IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

And Award 1012

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010-27

OPINION AND AWARD

Introduction

This case concerns the Union's claim that the Company has violated the Agreement by failing to fill permanent vacancies. The case arises out of a bargaining unit limited to Process Automation Engineer Technicians. The Agreement – the first between the parties – was effective August 1, 2001. The case was tried in the Company's offices in East Chicago, Indiana on December 16, 2003. Patrick Parker represented the Company and Dennis Shattuck presented the case for the Union. The parties submitted the case on oral argument.

Appearances

For the Company:

P. Parker.....Section Manager of Arbitration and Advocacy
J. Yothment.....Area Manager, Process Automation
J. Payonk.....Area Manager, Process Automation
T. Kinach.....Section Manager, Union Relations

For the Union:

D. Shattuck.....Grievance Committee Chairman
M. Allen.....Griever
P. Grusosky.....Steward
R. Smith.....Witness
S. Vukovich.....Griever
D. Kochert.....Witness

Background

Prior to the organization of the Engineer Technicians (ETs) in a separate bargaining unit, they were not organized for purposes of collective bargaining. During that period, ETs and Internal Control Technicians (ICTs) sometimes did the same kinds of work, although there is no dispute that ETs are more skilled than ICTs. The ICTs are members of the production and maintenance (P&M) bargaining unit represented by Local Union 1010. Jerry Yothment, an Area Manager in Process Automation, testified that there is substantial overlap between the two positions. Both classifications are responsible for the maintenance of instruments and controls. However, some ETs work on software and also have supervisory responsibility over the ICTs. For many years, ICTs have been assigned to work as hourly ETs, both on a short-term or special assignment basis, and on a long-term basis. Indeed, there was evidence that some hourly ETs have been working as such for more than twelve years. ICTs assigned as hourly ETs receive a $1 an hour pay differential for the assignment. These employees remain members of the P&M bargaining unit, a designation that did not create any controversy prior to the effective date of the ET Agreement on August 1, 2001. In this case, the Union challenges the Company's ability to continue making long-term hourly ET assignments, claiming that because the ETs now constitute a separate bargaining unit, the hourly ETs are filling permanent vacancies that must be posted.

Witnesses testified that there was discussion of having ICTs work as hourly ETs during negotiations leading to the 2001 Agreement, although there was no explicit agreement that the Company could no longer follow this practice. The parties agreed to posting language in Article 13, the seniority provision, as follows:

> When a permanent vacancy develops, or is expected to develop, Management shall post a notice of such vacancy or expected vacancy for such period of time and in such manner as may be appropriate at the plant for members of the P&M group established as Technicians, Instrument and Control, Standard. [i.e., ICT] Such vacancy shall be posted for twelve (12) calendar days.... After the end of such twelve-(12) day period, the Company shall fill the vacancy, if it continues to exist, from the bidders who apply therefore pursuant to the posting procedure. ***

This language is similar to posting provisions found in the P&M Agreement, and a Union witness said that contract was used as a model for this language. In particular, the Union focuses on the wording that says when there is a vacancy "Management shall post" and, subsequently, fill the vacancy if it still exists. As noted, the Union points to the fact that some hourly ETs have been in their positions for extended periods of time, and some of them replaced ETs who retired or were moved elsewhere. On cross examination, a Company witness agreed that hourly ETs were not performing work under the P&M Agreement, but, rather, were functioning as ETs. In fact, the Company stimulated that working as an hourly ET was not an assignment within the ICT classification. However, the Company argues that a lack of training and skills also means that hourly ETs are not the equivalent of ETs.

The Company argues that ICTs and ETs have overlapping jurisdiction, a fact outlined in the respective job descriptions and recognized in a previous arbitration case, Inland Award 810. The Company says it did not agree to relinquish its right to assign ICTs as hourly ETs, something it has been doing for many years. It also says that its actions are not eroding the ET bargaining

unit. The Company asserts that the vacancy language quoted above merely outlines the procedure the Company must use once it determines that a permanent vacancy exists. However, making that determination is a management right, it says, protected under Article 3, the Management Rights clause.

The Union says the language in this case is clear and unambiguous, and that it requires the Company to fill a permanent vacancy. It also argues that the Company has no right to determine unilaterally whether a permanent vacancy exists, something that would allow it to make arbitrary decisions. Whether there is a permanent vacancy, the Union asserts, is an "observable phenomenon," and not subject to discretionary decision-making by the Company. The Union also cites case construing similar language in the industry and it argues that the Company's position "negates the historic meaning" given to the language by industry arbitrators. The Union says that the negotiation of the language was in a context in which it wanted to insure the integrity of the bargaining unit, and it points out that the Company's interpretation would allow it to unilaterally undermine the unit.

Findings and Discussion

The Union submitted cases construing similar language, which it said recognized that the Company could not avoid filling a permanent vacancy. However, those cases offer no assistance in deciding the instant case. In Youngstown Sheet and Tube Decision No. RM-296, Arbitrator Mittenthal said a "common sense" definition meant that vacancies were permanent when they were expected to continue for an indefinite period of time. But the issue in that case was not whether there were vacancies the Company had to post, which is the matter in dispute here.

Rather, the Union contended that the Company could not post permanent vacancies for bid when the resulting number of employees would exceeded the actual number of jobs, a contention Mittenthal rejected. In Bethlehem Grievance No. 5781, Arbitrator Shipman said that a vacancy becomes permanent rather then temporary by the passage of time. He also said, "You must determine that a vacancy actually exists. The necessity of posting then follows." This does not say, however, who determines whether a vacancy exists, and the facts at issue there were considerably different from those in the instant case.

Of more relevance is Inland Award 810, which concerned the same two classifications at issue in this case, albeit before the ET employees were organized. In that case, the Union contended that management was eroding the P&M bargaining unit by assigning ETs to do bargaining unit work performed by ICTs. But Arbitrator McDermott rejected the Union's claim, noting that ETs had been doing that work for at least 16 years without complaint by the Union, which he saw as a joint decision that there was no violation. Obviously, the facts at issue here differ from Inland Award 810. The Union has been in place as the representative of ETs for only a short period of time, and the grievance at issue here was filed less than two months after the Agreement was effective. There was, then, no Union acquiescence by the passage of time, which is essentially what Arbitrator McDermott found in Inland Award 810. But that does not mean the same principle should not be applied here.

Even if the existence of a permanent vacancy is an "observable phenomenon" and even if the language of Article 13 requires that such vacancies be posted, there is no evidence that the parties understood that the hourly ETs were temporarily filling permanent vacancies, or otherwise taking "ET work." A Union witness said the parties discussed protecting the integrity of the ET

bargaining unit during negotiations, but she did not say that the Company agreed to stop making such assignments or that the parties agreed that Article 13, Section 4 would have any such effect. This is important because the parties entered negotiations knowing that the Company had used hourly ETs for many years, and that the two job descriptions at issue overlapped. They also knew that an arbitrator had rejected the Union's challenge to an interchange between the two classifications. I cannot say, then, that the positions held by hourly ETs were regarded by the parties as vacancies the Company was required to post.[1] Perhaps the conclusion would be different if an unrelated classification from one unit were used to do work properly belonging to a classification in another unit. But here, both parties understood that the ICT job included the performance of ET work, and vice versa. In these circumstances, if the parties wanted to change the status quo by restricting the kinds of ET assignments available to ICTs, they had to do so expressly. This effect could not be accomplished merely by adopting industry boilerplate language that has not previously been interpreted to require such action.

AWARD

The grievance is denied.

Terry A. Bethel
February 21, 2004

[1] This should not be understood as a rejection of the Company's claim that it has the discretion to determine whether a permanent vacancy exists. I need not reach that issue because, even if the Union's interpretation of the language is correct, it still cannot prevail.