swipe-in system, a contention Cayia denied. On cross examination, Mezo agreed that there was no written agreement and that the parties often reduce their agreements to writing.

The Union also called a witness who worked for Monateras in the payroll department, the team leader for the swipe-in system. She said that after meeting with the Union leadership, he returned to the department and said he had wanted to charge $20 for a replacement badge. The Union wanted a $5 cost and he negotiated with the Union and agreed to $6. On cross examination, she acknowledged that she was not at the meeting. She also agreed that as payroll manager, Monateras would not ordinarily have negotiated with the Union. The clerical employees were not organized at the time of the meetings at issue here.

The Company argues that it has the right to implement reasonable work rules without negotiating with the Union. There were no negotiations about the cost of a replacement badge, even though the Company accepted a Union suggestion. The Company says it has an obligation to insure the safety and health of employees, and part of that responsibility is to make the workplace more secure. The higher cost for replacement badges will help insure that outsiders cannot gain access to the plant. Also, it will help the Company protect the integrity of the information in its computer system, by making it harder for employees to arrive late or leave early. The Company also says there was no agreement with the Union concerning the cost of a replacement badge because the Company did not get anything from the Union and, therefore, received no consideration. The Company also argues that there is no protected local working condition.

The Union pins its case on the existence of a local working condition that the Company cannot change unilaterally. This was the result, the Union says, of the meeting at which Mezo proposed a $6 fee in response to the Company's plan to charge $15 or $20 for the badge. Once the parties agreed, the matter became governed by Article 2, Section 2 and the Company could

not change it without mutual agreement. It does not matter, the Union says, whether the agreement was oral, because the language of Article 2, Section 2 applies to both oral and written agreements. Even if there was no agreement, there is still a local working condition, the Union says. Both parties have accepted that the price of a replacement badge would be $6 and that has become the "accepted course of conduct repeated in response to a given set of underlying circumstances," which is the standard adopted by Sylvester Garrett for the USS-USWA Board of Arbitration in N146, a case that has been recognized throughout the industry. Finally, the Union says the Company cannot cite any changed circumstances that would justify elimination of the local working condition. Although the Company presented testimony that it believed there were employees with duplicate badges, there is no evidence that the number of employees has increased.

Discussion and Findings

I understand the Company's consideration argument to mean that it was not bargaining with the Union during the meeting concerning the cost of a replacement badge. Cayia testified on direct examination that the Company discussed the new swipe system with the Union, including the cost of replacement badges, because it wanted the Union to support the "successful implementation of" the system. A promise not to increase the price of a badge in exchange for the Union's cooperation – whether promised or otherwise manifested – would have been enough to support a bargain. Consideration – if it is even required in negotiations that occur under an already enforceable collective bargaining agreement – does not mean that the Company has to receive something tangible. However, the Company's claim of no consideration really means that

there was no bargain because, in the discussions with the Union, it did not seek a return, which is an essential test of bargaining.

The parties have not asked me whether the new swipe-in system was a subject about which they had to reach agreement. And each offers a different interpretation of what happened. Cayia testified that there were discussions and that the Company answered questions. He also said that it agreed to the request for a $6 replacement badge, apparently as a matter of trying to avoid Union resistance. Mezo, on the other hand, said there were discussions about such issues as where the swipe stations would be, how long employees would have to get to their work stations, and other issues. He testified that he believed the parties were negotiating, and he thought the Company believed the same thing. The agreement about the cost of replacement badges was part of these negotiations, he said.

It is obvious that the discussions with the Union influenced the Company to adopt a $6 fee for a replacement badge. But it does not follow from this that the partes recognized that the cost of a badge would be an item that would always be negotiated between the parties. Although I believed Mezo's testimony that the Union had influence over how aspects of the system were implemented, I am not able to find from the evidence that the Company conceded an obligation to bargain over the various facets of the system, even though it might have been influenced by discussions with the Union over some of them. That does not mean that some matters might not have been mandatory bargaining subjects, an issue that I need not address. But the fact that the Company might have sought input and advice from the Union, and that it accepted some of the Union's ideas, does not necessarily mean that it has tied its hands. Nor does it mean that the parties had reached an agreement for purposes of Article 2, Section 2.

The hard issue in this case is the extent to which a Company policy enacted as a rule can become a local working condition simply because the rule has not been changed for some time. In Inland Award 984, I found that there was no local working condition that prevented the Company from randomly testing probationary employees for drugs, even though it had never done so before and even though its work rules allowed only for-cause testing. Part of the problem in that case was the Union's inability to explain how probationary employees – who do not have just cause discharge protection – were benefitted by not being subject to a random test. The benefit to employees is more tangible in this case, because the price of a replacement badge increased by $44. But the question of benefit is not the only issue. The difficult question is identifying the circumstances in which management retains the right to act unilaterally, even though it has not done so before or even though it has refrained from making changes to a policy it implemented unilaterally in the first place. The Union's argument here – and to some extent in Award 984 – is that the unchanged policy has become the accepted way of reacting to a particular situation over an extended period of time and, as such, cannot now be changed unilaterally.

There are situations where this principle has applied at Inland, as evidenced by arbitration history. The Company has been required to allow wash-up times at the conclusion of shifts, even though management generally has the discretion to require productive activity while employees are paid. And, in the steel industry in general and Inland in particular, arbitrators have recognized that crew sizes can be protected past practices, and that they must be maintained even if there is evidence that it is not efficient to do so. In some such cases at Inland, the Company has not even contested the existence of the local working condition, but has argued only that there have been

changes justifying elimination. And in some cases, I have voiced confusion about how such decisions were made.

These comments are not intended as criticism of Company advocates or the litigation choices they have made. They merely recognize that this is a difficult area and one in which it is sometimes hard to articulate convincing distinctions. The same thing may be true here. Even though the Company accepted a Union proposal for a lower fee than was originally contemplated, I am unable to find that to mean either that the parties established the fee in negotiations or that the Company was precluded from making subsequent changes. I find that the Company had the right to control access to its gates and that, even if other aspects of the plan might have been negotiable, the Company was not required to bargain about the cost of a replacement badge. The fact that it was persuaded by a Union proposal to reduce its originally planned cost does not mean that it waived the right to make changes in the future. Had that been the intent, the parties would not have left an arbitrator to make inferences about whether they agreed that $6 would always be the charge or whether the price was pegged to the cost of replacement. More likely, they would have reduced the agreement to writing, or at least clarified the terms to which they had agreed to orally.[1]

The Company, then, was free to change the replacement cost, so long as its action was reasonable, which is the same requirement that applies for any rule. The fact that it has not changed a rule that it could have changed does not mean that there is a local working condition. The Union generally understands that rules can be changed when justified, so the fact that

---

[1] I thought the Union witness who testified about Monateras' remarks to his staff was credible. But it is also true that Monateras did not ordinarily deal with a unionized workforce and he may not have understood the purpose of the meeting or how bargaining is understood by the parties and under the Agreement.

employees rely on them is not, of itself, enough of a reason to preclude revision. This was not, as Garrett observed in N146, a "usage evolved by men as a normal reaction to a recurring type situation." Rather, in the rule the Company announced unilaterally how it would handle replacement badges, and it retained the right to modify the rule when necessary. I cannot say that there are no circumstances in which a unilaterally enacted rule would not ripen into a local working condition because, as noted above, some of the history is not easy to understand. But in this case, I find that the cost of the replacement badge was not a local working condition.

In order to change the rule, it is not necessary for the Company to prove that an increased cost *will* reduce fraud or keep more unauthorized persons off the premises. It must merely be reasonable to believe that this will result. This burden was easily satisfied here, especially because I understood Cayia's testimony to be that the Company did not understand how serious the problem of duplicate passes was until the audit in early 2002. But this is not the end of the inquiry. The requirement that the rule be reasonable also means that the new charge must be reasonable. And in that regard it is not enough merely to say that a high cost will deter employees from mischief or make them more cautious with their cards. A $1000 replacement fee would make them even more cautious and even less prone to fraud. As in most cases of reasonableness, a bright line is not possible. I find, however, that a fee of $50 is unreasonable and is unduly punitive for employees who may have been negligent in losing their badges. This does not mean that the Company is limited to minimal increases in the fee, or that the fee has to reflect the cost of the materials in the badge. A fee in the originally planned range of $15 to $20 might have been reasonable, but the $50 fee is punitive and cannot be enforced.

I will, therefore, order the Company to rescind the $50 fee and to reimburse employees who have paid it for the $44 difference between the new fee and the old one. But this does not preclude the Company from imposing a higher fee as a deterrent or to encourage employees to be more careful with the ID badges.

AWARD

The grievance is resolved as set forth in the Findings.

Terry A. Bethel
July 21, 2003