IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

And Award 1015

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010-27

OPINION AND AWARD

Introduction

This case concerns the Union's claim that the Company violated the Peak Letter when it failed to post vacancies in certain departments. The case was tried in the Company's offices in East Chicago, Indiana on April 19, 2004. 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
R. Marwitz.....Manager, MM & Logistics
R. Cayia.....Manager, Union Relations
B. Kane.....Student Intern
B. Larsen.....Student Intern

For the Union:

D. Shattuck.....Chairman of Grievance Committee
T. Hargrove.....President of Local Union

L. Aguilar.....Vice-Chairman of Grievance Committee
D. Mosely.....Griever, Plant 4

Background

The 1999 Collective Bargaining Agreement restricts the Company's ability to contract out work absent one of several express contractual exceptions. However, the Agreement does permit the parties to enter into agreements concerning contracting out. One such agreement is what the parties refer to as the Peak Letter, relevant portions of which provide:

> This will confirm the understanding reached between the parties with respect to contracting out of maintenance and repair work under Article 2, Section 3 of the Basic Labor Agreement. With respect to "work in the plant" as defined by Article 2, Section 3, B-1-a, whenever there is an unplanned event that causes the shutdown of a unit for an expected duration greater than 24 hours, or whenever there is a planned outage that includes the shutdown of a blast furnace and associated downstream equipment or units, and there are no qualified employees on layoff, the Company may contract out peak trade and craft work loads provided that the Company can demonstrate that it has utilized its qualified and available employees without jeopardizing the reliability of other units, thereby requiring the utilization of contractors and that the assigned and core bargaining unit maintenance forces where the work is being performed are working normal levels of overtime.
>
> In consideration of the above, the Company agrees to modify ... the Mega-Maintenance Agreement to include the following:
>
> > The new base force complements for the departments listed below are as follows:
> >
> > [department listings omitted]
> >
> > The new minimum base force complements for departments shown on the preceding page may only be reduced through shutdown of an operating department or portion thereof or technological change.
>
> ****

The omitted department listings are for 10 departments throughout the plant. There is a minimum mechanical, electrical and welding force for each department. Although the Company's

compliance with the base force agreements is an issue, the case did not focus on specific department shortages, so there is no reason to reproduce that material here.

The Company does not claim that it is at the minimum base force levels prescribed by the Peak Letter. In fact, although the parties may dispute the length or consistency of the Company's violation, and although they disagree about whether assigned employees should count in the base force totals, the Company acknowledges a violation of the Peak Letter in this case. The sole issue to be determined is the appropriate remedy.

The Peak Letter established a base force of 985 craftsmen, including 64 employees assigned to the 2A, 21" Mill. That facility was active at the time the parties agreed to the Peak Letter, but is now idled. The Union agrees that the number of 2A, 21" employees protected by the Peak Letter should not be included in the base force numbers until it is restarted. For purposes of this case, then, the base force totals 921 craftsmen divided among the mechanical, electrical, and welding crafts. At the effective date of the 1999 Agreement, which was shortly after the Peak Letter was signed, there were 921 craftsmen in the base force, excluding 2A 21" employees. However, as of March 3, 2004, the base force numbered 831 employees. The Union claims the 90 vacancies should be posted and filled as provided for in the Agreement.

Company witness Rick Marwitz explained that before it stopped posting for base force vacancies, the Company had difficulty getting employees to bid on some of the vacancies. For example, craftsmen were willing to bid out of Cold Strip East, but not into it. Some departments had substantial shortages, which caused the Company to "direct assign" employees from MMD, which is not covered by the Peak Letter, and whose employees are not included in base force numbers. In addition, as the number of craftsmen has shrunk, posting vacancies means that

employees filling a vacancy in one department also leave one in another department, which affects the ability to get work done there.

Marwitz, as well as Union witness Louis Aguilar, testified that the Company first stopped posting vacancies in base force departments at the time of the No. 7 Blast Furnace reline. After the reline was completed, Marwitz said he tried posting in selected departments, like the Cold Mill. But there were other areas where he did not post to keep from drawing employees out of departments where they were needed. Marwitz said he could not fill base force requirements without harming other departments, including some which are not included in Peak Letter coverage. The only way to do that, he said, would be to hire new employees. The Company has not done that, pointing out that it has not made money in several years, that it has increased competition from other steel mills with less restrictive contracting out provisions, and that a provision in the 1999 agreement allowed it to capture attrition.

The Company says, however, that once it stopped posting base force vacancies, it stopped relying on the Peak Letter to contract out work. That forms the basis of the Company's argument in this case. On May 31, 2002 and again on July 2, 2002, the Union's Contracting Out Chairman notified the Company that it could not rely on the Peak Letter because it had not maintained the appropriate base force numbers. The Company says this should be the limit of the remedy in this case.

The Company argued that it cannot afford to comply with the base force requirements if it means hiring new employees. And, it says, realistically, that is what it would take because postings simply move employees from one needed area to another. And in some cases, employees will not bid at all. The Company also says it is unrealistic to expect it to follow the Union's

suggestion that it use the apprenticeship program to attract employees to the crafts. Because it has been capturing attrition around the plant, as the 1999 Agreement contemplated it would do, the Company says there are no excess non-craft employees, so any current employees who entered an apprenticeship program would have to be replaced by new hires. The Company asserts that the Peak Letter is a contracting out agreement which the parties are free to enter into under the Agreement. Given that subject, the Company argues, any relief should be limited to contracting out sanctions. I do not, it says, have the authority to order the Company to hire new employees.

A Union witness claimed the Company had contracted out work under the Peak Letter even after it failed to meet base force requirements. On cross examination, he acknowledged that he did not have any notices in the hearing room that relied expressly on the Peak Letter during that period. But even if the Company did not contract out work after falling below base force requirements, the Union says a posting remedy is still appropriate. The Union argues that the Company is not free to disregard the base force requirements simply because they have become inconvenient or undesirable. The Company wanted the Peak Letter in negotiations and was happy to get it; the Union argues it is entitled to its part of the bargain. The Union says the Company cannot write the Peak Letter out of existence unilaterally.

The Union says that it does not expect me to order the Company to hire employees. Rather, it wants to protect the vacancies by requiring that they be posted and that any successful bidders be awarded back pay. In addition, it says there is a provision of the Agreement not at issue here which would require front pay for employees who bid but are not moved to the new position. The Union's primary remedy claim, then, is for posting and lost pay. In the alternative,

the Union argues that if the Company is not required to post, then there should be a back pay award for those periods in which the Company used the Peak Letter even though it did not meet base force requirements, something the Company denied ever happened.

Findings and Discussion

Although the parties disagree about whether direct assigned craftsmen can be counted in the base force, they agree that I am not to decide that issue in this case. In addition, although the Company cited Appendix TT, the parties agree that this is not an issue I need to address in this case. The Company says it cited the appendix only to help put the dispute in context.

There is no issue in this case about breach; the Company admits that it has not maintained the base force requirements of the Peak Letter. Presumably because of financial constraints, the Company has found it more advantageous to violate the agreement and do work with internal forces (or not do it at all) than it is to comply with the Peak Letter and contract the work out. But simply forbidding the Company from contracting out work under the Peak Letter is not an appropriate remedy for breach. Moreover, the Company's argument shifts the focus of the base force requirement by making compliance with the numbers one of the conditions that must exist before the Company can contract out. But that is not a proper characterization of the Peak Letter.

The Peak Letter does not merely list maintaining the base force level as a condition to contracting out. Instead, the letter describes the required circumstances – an unplanned event that causes the shutdown of a unit, etc. – and then says that in exchange for getting the right to contract out in those circumstances, the Company will maintain certain base force levels. The

base force, then, is not merely a limiting condition on the Company's ability to contract out; it is the consideration the Union obtained for giving up the right in the first place. The Company still has the right to contract out maintenance work in the circumstances described in the Peak Letter, whether it chooses to use it or not. Of course, no one would suggest that the Company could contract out work and ignore the base force levels. But this is not because the base force levels are simply one of the conditions that must exist to contract out. Rather, it is because when the Company falls below the required base force it is in breach of the Peak Letter agreement and cannot, therefore, claim performance under it. This is basic contract law. But precluding a breaching party from claiming rights under an agreement is not the same thing as granting a remedy for breach.

The typical remedy for breach of contract is a make-whole remedy that puts a party where it would have been if the breach had not occurred. The Union says that effect can be achieved by requiring the Company to post the jobs, which presumably would identify the successful bidder and allow for back pay. As I understand the proposed remedy, the posting itself would not result in employees being moved from one position to another; it would only provide money for employees.

Union witness Aguilar testified at some length about the procedure the parties had developed to fill base force vacancies. His testimony was consistent with Marwitz' claim that posting sometimes did not result in bids. That causes a problem in determining the precise remedy in this case. Because few, if any, employees would actually be moved into different jobs, an order to post all 90 vacant positions could be expected to result in bids to higher paying jobs by employees who had no real interest in moving. Employees would have a financial incentive to

bid on jobs they would otherwise have ignored. The purpose of contract remedies – including remedies for breach of a collective bargaining agreement – is to make the non-breaching party whole; a remedy for breach is not intended to secure a windfall. But it also true that contract remedies provide some incentive for performance in cases like this where, if there is no remedy, the Company has no reason to comply with the Peak Letter.

I find that the Company is in violation of the Peak Letter and that it has no right to refuse to fill the vacancies in the base force simply because it has elected to not contract out work as allowed by the Peak Letter. The base force remains at 931 employees, not counting the 2A 21" craftsmen. A make-whole remedy is appropriate, subject to the concerns raised above concerning windfall payments. The case will be returned to the parties for determination of how the make-whole remedy should be implemented.

AWARD

The grievance is resolved as set forth in the Findings.

Terry A. Bethel
July 8, 2004