

Arbitration Award 757
IN THE MATTER OF ARBITRATION
Between
INLAND STEEL COMPANY
Indiana Harbor Works
and
UNITED STEELWORKERS OF AMERICA
Local Union No. 1010
Grievance No. 8-R-18
Arbitrator: Clare B. McDermott
Opinion and Award
July 18, 1985

Subject; Discharge--Attempting to Provoke Fight With Another Employee in Plant--Pushing, Shoving, And Threatening Him and Other Employees--Provoking Argument and Fight With Same Employee Outside Plant as Continuation of Altercation in Plant--Punching And Shooting Him.

Statement of the Grievance: "The aggrieved, Ivory Perkins, Payroll No. 29129, contends the action taken by the Company when on July 11, 1984, his suspension culminated in discharge, is unjust and unwarranted in light of the circumstances involved.

"Relief Sought - "The aggrieved requests that he be reinstated and paid all monies lost."

Agreement Provisions Involved: Article 3 of the March 1, 1983 Agreement.

Statement of the Award: The grievance is denied.

Grievance Data

Filed: July 11, 1984

Step 3 Hearing: October 9, 1984

Step 3 Minutes: November 20, 1984

Step 4 Appeal: November 30, 1984

Step 4 Hearing: January 31, 1985

Step 4 Minutes: February 18, 1985

Appeal to Arbitration: February 26, 1985

Arbitration Hearing: March 18, 1985

Transcript Received: April 26, 1985

Appearances

Company

R. B. Castle -- Arbitration Coordinator, Labor Relations

L. F. Gallagher -- Assistant Superintendent, Plant No. 2 Mills

W. Jansky -- Assistant General Foreman, 28" Finishing End

L. Brown -- Foreman, 28" Finishing End

R. Puhek -- Lieutenant, Plant Protection

L. Yurko -- Lieutenant, Plant Protection

G. Gary -- Check No. 23868

W. McLaurin -- Check No. 11203

J. Penley -- Check No. 15760

T. L. Kinach -- Assistant Superintendent, Labor Relations

B. Brown -- Superintendent, Plant No. 2 Mills

J. Spear -- Assistant Labor Relations

Union

Thomas L. Barrett -- Staff Representative

Nathaniel Haden, Jr. -- Witness

Bruce L. Threatt -- Witness

Daryl E. Johnson -- Witness

Paul B. Moore -- Steward

Sylvia Napules -- Steward

Ivory Perkins, Jr. -- 29129

Don Lutes -- Secretary Grievance Committee

Joe Gyurko -- Chairman Grievance Committee

Barry Hall -- Witness

Raymond Lopez -- Griever

BACKGROUND

This grievance from the 28" Mill Finishing End of Plant No. 2 Mills of Indiana Harbor Works claims that grievant's suspension and discharge for alleged violation of Rules 127-a and -p of the General Rules for Safety and Personal Conduct (in seeking to provoke a fight with, and threatening, fellow employees, shooting one of them outside the plant, and threatening a supervisor) and his allegedly unsatisfactory overall work record, were without cause, in violation of Articles 3 and 8, Section 1 of the March 1, 1983 Agreement.

Grievant began with the Company in 1969 and was working as a Hooker in June of 1984.

The following is the Company's version of what occurred and in the order in which higher Management became aware of it, which was not chronologically.

Plant 2 Mills Superintendent Brown said he learned at his home after 6:30 p.m. on June 19, 1984, that two Inland employees had been involved in a shooting that afternoon at a place off Company premises called Kentucky Liquors. The call to Brown came from Assistant Superintendent Collins, who said also that the shooting incident sounded as if it might have been an extension of something that had happened between the two employees earlier. Brown was scheduled to be away from the plant for several days, and thus he had Gallagher, his other Assistant Superintendent, conduct an investigation in order to determine whether the shooting was Company related. June 21 was set as the investigative hearing date. Brown told Gallagher to get in touch with bargaining unit employees McLaurin, Watson, and Penley for additional information. As of the beginning of Gallagher's investigation, he was aware only that there had been a shooting and that employee Gary had been shot and was in intensive care at St. Catherine's Hospital. Plant Protection Lieutenants Yurko and Puhek told Gallagher that Gary could not be questioned yet.

Before his investigative meeting, Gallagher interviewed three bargaining unit employees, beginning with Rose Watson, in the presence of four other Management persons and two Union representatives. Gallagher and other Management personnel asked questions, as did Grievance Committeeman Lopez. The three named employees testified at the investigative hearing. Watson's statement made accusations against grievant, but she did not appear to testify at the arbitration hearing.

Employee McLaurin also was interviewed in the presence of those stated above at the investigative hearing. He made and signed a statement, and he appeared at the arbitration hearing and testified. The Union requested that Watson, McLaurin, Penley, and Gary attend the arbitration hearing. All but Watson did so, and they testified.

McLaurin has worked for the Company since 1969, and was a Craneman in the 28" Mill Finishing End in June of 1984. He worked the 4-12 turn on June 9 and was in the canteen when a dispute arose between grievant and Gary. McLaurin testified that they were talking about a truck, that Gary had his truck fixed up, with antennas and Cadillac rims on the wheels, so that it looked like the Fourth of July. They were arguing and went farther, and McLaurin told them to cool it so that it would not go too far. He testified that grievant tried to start a fight with Gary, had his finger in Gary's face, said he had a gun and would blow Gary's head off, and said he would take on all three of the employees there, Gary, Watson, and McLaurin. McLaurin testified he had not provoked grievant in any way. He said that about thirty minutes after that argument, he told Turn Foreman Brown that grievant and Gary had been arguing and that he should watch out.

McLaurin said that a week before the arbitration hearing he received a telephone call while at work from grievant. He knows grievant's voice. He said grievant asked him to change his statement as to what had happened on June 9, 1984 and asked him to lie, but that he had not done so.

On cross-examination, McLaurin said he heard nothing in the canteen argument about grievant's wife. He saw grievant's finger in Gary's face but saw no pushing or shoving. He did not tell Foreman Brown about grievant's saying he would shoot Gary. Brown said McLaurin should stay away from fools. McLaurin said he has heard arguments in the plant, and they might not have been reported, but maybe they did not go so far as shoving one's finger in another's face or threatening to blow his head off. McLaurin said that the way grievant was carrying on in the canteen that day, in light of the way he was arguing, unbuttoning his shirt as if preparing to fight, and trying to pick a fight, was acting like a fool.

Employee Penley has worked for the Company for eight years. He made and signed a statement on June 21 in the presence of those listed above. He appeared and testified at the arbitration hearing. He worked the 12-8 turn on June 12, as did grievant. He testified that grievant told him that day about an argument he had had with Gary in the canteen; that it started about grievant's wife or lady going to a party without him; that he had threatened Gary; that if he had to, he would throw a brick through Gary's truck window to stop him and shoot him; that there were five people in the mill to get to make it right. Penley testified grievant said

nothing then about having made a bet with Gary. Penley did not report this to anyone because grievant talks that way, and has threatened to beat people before. Penley thinks another employee must have overheard the statements by grievant and reported them. Penley did not.

Gallagher thus came to his June 21 investigative meeting armed with the information given by Watson, McLaurin and Penley as to events on June 9 and 12. He was commissioned to conduct an investigation by Superintendent Brown in order to determine whether or not the June 19 shooting was related to the incident of June 9 in the plant. He had not yet--no one for the Company had--questioned Gary, who still was in the hospital.

Grievant was scheduled to report for work in ordinary fashion on June 21. Plant Protection Lieutenants Yurko and Puhek were aware of the June 19 shooting incident outside the plant. Lieutenant Puhek had received a telephone call about that incident from the East Chicago Police on June 20. They had been instructed to stop grievant at the gate when he reported for work. They did so, searched him and his locker for a weapon, found none, and took him to Gallagher's office for the investigative hearing. Gallagher told grievant at that meeting that Management had learned of the outside shooting incident and was attempting to find out if it had started in the plant and overflowed to the outside. Grievant said it was not Company related but that the problem from which the shooting grew was a bet on a basketball game between grievant and Gary. He said Gary had lost \$50 to him on a bet, and he was trying to collect his winnings, and that was how the altercation started.

At the conclusion of that meeting, Gallagher told grievant that his status still was confusing and had to be unscrambled and, until it would be, he had to turn in his gate pass, and that as soon as his status was resolved, he would be advised. Gallagher says that grievant immediately became very disturbed, jumped up, and began calling Gallagher a lot of names; saying Gallagher was ugly; that he stunk; was the worst son-of-a-bitch he ever had seen; had no business being an assistant superintendent; that if Superintendent Brown or the other Assistant Superintendent (Collins) had been there, he would get a fair hearing; that Gallagher was discriminating against him; was trying to hamper his family and his vacation. Grievant went to the door, turned around, shouted something, came back to the front of Gallagher's desk, put his finger in Gallagher's face, and said Gallagher had better be careful, that he never would forget Gallagher's face, and that he had better be careful.

Gallagher said he became very upset by grievant's last statements. He never had seen grievant before. He took grievant's words as threatening, and went to the Highland Police Department and reported all this, including a description of grievant, his license number, and gave the police a photograph of grievant, and asked for extra police protection because he was afraid, since grievant had already shot a man and was out walking around.

Gallagher said four other Management representatives, two Union representatives, McLaurin, and his secretary were in the room at the time of grievant's statements. Lieutenants Yurko and Puhek testified in confirmation of Gallagher's testimony of grievant's threats against him at the investigative meeting. Puhek said grievant pointed his finger at Gallagher about four feet away, said he would get Gallagher, would never forget him, and that he was ugly and stunk. He said grievant was very angry and belligerent. Puhek got up and stood beside Gallagher to protect him. Yurko said grievant pointed at Gallagher, said he stunk and was ugly, that he would not forget Gallagher, and that Gallagher had better be careful. Yurko, too, got up and stood at Gallagher's other side.

At the end of that meeting, grievant was suspended preliminarily until his status could be resolved. Lieutenants Puhek and Yurko interviewed Gary in the hospital on June 22. He made and signed a five-page statement, and he appeared and testified at the arbitration hearing. He said he had an argument with grievant in the canteen on June 9. The statement and Gary's later testimony said that he was sitting in the canteen. Grievant said he was going to a party, and Gary said his (grievant's) wife would put on her clothes and beat him to the party. This upset grievant, and he began talking about Gary's truck, and Gary about grievant's car. Grievant said he would kick Gary's ass. Gary went outside to get away from grievant. Grievant followed him outside, and approached him again, trying to get him to fight. Grievant made a fist with one hand, and pushed Gary with the other. Grievant said they should go to the bathroom and fight, and no one would see them. Gary went back inside. Grievant followed and challenged Gary to fight and pushed and shoved him twice. Grievant said he had a gun and was going to shoot Gary and get him at the clockhouse if he had to. Employees Watson and McLaurin were there, and they tried to help Gary by talking to grievant and telling him not to fight because that could cause him to lose his job. Grievant told them to stay out of it, and he was going to whip their asses. McLaurin went to a telephone, pretending to call someone. Grievant told McLaurin he was a suck-ass, and he would whip him, too. Grievant kept saying

he was going to beat up all of them and whip all their asses. Watson, McLaurin, and Gary left and went back to work, as did grievant.

Gary said he drove his truck to Kentucky Liquors in East Chicago (about three blocks from the plant) at about 4:15 p.m. on June 19. Kentucky Liquors is a neighborhood hangout. He bought a six-pack of beer and returned to his truck and put the key in the ignition. He saw grievant walking across the parking lot. Grievant walked to the passenger side of Gary's truck and asked why he would not fight him in the mill. Gary said he did not fight on the job, since he had too much to lose. Grievant came around to the driver's side and said they were not in the mill then. Gary said he thought all that was dead, and he said he offered grievant a can of beer. Grievant said he wanted no beer, that Gary had too much mouth, talked too much, and hit him with his fist on the left side of his face.

Gary tried to get out, but grievant held the door against him, so Gary got out the passenger side. Grievant swung, Gary ducked but was brushed on the shoulder by the blow. Gary went around the back of his truck and grabbed what he called a "stick" from the truck bed. Grievant ran to his car and came out with a hand gun. Gary saw the gun and turned and ran toward the back of his truck, looking back toward grievant. Grievant pointed the gun at Gary, who ducked, but grievant shot him in the right leg. Another man in the parking lot took Gary to the hospital.

As a result of all this, grievant was suspended preliminary to discharge on June 25, 1984 for violation of Rules 127-a and -p and his allegedly overall unsatisfactory work record. He was discharged on July 11. Gary started with the Company in 1972. He testified at the arbitration hearing that on June 9 he, Watson, McLaurin, and grievant were eating lunch in the canteen. Grievant said he was going to call his lady and tell her he was going down to Bub's Lounge to party after work that night. Gary said he thought grievant was referring to some ladies, and he said grievant should call her and she was subject to put her clothes on and meet grievant down there. Grievant went off, saying that everybody was not like Gary. Gary said he really did not mean anything by his remark. Grievant began talking about Gary, his clothes, how he stunk, that his "show" truck looked countrified, how "country" Gary looked, with his cowboy hat. Gary said something about grievant's car, asking whether he was going to jack it up and put stripes on it and run it at the strip. Watson and McLaurin went outside, and Gary then went outside and sat on a hydrant cover with Watson. Grievant followed him out and challenged him to a footrace to the 76 Hot Strip Mill. Grievant was saying that anything Gary could do, he could do better. He could outfight him "outcrane" him (both were Crane Operators), outrun him, and whip him.

Gary kept arguing, and Watson told Gary to shut up, saying that he was belittling himself by arguing with grievant, and that he knew how grievant was. Gary shut up, and grievant got on Watson's case, talking about her clothes and personal life. Watson started with grievant, and Gary said she should shut up. She did, and grievant began again with Gary. He threatened him, saying he could kick his ass. Gary said grievant should let him alone. Grievant pushed Gary, who said he did not want to fight. McLaurin said there would be no fighting because he would not let that happen. Gary went back into the canteen, and, as he did, grievant pushed him with his fist, saying; "Come on, let's fight. Let's go to the toilet, to the bathroom," Where no one would see them. Gary told grievant to keep his hands off him. Grievant pushed Gary again, and Watson and McLaurin stepped in to prevent any fighting. Grievant continued, and McLaurin went to the telephone and dialed numbers, pretending to call Foreman Brown. Gary said grievant had hit him three times and that he thus "had" grievant's job, that he could be fired for what he just had done, and that he should not hit Gary again. Grievant started crying, saying everyone was against him, and that McLaurin was trying to get him fired. McLaurin said there would be no fighting, and that everybody was going back to their jobs. Grievant said he would kick Gary's ass right then, that he would kick McLaurin's ass, would take on all of them, that he had whipped families before, and would meet and would have somebody meet Gary at the clockhouse after work, and would take his gun and shoot Gary.

All four went back to their jobs. Gary did not report any of this.

Gary was at Kentucky Liquors on June 19. He just had bought a six-pack and returned to his truck. He opened a bottle of beer, put the key in the ignition, and saw grievant coming toward him on foot. Grievant came to the passenger side of his truck and asked why Gary did not want to fight him in the mill. Gary said he had three kids and a job at stake, and did not believe in fighting in the mill because he would lose his job. Grievant said they were not in the mill then, and that they could have fought in the plant and no one would have known of it. Grievant then came around to the driver's side and asked if Gary was mad at him about a woman at the mill. Gary said he did not worry about any women in the mill. Grievant said Gary had a lot of mouth and thought he knew everything; that he had introduced Gary to his wife at a party once, and Gary had said he remembered her from the West Side and Grievant said he did not remember her because

she was not from around there, but was from down South, and Gary said she looked like a girl he knew from going to school at West Side; that he thought he knew her, and, if he did not, he was sorry. Grievant said Gary had too much mouth, and Gary said maybe that's the way he was, and grievant hit him under his left eye, and beside his nose. Gary said he did not strike grievant, and had not thrown a beer bottle at him, but that, when he was hit, the beer bottle he was holding in his right hand was knocked to the floor of his truck.

Gary tried to get out, but grievant held the door so that he could not. Gary slid across the seat and got out on the passenger side. He went around the front of the truck, and grievant met him there. Grievant swung. Gary ducked and counter-punched grievant. They were fighting, and Gary was backing up. Grievant caught Gary with a blow in the face, and Gary's eyes went blurry and his nose bled. Gary turned to get away. There was junk in the bed of his truck, and he reached in and picked up with one hand what he called a "stick". As will be shown later, it was a heavy, steel leaf spring, about two feet long. Grievant saw that, turned Gary loose, and ran to his car, next to Gary's truck, but parked head to tail. Gary then was at the back end of his truck on the driver's side. Grievant then had arrived around his car, and Gary went after him, going between his truck and grievant's car. Grievant reached in the driver's side of his car, and leaned down as if getting something. Gary was at the passenger side windshield of grievant's car. Grievant came up with a pistol in his hand. Gary turned and ran, looking over his shoulder as he did so. Grievant was standing at about the front tire on the driver's side of his car, and grievant shot Gary in the right leg, just below his knee. Gary says he was running away, with his back to grievant, when he was shot. The bullet went in the right front of Gary's knee and came out the back.

The wound put Gary down on one leg, and grievant proceeded to follow him. Gary asked another man in a car parked next to him to take him to the hospital, but the man burned rubber getting away. The parking lot was clearing, with cars cranking up and people running. Gary ran and hopped "wiggly wobbly" to the other side of the lot and asked another man to take him to the hospital. The passenger in that vehicle said they did not want to have anything to do with this, and that that guy was still standing over there with a gun. The passenger jumped out, Gary got in, and was driven to the hospital.

Gary said that, aside from two people in the car parked beside his truck, no one else was close enough to hear statements of grievant and Gary while Gary still was in the truck.

Gary said he received a telephone call from grievant about 8:00 or 8:30 p.m. on June 21, while he still was in the hospital. Grievant said he had a lawyer, that Gary was only wasting his time by filing a charge against grievant, and that he had gone back to Kentucky Liquors the next day and had twenty-five witnesses that saw Gary attack grievant first. Gary asked why grievant had shot him, and grievant said Gary should be thankful he had not shot him in the head, and for the fact that it was a .22 and not a 9 millimeter. Grievant said he had over \$5,000 in guns, had cousins all over the Harbor, and that, if Gary would have been rather like some other so and so's in the mill, he would have blown Gary's brains out. Grievant said he wished he had blown Gary's brains out because then he would not have to be going through all this trouble. Grievant said he would not have shot Gary if Gary had not hit him with the beer can, saying that grievant had hit him through the truck window. Grievant said he was only trying to protect himself, and if Gary had not picked up the piece of iron and had not tried to hit him with it, he would not have shot Gary. Grievant said he was fighting fair, and Gary picked up the iron, and grievant got his pistol to shoot him in order to protect himself. Gary said he had turned to run from grievant and had his back to him. Grievant said Gary should be thankful he did not blow his brains out. Gary said grievant did not know where he was shooting, because, when he shot, he "slung" it. Grievant disagreed, saying that he took perfect aim and knew where he was shooting. He said Gary was not the only person he had shot, that Gary was his third victim, and that he had shot somebody in March.

Gary said during this telephone conversation grievant asked Gary for \$50 for a bet. Gary asked what bet that was, and grievant said he wanted his money and began to cry. Gary asked what money, and grievant said for the bet they had made. Gary asked what bet, and grievant said on the game. Gary asked what game, and grievant said on the basketball play-offs, stating who it was that was playing, and then asked what team Gary had. Gary said if he had made a bet with grievant, grievant should know what team Gary had.

Grievant said he had to watch Gary because the guys on the corner had said Gary was going to get grievant. Gary said he had been in the hospital since he had been shot, and asked how he could have said such things to the guys. Grievant said he knew Gary could not have said it, but he still had to watch him, and never could trust him again because grievant thought Gary was going to get him.

Gary said that he was not, that he felt grievant needed help, that he loved grievant, and did not hate him. Grievant said he loved Gary, too, and began crying.

The nurses heard the telephone commotion and came and told Gary to be quiet.

Gary filed charges against grievant for the shooting.

Gary has known grievant slightly from about 1970. They had been in school at the same time. Gary got to know grievant better at the plant, and every now and then saw grievant at parties and at Kentucky Liquors. Gary and grievant had one major argument before June 9, and that was in about 1977, but nothing came of that. There had been what Gary called "regular" grievant arguments, meaning that in arguments with grievant, the other person usually walked away as the best thing to do.

Gary said that in the canteen on June 9 grievant said he was going to call his lady, and Gary said she would put on her clothes and meet grievant at Bub's Lounge. Gary said he said it in a joking manner, and that he did so because grievant had talked over the CB and the crane about going out with five and six ladies at a time, with two on each arm. Gary says he did not mean to suggest that grievant's lady was naked, but only that she would put on her Sunday-best clothes, what she would wear to go out. Gary says he saw nothing derogatory in that, and did not know why grievant took offense at it.

Gary says that after the June 9 altercation in the canteen, he had no association with grievant until June 19 at Kentucky Liquors.

Gary says he did not go after grievant with the piece of steel, but that he went to the windshield of grievant's car on the passenger side, with grievant on the other side at the driver's door, and Gary's intention was to hit grievant's windshield with the iron. He saw grievant with a gun and dropped the iron and turned and ran. He says he was running at about the middle of the back of his truck when he was shot. Gary says he was twenty or twenty-five feet from grievant and running and looking backward when he was shot.

Gary then displayed the entry and exit wounds on his leg. The bullet entered his right leg to the right front of his knee about even with his kneecap and exited about four inches down the top of his calf, at the back. The Union insists that physical evidence of entry and exit wounds is inconsistent with Gary's testimony that he was running from grievant when he was shot. It asks how a man running away can be shot so as to leave an entry wound at the right front and an exit wound at the back of his leg. The Union argues vigorously that the wounds show instead that Gary still was coming at grievant wielding a two-foot piece of steel when grievant shot him, in self-defense, as grievant says.

The Union stresses also that Watson's written statement says that on June 9 grievant left the canteen first and then Gary and the others went out, as opposed to Gary's view, which said he left first and that grievant followed him out and continued the argument.

Gary was off work because of grievant's shooting him from June 20, and his personal physician certified him as able to return to work on December 17, 1984. On December 15, however, Gary went Christmas shopping and took his gun with him. As he got out of his car, the gun dropped, went off, and shot him in the foot. Thus, he never cleared the Company Clinic to return to work from grievant's shooting him on June 19 before he was injured again. He was off work from June 20 to December 15, 1984, because grievant shot him. He was off work from December 17, 1984 to March 10 1985 because he shot himself.

Assistant Superintendent Gallagher said that the suspension and discharge decision was a kind of group decision by his superior, Superintendent Brown, Assistant Superintendent Collins, and himself. He said that decision was based upon grievant's pushing and shoving Gary, attempting to pick a fight with him, his threatening Gary, Watson, and McLaurin on June 9, and upon grievant's statements to Gallagher on June 21. He said grievant's shooting Gary outside the plant was not considered as a ground for the discharge. Superintendent Brown testified that he receives advice and thoughts of other members of Management about discipline of employees, but that the final decision is his, alone. He said grievant's pushing, shoving, and threatening Gary, and threatening Watson and McLaurin on June 9 was one of the bases for his decision to suspend and discharge grievant, as was grievant's statement to Penley on June 12 that he would shoot Gary, as was grievant's shooting Gary outside the plant on June 19; since it was seen as an extension of the June 9, in-plant altercation, and, finally, as was grievant's threatening Gallagher on June 21.

Brown said that Assistant Superintendent Gallagher should not be speaking for him as to what grounds he considered in arriving at his final decision to suspend and discharge grievant. Brown said he, and not Gallagher, made the decision, and that he did base it in part on grievant's shooting Gary outside the plant on June 19.

The Union argues that the timing of the disciplinary actions against grievant show that Management thought nothing then of the June 9 altercation in the plant which it now highlights. That is, the Union points out that ten days went by with no Management action about anything that took place in the plant on June 9, even though employee McLaurin had told Foreman Brown that there had been an argument. Thus, the Union says the Company thought nothing about the June 9 altercation until after the June 19 shooting. It

says there never would have been a June 21 investigative hearing if there had not been the June 19 shooting.

The Company answers that McLaurin's report to Turn Foreman Brown on June 9 included only that there had been an argument and did not detail grievant's pushing and shoving Gary, his threatening him, or his threatening Watson and McLaurin. Superintendent Brown said he did not become aware of any of that until June 19, and, therefore, that higher Management could not have investigated anything about any of that until after it became aware of it.

The Union stresses Gallagher's concession that when two employees are in an altercation, Management usually suspends both until responsibility can be cleared up. That was not done here, since only grievant was suspended.

The Company answers that it would have been senseless to suspend Gary as of June 21, since he still was in the hospital and unable to come to work.

The Union replied that Gary still has not been disciplined for the June 9 or 19 events.

Turn Foreman Brown was the immediate supervisor of Watson, McLaurin, Gary, and grievant on June 9. Grievant said he thought he would go down to Bub's that night and that he would call his old lady and tell her he was going to Bub's. Gary said she probably would meet him there. Brown had other things to do and said he had to leave, and he did. He was not aware of any hostility between Gary and grievant then. About one-half hour later, McLaurin told him grievant and Gary had had an argument, but that everything then was cool. He heard nothing of threats then, and did not learn of them until after the June 21 investigation. Thus, he did not pursue the matter. He said, if he had known of grievant's threats against Gary, Watson, and McLaurin, he would have called Plant Protection and had both employees escorted out of the plant until the situation could be clarified. Brown saw both grievant and Gary later that evening and spoke to both. He asked grievant what had happened at the canteen, and grievant said nothing had happened, and Brown dropped the subject. He did not ask Gary about that.

Foreman Brown then testified at the arbitration hearing that on or about June 25 grievant called his home and spoke to his wife. Grievant said that Foreman Brown was siding with some employees against him, and he was going to cause Brown trouble. Brown took this as a threat against him by grievant. He reported this to his Assistant General Foreman the next day.

Inland employee Threatt testified he was at Kentucky Liquors, standing outside drinking a few beers in the late afternoon of June 19. He had three or four beers, give or take a few. He was talking with friends. He said two guys about five or ten feet away were arguing over a bet on a basketball game in the Boston-Los Angeles, National Basketball Association finals. One was inside the truck, and the other was outside at the driver's door, with the truck between him and Threatt. The outside guy was saying if he had lost the bet, he would have paid. Threatt could not hear what the inside guy was saying. He went inside to use the washroom. He returned outside, and they still were arguing. The guy on the inside was trying to get out, and the one outside was preventing him from getting out. The inside guy got out on the passenger side. The outside guy came around, and they started to fight, and the outside guy was getting the better of it. The inside guy went to the back of his truck and got a steel object out of the bed and started chasing the outside guy, with about three to five feet separating them. When the inside guy picked up the steel from the back of his truck, the outside guy was about three-fourths of a truck length away. The outside guy ran to his car about fifteen feet away and, at that, Threatt ran to the opposite end of the building and around the corner. He said he knew that when the outside guy ran to his car, that meant he probably had a gun in it. If he simply had run away across the parking lot, there would have been no such message. A few minutes later, Threatt heard a shot. Another few minutes--no more than five--went by, and Threatt came out and saw that the inside guy had been shot. The outside guy still was there, and he was upset. He said it had been a fair fight, that the inside guy had no reason to pick up anything, and that the inside guy was trying to kill him. Threatt did not know either of the two, although he had seen them at Kentucky Liquors.

Grievant's brother was a neighbor of Threatt and asked if he had been there at the time. Threatt said he had been, and grievant's brother asked if he would tell what he saw, and Threatt said he would. He testified at Step 3 and at the arbitration hearing.

Threatt said he thought grievant was threatened, and that he would have acted the same way. He said grievant did not have time or opportunity to fire a warning shot first. He identified the leaf spring exhibited at the hearing as the one, or similar to the one, Gary had and dropped when he was shot. He said grievant picked it up. Grievant said he gave it to his attorney to keep. Threatt said Gary held it as one would a baseball bat, ready to swing.

Threatt did not see what started the fight. He once had been discharged from the Company for fighting, and he thought that was unfair. He later was rehired.

Grievant's friend, Daryl E. Johnson, said he was at Kentucky Liquors on June 19. He saw Gary pull up first and then grievant came. He was standing talking to a Mr. Hall, about eight or nine feet from Gary's truck, when he heard a pop. He did not know who hit whom, but saw the truck shaking, with Gary trying to get out and grievant holding the door shut against him. Gary crawled across and got out the passenger door, and they fought. Grievant was getting the better of it, and Gary ran or walked around his truck and grabbed a big piece of steel from the bed. Gary began chasing grievant, holding the steel up in a swinging position. Grievant ran to his car, and Johnson and Hall ran around behind grievant, figuring that grievant did not run to his car for nothing. When grievant got the piece, Gary still was coming at him, and grievant shot him from about five to seven feet away and over his car. Johnson said grievant held the gun in a downward position. In Johnson's opinion, grievant was threatened by Gary and had no time or opportunity to fire a warning shot. Johnson did not hear any conversation before the fight. Johnson says Gary took two or three more steps toward grievant after grievant pulled up with the gun. Johnson says Gary turned to run after he was hit. Johnson says grievant, standing at the driver's door, pointed the gun downward, shooting over the roof of his small car at Gary on the other side of it. Johnson and Hall ran to get behind grievant and, when Johnson turned to see what was going on, he was almost behind grievant. Grievant did not get into the car and then out; he simply reached in and came out with the gun.

Inland employee Hall was at Kentucky Liquors on June 19, and he testified at Step 3 and at the arbitration hearing, at grievant's request. He is not a friend of grievant, but was at Kentucky Liquors later when grievant came around asking whether anyone had seen the event. He said he had and would testify.

Hall says he was going inside Kentucky Liquors on June 19 when he heard something about a bet. He went into the store and came out and saw grievant hit Gary. Gary got out of the truck, and they fought. Grievant was getting the better of it, and Gary ran to the back of his truck and pulled out a flat piece of steel and chased grievant, who ran back to his car, came out with a gun, and shot Gary over grievant's car, who then was seven to ten feet away and running toward grievant, but with grievant's car between them. His opinion was that grievant was threatened and had no time to fire a warning shot.

Union witness Nathaniel Haden, Jr. had grown up and gone to school with grievant, but they had no personal relationships since grievant moved to Gary. Grievant asked several days later if Haden would testify for him.

Haden was standing in the parking lot at Kentucky Liquors, and he heard loud voices from approximately fifteen feet away. He looked and saw Gary in the truck and grievant outside it. Grievant was asking why Gary did not pay him and saying that, if he (grievant) had lost the bet, he would have paid. It was about a basketball game. He could not hear what Gary was saying from inside the truck. Haden was talking with friends and looking at grievant and Gary off and on. The next thing he heard was a loud slam against the hood of the car. He looked and saw a beer bottle lying on the dashboard, with beer spilling out of it. Gary tried to get out, but grievant held the driver's door against him. Gary got out the passenger side, and they fought. Grievant was getting the better of it, so Gary ran. He ran to the back of his truck on the passenger side and grabbed a piece of steel and came back at grievant with the steel. When Gary grabbed the steel, the crowd dispersed. Haden went one way, and others went other ways. Haden was running and looking back over his shoulder to make sure they were not running in his direction. Grievant ran toward his car, with Gary after him. Grievant fired toward the ground, and Gary decided to go the other way. Haden does not know if Gary dropped the steel, because by that time he (Haden) was around the front of the building. When he came back from the front of the building, grievant was holding the steel. In Haden's opinion, grievant was threatened and had no time to fire a warning shot to stop Gary from hitting him. He says grievant had time for only one shot. Haden says he saw Gary throw the beer bottle--saw Gary's arm in motion--but it hit the panel inside the truck and did not get outside it. He did not see the bottle leave Gary's hand. As Gary chased grievant toward his car, they were a good twelve feet apart, or about the length of Gary's truck. Haden saw grievant fire over his car at Gary who was in front of the car on the other side. Grievant had one foot in his car door, and he fired over the door in a downward position at Gary, who was less than six feet away. Haden then was about forty feet away, running away but looking back over his shoulder.

Grievance Committeeman Lopez was at the June 21 investigative meeting. After the discussion and argument back and forth, Gallagher said he would let grievant know of his decision. Lopez looked down to write his notes. There was a lot of commotion up front, and Gallagher said "Take him out". Lopez heard no threats.

Grievant's account differs on nearly every significant point from the versions of Company witnesses and those of McLaurin, Penley, and Gary.

Grievant says in the canteen on June 9, he said he was going to pick up his wife later that night and they were going to go out and have a few drinks. He says Gary then said,

"Well, you know, your wife will probably be already down there having a few drinks already before you get down there, with everybody else down there."

Grievant said his wife was not like that, that he did not have that type of wife, and that Gary did not know anything about his wife to be saying any comment like that. Foreman Brown said, "Oh, boy," and got up and left. Grievant said everybody laughed when he said his wife was not like that. Watson said she knew what grievant was referring to, saying grievant was referring to what everybody was saying about her. Grievant said he was not referring to Watson and she should stay out of it since she had nothing to do with this argument. Watson kept getting into it, and siding with Gary. Grievant started talking about Gary's truck, and they were speaking of stupid, immature things, and trying to cut each other down, but without cursing or threatening words. McLaurin began to put his two cents in, so that grievant then was arguing with Watson, McLaurin and Gary, and things heated up. Several other employees left the canteen. Grievant says he went outside, since he was outnumbered. A few minutes later, Watson and Gary came outside where grievant was sitting and provoked further argument. Watson kept saying she knew what grievant meant, referring, grievant suggested, to rumors going around about her going with Foreman Brown and a person named Johnson. Grievant says he was not referring to Watson. McLaurin and the others got on grievant for no reason. Everybody then went back to work.

Grievant says in that altercation he did not threaten to shoot Gary or Watson, and did not threaten McLaurin.

Grievant denied that he called McLaurin and asked him to testify and lie for him. Grievant says he was at Bub's Lounge once when McLaurin came in and shook his hand, saying that there were no hard feelings and that everything was cool. Grievant says he agreed and asked McLaurin whether it was true, as reported in McLaurin's statement, that he had said grievant had threatened to shoot him. Grievant told McLaurin that was not true. Grievant says McLaurin said he never had said grievant threatened to shoot him or anybody else. Grievant says he then asked whether McLaurin could come to the arbitration hearing and clear that up, and he says McLaurin agreed to do so, but that he came and continued to lie about grievant.

As to Penley's testimony that on June 12 grievant had told him that he threatened to shoot all those employees and would shoot five more, grievant denied he said any of that. He says he did not talk to Penley about anything that day.

As to the June 19 shooting, grievant said Gary was coming out of Kentucky Liquors, and Gary said, "What's happening, Perkins?" Grievant said, "What's happening, Gary?" Grievant then said, "Oh, can I get my money now?" Grievant says he was going on vacation soon and that June 19 was the day after payday. Grievant said he had not asked for the money before that. Gary said they should talk about it at his truck. Gary got in the truck, and grievant came over to it. Gary opened a beer, and they were talking about the bet, and grievant said that Magic Johnson had messed up the game, and for that reason he did not feel he owed grievant anything. Grievant said regardless of that, Gary's team lost and grievant's team won, and grievant would have paid if his team had lost. Gary said he was not going to pay a mother-fucking thing, and if grievant did not get away from his truck, Gary was going to hit him in the face with a beer. Grievant asked why Gary was like that, and the next thing he knew, Gary threw the beer at him, but the bottle did not leave the truck. Grievant got beer all over him. He moved to the side and guesses he hit Gary, but not hard, since the truck is high and there was a long mirror there, too.

Gary tried to get out, but grievant held the door. Gary got out the other side, and grievant went around to the front of the truck, and they fought. Grievant said it was a fair fight, and he was getting the better of Gary. They fought all the way to the side of the truck and to the back. Gary got a flat piece of steel, and grievant turned and ran to his car, with Gary running after him. Grievant ran to his car because he knew he had his gun (a .32) in it. He says he got to the car just in time to get the gun out and that the only thing he could do was try to scare Gary or shoot at the ground, hoping to frighten him. He says he aimed toward the ground and that the shot ricocheted or something, and that was the only thing that prevented Gary from hurting him. Grievant insists that when he shot, Gary still was coming at him with the piece of steel.

Gary dropped the piece of steel, and grievant picked it up and put it in his car. Grievant waited thirty-five or forty minutes for the police to come, but they did not. He left.

Grievant agrees he did call Gary while the latter was in the hospital, but he says it was to say he was sorry and that Gary had left him no choice but to defend himself. He says he told Gary it had been a fair fight,

that Gary could have driven away, and that he hoped Gary would get well. Grievant said he did not cry over the telephone.

As to the investigative meeting on June 21, grievant agrees he was upset at being suspended, but he denies he threatened Assistant Superintendent Gallagher or called him names or shook his finger in Gallagher's face. He said he had no right to do that, and especially not with Gallagher between two plant guards. He told Gallagher the shooting outside the plant was not mill-related and it was about a bet, but Gallagher's mind already was made up. Grievant agrees he was loud then, but says that was because he was upset. He suggests some people consider loud talking to be threatening. He agrees he told Gallagher he was prejudiced against him and was discriminating against him, and did not act as a superintendent should. He had not met Gallagher before this. He suggests Gallagher may have taken it as a threat when grievant spoke up, in that he might have felt that an employee simply should not say those things to a superintendent. Grievant says Gallagher, Yurko, and Puhek all were lying in saying he had threatened Gallagher at that meeting. He said that at Step 3 the heavy-set Plant Protection Officer said that he did not think Gallagher was threatened by grievant, and yet he came to the hearing and lied. He suggested all those Management people stick together and lie together.

Grievant denies he ever said to Gary that he was the third person he had shot, saying he never had shot anybody.

Grievant denies he called Foreman Brown's home on or about June 25 and spoke to his wife. He says Brown's saying that he did was a lie.

Grievant says he did not point his finger in Gary's face in the canteen on June 9; did not call McLaurin names then; did not threaten or curse anyone then, but that Watson and McLaurin might have cursed; did not unbutton his shirt as if preparing to fight; did not say he would take on all three (Gary, Watson, and McLaurin); did not say he had a gun and would blow Gary's head off; and did not act as if he wanted to attack McLaurin. He said what McLaurin testified to was all lies and that McLaurin sort of wanted to be like a foreman and tell people what to do and how to do it, and was bossy. He did not get along with McLaurin, and that was why McLaurin told all those lies about him. Grievant said that most of the people who testified against him were not his friends.

Grievant says the accusations against him in Watson's signed statement are untrue. He claims the only true statement she gave was in her saying that when he and Gary were arguing in the canteen, grievant got up and went outside first. Grievant says he and Watson did not get along, and that Watson and McLaurin were friends of Gary. That was why Watson would lie about him and in favor of Gary.

Grievant denied that he pushed Gary at the canteen; says he did not tell him he had a gun or that he or grievant's friends would get Gary at the clockhouse; did not say he would shoot Gary or that he would whip all their asses. Grievant says everything Gary said about him was a lie.

Grievant denies he spoke to employee Penley on June 12, and therefore, denies that he said any of the things Penley testified he did. Grievant says Penley, too, lied. He says Penley was trying to get into the job sequence grievant was in and, with grievant out of the way, Penley probably was doing grievant's job, and that was Penley's motive for lying about him. Moreover, Penley, too, was friendly with Gary. He was not an enemy of grievant.

Grievant says he did not strike the first blow at Kentucky Liquors. He says Gary tried to hit him with the beer bottle, but he missed. The beer hit grievant, and then grievant hit Gary. Grievant says he shot toward the ground to warn Gary off or frighten him into stopping, so that he could not hurt or kill grievant. He insists Gary was right on him at the time at the front of his car but on the other side. Grievant says this was the first time he used his gun against a person.

Grievant says he should have pressed charges against Gary for trying to kill or harm him. When he called Gary, who still was in the hospital, he says Gary did not say he was going to press charges against him, and did not ask grievant why he had shot him; grievant did not say he wished he had blown Gary's head off and did not ask about the \$50. He said that was all over by then.

Grievant says the argument in the canteen was just that, and the Union contends that Foreman Brown and the Company must have thought so, too, since nothing was done about it until after the shooting outside the plant.

Grievant says he told Gallagher at the investigative meeting on June 21 that the shooting was not mill-related and did tell him then that he shot in self-defense.

Grievant says the bet he refers to was made sometime in May at Kentucky Liquors and was on the last, seventh, game in the NBA final play-offs. He says Los Angeles was down three games to one or was

behind by two games. He never had bet on anything with Gary before this. Grievant took Boston. Grievant says it was a plain, win-lose bet, without concern for one team's winning by a set number of points. Grievant agrees he had worked for Foreman Brown for a long time and got along pretty good with him. He could not explain why Brown would lie and denies he called his home and talked to Brown's wife with threats against Brown.

Grievant said that Gary, Watson, and McLaurin were arguing in the canteen on June 9, and not just him, and yet he was the only one suspended.

Grievant had seen Gary twice at Kentucky Liquors between June 9 and 19, and he says that the altercation in the canteen was over by then. The first time was when Gary had two or three beers out of grievant's car at Kentucky Liquors, and the second time also was at Kentucky Liquors, where grievant, Gary, and a whole bunch of guys were talking. Grievant said nothing about the bet on those occasions because he did not need the money then. His vacation was coming up on July 4, and, therefore, he needed the money on June 19 and that is why he asked about it then.

Grievant estimates McLaurin is about 6 feet 2 inches or 3 inches tall and weighs 245 or 250 pounds and thus is bigger than grievant. Accordingly, he says he did not say he would take on all three of them in the canteen, and that it would not be reasonable to suppose that he would offer to take on McLaurin and Gary, since they would kill him.

Grievant estimates he was about ten feet away from Gary when Gary grabbed the steel bar and began to come after him, or perhaps the length of Gary's truck. When grievant came up out of his car with the gun, he says Gary was right in front of the car, about five feet away, but on the other side of the car.

Gary was recalled and testified that grievant was just short of the left front tire of his car when he fired and that Gary had turned and was running between the truck and car and had reached about "middle way" the back of his truck, perhaps ten to twenty-five feet away, when he was shot. He says he was running and looking over his shoulder then.

The Company says grievant is guilty of multiple offenses, any one of which represents cause for discharge. It says the discharge was based on the events of June 9, that is, grievant's attempting to provoke a fight with Gary, threatening to beat up and shoot Gary, Watson, and McLaurin; the events of June 12, when he repeated to Penley his threat to shoot Gary; the events of June 19, when, in fulfillment of his June 9 threats, he shot Gary, and in those of June 21, in his threatening Gallagher.

Management says only issues of fact are important here. That is, it insists that, if the events of June 9, 12, 19, and 21 took place as it says they did, then discharge clearly is warranted.

On that subject, the Company says the credible evidence overwhelmingly supports it. Watson, McLaurin, and Gary gave statements supporting that, and McLaurin and Gary testified to it. Union officers had the opportunity to question those three at the investigative meeting, and they did so. Those witnesses made it clear that grievant physically accosted Gary on June 9 and repeatedly attempted to provoke a fight. Management says it was no credit to grievant that no fight ensued. Only Gary's prudence prevented that. Grievant also threatened Gary, Watson, and McLaurin then.

In order to accept grievant's account of those events, the Company says it would require belief that four bargaining unit employees conspired against grievant. There allegedly is no support for any such theory. Management says the June 19 shooting obviously was linked to the June 9 argument, provocation, and threats. Gary testified that the first words out of grievant's mouth that day were, "Why wouldn't you fight me in the mill?" Union witness Hall said he saw grievant strike the first blow. All Union witnesses, including grievant, put grievant on one side of his car and Gary on the other when grievant fired over the roof of the car, and the Company thus concludes that grievant did not have to fire in legitimate self-defense then.

The Company stresses that those Union witnesses who testified they heard grievant speak of a bet agreed they could not hear anything that Gary said from inside the truck, and it thus notes that there is no other testimony of Gary's acknowledging a bet, aside from grievant's testimony. Management contends that grievant clearly was the aggressor on June 19, as he had been on June 9.

The Company alleges that the testimony of Gallagher, Yurko, and Puhek established that grievant did threaten Gallagher at the investigative meeting on June 21. He allegedly said he never would forget Gallagher's face, he would get him, and that Gallagher had better be careful. Yurko and Puhek heard that as a threat, and stood up to protect Gallagher. Gallagher surely took it as a serious threat by one who had carried out his threat to shoot Gary, when he went to ask for police protection.

The Union notes that grievant presented four witnesses who said they saw or heard some of what happened at Kentucky Liquors on June 19, but that Gary presented none, out of all those allegedly there that day.

The Company replied that all the witnesses to the Kentucky Liquor shooting were friends of grievant or of grievant's brother.

The Union stresses that Watson, McLaurin, Gary and Penley apparently thought so little about the argument in the plant on June 9, that, aside from a sanitized report by McLaurin to Foreman Brown that night, they said nothing to anybody about it until after the June 19 shooting. It is said that if grievant really had threatened to shoot them, they would have told someone of it sooner.

The Union emphasizes that grievant need not prove his innocence, but that the burden is on the Company to prove his guilt.

It is argued that Gary made a demeaning remark about grievant's wife. It claims that Foreman Brown heard that and then decided to leave rather than to stay around to cool what might become a heated situation. It is noted that Gary testified he left the canteen to get away from grievant, but that Watson's written statement says grievant went outside first.

The Union says that Gary's saying that grievant began crying on June 9 and on June 20 in his telephone call to Gary in the hospital is so unlikely as to show he is not a credible witness. It notes that grievant nor anyone else ever got Gary at the clockhouse. The Union urges that, if it should become significant to determine whether or not grievant had a reasonable avenue of escape short of shooting Gary, then it is equally clear that Gary, sitting in his truck with the key in the ignition, could have started the engine and driven away, in which event the fight and shooting would not have taken place.

It is argued that Gary took on the posture of the aggressor when he picked up the piece of steel and chased grievant with it. Moreover, the Union emphasizes that, although Gary said he was running away when shot by grievant, the bullet entered the right front of his knee and exited at the top of his calf in the back. The Union is certain that physical evidence shows that Gary still was coming at grievant and was not running away when he was shot. Thus, the Union says grievant did, indeed, act in self-defense.

As to Foreman Brown's claim that grievant called his home on or about June 25, shortly after these events, and threatened Brown, the Union notes that there was a suspension meeting on July 2, a Step 3 meeting on October 9, and a Step 4 meeting on January 31, 1985, but that that charge never was made in any of those meetings but was held until the arbitration hearing.

The Union argues that Gallagher's having two Plant Protection officers at his June 21 investigative meeting shows that he already had made some kind of judgment of grievant's character, even though he did not know grievant at all then.

The Company says grievant was very hazy about the circumstances surrounding the claimed bet with Gary and did not know where or when the game was played. Grievant said that Los Angeles at one point in the play-offs was up three games to one, but that never was the case.

The Company stresses grievant's telephone call to Gary, saying he was sorry he had not blown his head off, so that he would not have these problems, his telephone call to Foreman Brown, threatening him; and his telephone call to McLaurin, to get him to change his testimony. It is said all that shows additional instances of intimidation and harrassment by grievant.

FINDINGS

Resolution of this problem turns almost entirely on issues of fact. There are a few doctrinal arguments, but they are not so critical as are decisions on whether or not grievant did the things for which he was charged. That grievant did commit the offenses with which he was charged is supported by direct, first-hand testimony of three bargaining unit witnesses (Gary, McLaurin, and Penley) and three Management persons (Gallagher, Yurko, and Puhek), one or more of whom testified that he saw or heard grievant do or say one or more of the things charged against him.

For example, employee McLaurin testified that in the canteen on June 9 grievant tried to start a fight with Gary; had his finger in Gary's face; said he had a gun and would blow Gary's head off; and that grievant said he would take on all three of the employees, Gary, Watson, and McLaurin.

Employee Gary testified that in the canteen on June 9 grievant threatened to kick his ass; pushed him several times; provoked him to fight; threatened Watson and McLaurin; and said he would shoot Gary. Employee Penley testified that on June 12, grievant told him he had threatened Gary and would throw a brick through Gary's truck window to stop him and would shoot him.

Employee Gary testified that at Kentucky Liquors on June 19 grievant's first words were his asking why Gary had not fought with him in the mill on June 9. That is sufficient, if taken at face value, to connect what occurred at Kentucky Liquors on June 19 with what had begun in the plant on June 9. Moreover, a Union witness testified that he saw grievant strike the first blow at Kentucky Liquors on June 19.

Finally, three Company witnesses testified that grievant threatened Gallagher at the investigative meeting on June 21.

Grievant says, however, that those three Management witnesses naturally stuck together and lied about him. It is unnecessary to decide whether there is any merit in grievant's suggestion that all humans working on the Management side of the enterprise necessarily and always lie against bargaining unit employees in order to get them fired. Even if it were supposed that that charge were in any way accurate, that still would leave a situation in which grievant has been charged with serious offenses on June 9, 12, and 19, solely at the word of fellow bargaining unit employees and his only explanation of why they would make those charges, if they were not true, is that those fellow employees were not his friends, did not like him, or were friends of Gary.

But grievant cannot have it both ways. That is, he cannot parry charges by Management personnel on the basis of a supposed bias by all Management persons against all bargaining unit employees, even in the absence of any personal problems between them and grievant in the past, and there were none, and then expect to be believed when he says that three bargaining unit employees would have testified falsely against him solely because they were not his friends, were Gary's friends, or did not like him. Something more pointed would be needed to make such explanations credible. In short, there were too many persons on both sides of the labor-management table who testified against grievant, with no suggestion of a specific, malicious motive sufficient to prompt them to testify falsely about grievant. Thus, grievant is reduced in nearly all elements of this problem to repeating that all who testified against him were liars, without any reasonably adequate explanation of why those six persons would be motivated to conspire to say such serious but untrue things about him. Accordingly, the great preponderance of the evidence as a whole points to the conclusion that grievant properly was charged with offenses on June 9, 12, 19, and 21. Specifically, that means that two fellow employees, with no satisfactory suggestion as to why they would make up serious charges against grievant, testified unequivocally that he threatened to beat up and whip three bargaining unit employees. One testified equally convincingly that grievant pushed and shoved Gary, and two said he did his best to provoke a fight with Gary in the plant on June 9.

Another bargaining unit employee said that on June 12 grievant told him he intended to shoot Gary.

Another bargaining unit employee said that the incident at Kentucky Liquors on June 19 was a direct continuation of the altercation in the plant on June 9. Gary said grievant's first words asked why grievant did not fight with him in the plant on June 9 and, after Gary's explanation of refusing to fight in the plant for fear of losing his job, grievant then observed that they were not in the plant at that time.

Several observations must be made about the June 19 shooting away from the plant. The fact that it did not occur on plant premises is not a sufficient defense by grievant, if it was related to and a continuation of the altercation grievant and Gary had in the plant on June 9, and it would be more an act of faith than of reason to conclude that it was not.

Gary, a fellow employee, said, in convincing fashion, that it was. Grievant said it was not, but his assertions were not persuasive. Gary denied there was any bet and, thus, the only assertion of a bet came from grievant. None of his four witnesses of the Kentucky Liquors argument on June 19 could hear what Gary was saying from inside the truck. Hence, there is no confirmation of grievant's claim of a bet, and his unsubstantiated allegation is not convincing.

Examination of grievant's own explanations demonstrates that. He said the shooting arose from Gary's making, losing, and not paying off on a bet with him on the NBA final play-off game in 1984. Amidst a cloud of uncertainties about the origin of that bet, grievant did say positively that the bet had been made in May.

That just will not wash. Grievant made it quite clear that the bet he was describing was on the last, that is, the seventh play-off game, and he was deliberately specific in saying that the bet had been made in May. Several things are wrong with that. The sixth play-off game in that best-of-seven series was not played until June 10. Thus, it would have been impossible, without clairvoyance, to know in May that any games beyond four would be necessary and, especially, that a seventh game would have to be played. Bets are not made in May on a potential seventh and final play-off game of a best-of-seven series whose last game will not be played, if at all, until June 12. Moreover, grievant said that when the bet was made, Los Angeles was down three games to one, and yet that never was the case. Neither team ever was down three games to one in that play-off series.

The entire structure of grievant's account collapses when it is realized that no one could have known that a seventh game would be necessary until Los Angeles won the sixth game on June 10. But June 10 was one day after the altercation between grievant and Gary in the plant on June 9. In the emotional state that each

described for himself and the other as a result of the arguments, pushing, shoving, and threats of June 9, it just would not be sensible to believe that one day later they would have mellowed, gotten together, and made a bet on a basketball game. Grievant said he did not ask Gary on June 9 for the \$50 he allegedly had lost on the claimed bet because no one is willing to pay off on a bet when they are mad, as Gary allegedly was on June 9. But that makes no sense for, not only could Gary not have lost such a "bet" as of June 9 because the seventh game had not been played yet, but, moreover, no such "bet" could have been made yet, since the prerequisite sixth game would not be played until the next day, June 10. No one could have known until June 10 that a seventh game would have to be played on June 12.

Thus, in addition to a surprising vagueness as to circumstances of the alleged bet, grievant simply was wrong on the only details he did recite. And he was wrong not just on trivial matters that anyone could get confused about. He explained as bases of the claimed bet circumstances that simply could not have happened. Moreover, grievant says he had seen Gary at least twice between the making of the bet and June 19, and yet he agrees he had not said a word to Gary about the \$50 that should have been due him from Gary's losing that "bet".

Accordingly, in addition to the clear impression that Gary was speaking the truth when he said that grievant's first words at Kentucky Liquors on June 19 were to ask why Gary would not fight with him in the plant on June 9, the equally clear impression arises in the same direction from the impossibilities about the "bet" suggested by grievant, even considering only his internal explanation and without regard to Gary's denial of any such bet.

Since grievant's claimed bet does not stand up under the evidence, the only explanation left for his June 19 violence is that he saw Gary at Kentucky Liquors and decided to continue the provocation and aggression he had started but apparently not finished in the plant on June 9.

It should be made clear that in these credibility determinations, grievant's has been undercut seriously by his telephone calls to Gary and to McLaurin. The call to Foreman Brown would do grievant no good, but Management let it go unmentioned for so long as practically to neutralize it. The preponderance of the evidence establishes that the calls were made, and that to McLaurin is particularly damaging to grievant. It was made shortly before the arbitration hearing and sought to suborn the witness. That constitutes a virtual admission by grievant that, unless McLaurin would change his account of these events, grievant's case would be fatally weak. It casts doubt on all assertions made by grievant here.

Thus, the evidence makes it clear that grievant started and continued not only the altercation in the plant on June 9 but also the altercation at Kentucky Liquors on June 19, and that the latter was just a continuation of the former and, therefore, was well within Management's disciplinary ken, as a job-related incident.

While on the June 19 event, although grievant instigated it and escalated it from a verbal affair to bare fists, it then was escalated further to an iron club and then to a gun. But, having started the verbal altercation and, still unprovoked, having escalated it from words to blows by striking first, grievant is in no very strong position to invoke principles of self-defense in this continuing but integrated flow of violence that he started. This is especially so in the face of the positive testimony of all grievant's witnesses and of grievant, too, that puts grievant on the driver's side of his car and Gary still on the other side when grievant shot.

Gary says he was running away, ten to twenty-five feet off, when he was shot, but let that be ignored for present purposes. And let the evidence of entry and exit wounds be taken for the most they might mean, as the Union does, rather than the least they must mean. That still would leave grievant on one side of his car being chased by one with an iron club, but who still was on the other side of the car.

Whether or not grievant's resort to his gun in these circumstances reasonably was warranted well might be a jury question in a criminal proceeding before a judge and jury but, if it were and if the arbitrator were such a juror, he would be hard put to conclude that these circumstances justified grievant's use of potentially deadly force. He still had the car between Gary and him, and there was nothing to prevent his retreating.

Moreover, he had other, less lethal alternatives. In dealing with alternatives, it seems much more appropriate in these circumstances to consider what alternatives to use of deadly force were available to grievant, who started all this and who then shot, than to speak of grievant's arguments that Gary, who did not start this, had alternatives to picking up an iron bar to avoid being beaten. Gary had no obligation to drive away when grievant began the argument or when grievant punched him or was beating him. Grievant began as the aggressor and still was in that posture. There had been no cooling off or breaking up of the initial attack. Grievant did not run to get away. He ran to get and use a more lethal weapon.

Moreover, this arbitration proceeding is not bound by what a civil or criminal court may do about this situation. The Arbitrator must decide the issue of cause for the suspension and discharge under Article 3 of the Agreement on the basis of the record made before him and independently of what other triers may find.

If grievant were to be found guilty in a criminal proceeding, the arbitration process would not be bound by that finding. The burden in a criminal proceeding by the state is different. It legitimately is much more severe against the prosecution. "Beyond a reasonable doubt" is a much heavier burden than "by a preponderance of the evidence".

The Union wonders why Management waited until June 20 to investigate the occurrences on June 9. The adequate explanation is that it was not until June 20 that anyone in Management was aware that there was anything important enough to investigate. Superintendent Brown learned of the June 19 incident only on that evening. Foreman Brown learned on June 9 only of an argument between grievant and Gary that day but knew nothing of its serious extent until the June 21 investigation. Thus, Management neither knew nor reasonably should have known of grievant's aggression, provocation, and threatening behavior against Gary and against Watson and McLaurin on June 9 until June 19. It could not have checked any of that before learning of it. Accordingly, there was nothing surprising or sinister in Management's not acting on grievant's serious June 9 misbehavior until after the June 21 investigation.

Finally, the evidence is clear that grievant did threaten Gallagher at the end of the June 21 investigative meeting. Gallagher, Puhk, and Yurko said he did. Grievance Committeeman Lopez said he heard or saw no such threats, but he had agreed earlier that he then was concentrating on making and writing his notes of the meeting and was not paying attention to what grievant was saying to Gallagher and, therefore, was in no position to hear or see what had happened at the end of the meeting. Thus, his testimony can mean no more than that he did not hear or see anything about such threats and not that there were none.

In sum, therefore, the clear preponderance of the evidence shows that grievant instigated an altercation with Gary in the plant on June 9, pushed and shoved Gary then, and attempted verbally and physically to provoke grievant to fight; that he threatened to beat and shoot Gary, Watson, and McLaurin that day; that he threatened on June 12 to shoot Gary; that he continued the June 9 altercation on June 19 outside the plant by starting another altercation with Gary and by hitting and shooting him in circumstances that cannot be found to have justified his claim of self-defense; and that he threatened Supervisor Gallagher at the investigative meeting on June 21.

Those offenses were cause for grievant's suspension and discharge and, therefore, the grievance will be denied.

It should be noted that this analysis has not relied in any way upon the written statement of employee Watson.

AWARD

The grievance is denied.

/s/ Clare B. McDermott

Clare B. McDermott

Arbitrator