

Award No 803
OPINION AND AWARD
In the Matter of Arbitration Between
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 19-S-73

Appeal No. 1414

Arbitrator: Ellen J. Alexander

May 5, 1989

Appearances:

For the Company:

P. Parker, Representative, Union Relations

B. Smith, Representative, Union Relations

W. Moore, Operations Manager, IRMC

B. Nanney, Captain, Safety & Protection

L. Osburn, Civil Supervisor, IRMC

R. Burns, Witness

For the Union:

Jim Robinson, Arbitration Coordinator

M. Mezo, President

L. McMahon, Griever

Don Lutes, Secretary, Grievance Committee

J. Jacob, Asst. Griever

J. Smith, Grievant

D. Zandstra, Witness

M. Wyrick, Witness

J. Maynard, Witness

R. Flahardy, Griever

T. Hargrove, Griever

Statement of the Grievance:

The aggrieved, James Smith, Check No. 18455, contends the action taken by the Company, when on December 28, 1988 his suspension culminated in discharge is unjust and unwarranted.

Relief sought:

The aggrieved requests that he be reinstated and paid all monies lost.

Contract provisions cited:

The Union cites the Company with alleged violations of Article 3, Section 1 and Article 1, Section 1 of the Collective Bargaining Agreement.

CHRONOLOGY

Grievance No 19-S-73

Grievance filed	December 28, 1988
Step 3 hearing	January 11, 1989
Step 3 minutes	March 7, 1989
Step 4 appeal	March 8, 1989
Step 4 hearing(s)	March 9, 1989
Step 4 minutes	March 10, 1989
Appeal to Arbitration	March 10, 1989
Arbitration hearing	March 13, 1989
Award issued	May 5, 1989

Stipulations at Hearing:

No. 1: The parties agree that the arbitrator's decision in Grievance No. 19-S-73 shall be non-precedential and shall not be cited or relied upon by either party in any future situation or grievance.

Statement of the Award:

Grievance denied.

BACKGROUND

Grievant James Smith, carpenter of Field Services Department (IRMC), was discharged December 28, 1988 for his alleged participation in the theft of an estimated \$2,000-\$2,500 worth of equipment from the plant Carpenter Shop. Mr. Smith asserts his innocence of these charges and, therefore, that his discharge is without just cause; and in violation of Article 3, Section 1 and Article 1, Section 1 of the Collective Bargaining Agreement.

The chief evidence against Grievant is the quite detailed testimony of former Company employee Robert Burns, his co-worker that night. Mr. Burns has admitted his own participation in the theft for which he too was discharged. Grievant has produced alibi witnesses and the evaluation of witness credibility is a significant factor in this grievance.

Certain facts are not in dispute, Mr. Smith and Mr. Burns were working together in the North Carpenter Shop on the 4:00-12:00 turn (3:30-11:30 P.M.) Wednesday, November 23, 1988, without supervision. Their assigned task was constructing wood pallets. There were four other carpenters working in the South Carpenter Shop and evidently not in contact with Mr. Smith or Mr. Burns. The two shops are under one roof but have different lunchrooms. What occurred following completion by Mr. Burns and Mr. Smith of their shift is in sharp dispute.

Company witness Robert Nanney, Captain for Investigation of Plant Safety and Protection, was not at work the night in question, but testified from records maintained by his department. At 7:50 P.M. an anonymous call had been received reporting a "suspicious truck" in the north end of No. 2 Cold Strip Mill, which is near the Carpenter Shop. A lieutenant did go out and observe the parked truck about which he noticed nothing suspicious. He noted its license plate and requested that gatehouse personnel halt the truck on its departure. A second report was filed indicating an unsuccessful effort at 11:10 P.M. that night to stop an exiting truck bearing the same license plates. The Carpenter Shop was not staffed on Thursday the 24th (Thanksgiving) nor Friday the 25th. On Saturday the Carpenter Shop microwave and tools were reported missing. There were no signs of forced entry into the microwave cabinet or tool locker. Subsequent investigation revealed that Carpenter Robert Burns was working the 4:00 to 12:00 shift on November 23rd, that the noted license plates were registered to his own vehicle, and that he had once been issued a Company drive-in pass which he had no reason or authority to be utilizing on that night. Working with him that night was Grievant Smith.

When questioned Monday morning (November 28th) by Captain Nanney, Mr. Burns denied driving his truck into the plant and initially asserted that he and Mr. Smith had taken the bus out together and clocked out together. Mr. Smith was called in and he told Captain Nanney that he had worked with Mr. Burns, but that he had left the shop alone, catching the circulating Company bus at 10:50 with some South Shop carpenters.

Mr. Burns was reinterviewed and on Monday afternoon voluntarily allowed plant protection personnel to search his truck, residence and barn. The known stolen items were not found but the search turned up a Company chain fall. Compelled either by his wife's urging or by the Company action of summoning the Lake County sheriff to his house to (at the minimum) take a report about possession of the chain fall Company property, Mr. Burns, while still at his residence, confessed to the theft and indicated the stolen items were at other property he owned. He did not want the Company to go and get them at that time but said he would return within 24 hours those stolen items in his possession. Mr. Burns stated that he could not return the belt sander or microwave because "another fellow has them." According to Captain Nanney, Mr. Burns "really did not want to" identify that other employee, but when pressured he stated that it was Grievant Jim Smith. Robert Burns signed a brief statement back at the plant at 4:50 P.M. that same Monday. He was then escorted to his locker and his departure was evidently noted by or reported soon to Grievant Smith who was at the plant working. Tuesday afternoon, November 29th, Mr. Burns returned several items including two whose absence had not yet been ascertained.

Tuesday morning at 8:00 A.M. Grievant Smith had been brought in for additional questioning. He maintained during that interview that he did not remember whether on November 23rd he had left work with Robert Burns and he did not know whether Burns had driven his truck into the plant. He denied possessing keys to the Carpenter Shop microwave cabinet and tool lockers, denied helping load Burns's truck, or taking Burns's time card to the clockhouse. He denied stealing or possessing items and denied knowing who possessed any of the stolen items. Mr. Smith also maintained in that interview that he had no permanent address, and "maybe" slept in his car on Wednesday night. He stated in interview that he had his car at work that night (a black Mercury) and that he drove it right after work to meet his (not then identified) girlfriend at "My Friend's Place" tavern. He signed a brief written statement setting out the above answers to questions posed by Captain Nanney.

Company witness Pat Parker, Labor Relations Representative, testified that at the initial investigatory meeting held Wednesday, November 30th Grievant Smith again denied any knowledge of the theft or of whether Burns had driven into the plant but had been "very unsure of time specifics," unsure of when the men might have finished work, of when he last saw Burns, of what time he might have caught the bus, as well as of whom he rode out on the bus with. Mr. Smith also said there that the pallet "quota" was nine or ten and he said he left the plant between 10:30 and 11:00. Although it was at that meeting made clear to Mr. Smith that Mr. Burns reported that they met in the Denny's Restaurant parking lot, he did not on that date offer names of other persons besides his girlfriend who were with him at the "My Friend's Place" tavern.<FN 1> However, by the time of the suspension hearing (Step 3) on December 12th, the Grievant provided specific times when he left the plant (around 11:10) and when he arrived at the tavern (11:15-11:20) He also named two other witnesses to his tavern arrival, J. Maynard and M. Wyrick.

Arbitration Testimony of Robert Burns

Mr. Burns testified that prior to the shift he had driven his personal truck into the plant in order to carry out a plan proposed some days earlier by Grievant Smith to steal the shop tools and the microwave oven out of the lunchroom. Jim Smith told Mr. Burns "he had keys to the tool cabinet and to the microwave and because it was a holiday weekend nobody would know so I agreed to help him with it." The two employees finished their "quota" of five pallets in about three hours. They hung around the lunchroom an hour or so, then went and washed and changed clothes. After that they rode back and forth in a Company pickup truck watching and waiting for the four South Shop carpenters to leave. Mr. Burns recalled that two of those carpenters left on one circulating bus, and the other two left on the next bus. Mr. Smith then dropped Mr. Burns off at his personal truck parked near the shop and returned the Company pickup truck to the shop. Mr. Burns relates that he backed his truck down a ramp right into the Carpenter Shop where Mr. Smith was already removing the microwave oven belonging from the lunchroom. Mr. Burns took the oven and loaded it inside a big tool box on his truck Together the men loaded up various other Company-owned tools (described by Mr. Burns as a ramp set, belt sander, router, chain saw and shop vacuum). They then drove off. Mr. Burns dropped Mr. Smith off at the parking lot #40 clockhouse where he was to turn in both employees' time cards and get his own car.

Mr. Burns testified that he took a long route within plant property so he would "have a straight shot going out the gate" leading directly onto Route 20. He did not see any Company plant protection efforts to flag his truck down. He drove ten minutes to a Denny's Restaurant parking lot where he handed over the belt sander and microwave to Jim Smith who was waiting there with his car.<FN 2> Mr. Burns then returned home.

Testimony of Grievant

Grievant Smith, a 17-year employee of the Company, testified at arbitration that on Wednesday, November 23rd, after constructing five pallets he and Mr. Burns knocked off "somewhere between 9:30 and 10:00." They cleaned the shop and put the tools up, which he estimated took about 30 minutes. Mr. Smith showered and shaved which he estimated took another 20-30 minutes. But Mr. Smith also estimated that he probably did not hit the shower until 10:15 or 10:20 "give or take five or ten minutes." He went outside to catch the circulating Company bus "possibly at 10:45" and only waited three to five minutes for it. He paid no attention to who was on the (40 seat) bus with him, "I just wanted to get to the clockhouse." There, he turned in just his own time card.<FN 3>

From the plant parking lot, Mr. Smith drove directly to "My Friend's Place" tavern. He placed his time of arrival there at about 11:10. He was greeted there by fellow employee and tavern habitue M. Wyrick, who teased him "about being there so early . . . because I usually get there between 11:30 and 11:45." Mr. Smith reports that he did not again leave the tavern until it closed at 2:00 A.M. About eight regulars were there that night, including his girlfriend, Mike Wyrick and Jim Maynard.

Mr. Smith stated that he did not remember seeing Mr. Burns again that night after he himself went off to shower. He was unaware of any stealing by Mr. Burns. While he had once in the past borrowed a microwave cabinet key from a carpenter Porter, he had returned it the next morning and "never even took it out of the mill." He denied ever telling Mr. Burns he had a key to the microwave. He denied taking any items, or helping Mr. Burns. He continued to maintain, consistent with his earliest reported statements, that he did not recall where he slept the night of the theft, that he was at the time living intermittently out of his car, or with various friends. (Even though he takes home about \$700 pay every two weeks, Grievant reports heavy child support costs of \$200 per week). Mr. Smith also stated both that he had some money in the bank and that he was trying to save up more.

The Grievant recalled further that after he was suspended pending discharge Tuesday the 29th and escorted from the plant, he "probably" went back to "My Friend's Place" that night and expressed his disgust at

Company allegations. Mike Wyrick was there and offered to be an additional witness for Grievant to show he could not have been at Denny's Restaurant. At that particular time he had not thought Wyrick's offer was important; he was more concerned about the Company interest in interviewing his (married) girlfriend, which he did not want. Grievant has expressed surprise throughout that Burns would implicate him falsely, suggesting that Mr. Burns was pressured by the Company to do so.

Additional Union Testimony

At hearing Mike Wyrick, another Inland employee and regular patron of "My Friend's Place," testified that Jim Smith came to the tavern on the 23rd at 11:10 P.M. He knew this because he looked at the clock and teased Smith about getting there so early (Mr. Smith's "hair was still wet.") Mr. Wyrick does not believe Mr. Smith left the tavern again even briefly until closing time. There were only approximately eight "regulars" in attendance that night. The washrooms in the tavern are located near the exit.

Mr. Wyrick stated that on Tuesday, November 29th, the Grievant, just suspended, reported that the Company accused him of stealing and that "at 11:30 he was supposed to be at Denny's getting the stuff and I told him that it was impossible, that he was there with us at that time and if it would help I'd do it" (testify for him). Mr. Wyrick gave Grievant his phone number on November 29th, but he recalls not hearing back from him until the next week. At the initial (November 30) investigatory meeting, Grievant did not mention Mr. Wyrick as an alibi witness. At the third step hearing Mr. Wyrick said that he talked with tavern colleague James Maynard "and we both agreed that it was 11:10 that Jim came in the bar and we both started teasing him."

At Arbitration Union witness Maynard said he had been at the tavern drinking since about 8:00 P.M. He "could not say exactly" when Grievant had arrived the night of the theft, but it was "around eleven o'clock." Mr. Maynard learned "around the tavern" about Grievant's suspension about a week later. He agreed to Mike Wyrick's request that he testify.

During or right before the investigation meeting held Wednesday, November 30th a friend of Grievant's, Daniel Zandstra called in to the meeting that the microwave and belt sander had turned up in the #4 BOF trailer which is more than a mile distant from the Carpenter Shop. The Company asserts that those items had not been in the BOF trailer as of 3:30 the prior day. Mr. Zandstra testified at hearing that there are "a lot of keys out there" to various keyed locks in the Carpenter Shop. He also described Mr. Burns as a man subject to sudden intense bouts of anger, who is best left alone at work. Mr. Zandstra was not, however, aware of any bad feelings between Mr. Burns and Grievant Smith.

In an effort to show a motive for Burns to have fabricated accusations against Mr. Smith several witnesses were asked about an episode four or five years earlier where Daniel Zandstra (and allegedly Mr. Smith) damaged the personal vehicle of a brother-in-law of Robert Burns. Mr. Burns acknowledged being told that Mr. Smith was a participant in that five years earlier incident. I cannot from the testimony on this point conclude that a motive of retaliation for the vehicle damage against his brother-in-law five years earlier is behind an unfounded accusation of theft made against the Grievant by Mr. Burns. While, at least remotely, it raises potential motive for Robert Burns to weave such an elaborate detailed web for the sole purpose of implicating Jim Smith, it would require great speculation on my part to, on the basis of these theories and recollections, conclude that Mr. Burns is more probably than not fabricating. Mr. Burns had already lost his own employment if not when the Company discovered the chain fall on his property, certainly when he confessed to having the goods that were stolen Thanksgiving Eve. If he possessed the microwave and sander he could well have returned them with no greater injury to his own position. But in order to implicate Mr. Smith, Mr. Burns needs to have either enlisted a third party to return the two items to the BOF trailer or to have found some way to get them there himself at a location where he would have no authority to be present following his suspension. And I also note that the items were discovered and/or reported, in fact, by a good friend of the Grievant.

DISCUSSION AND FINDINGS

There is no question but that the initial burden in a discharge is upon the Company. It is not the defense's obligation to overcome a weak affirmative Company case. At the same time conflicting testimony requires an evaluation of the credibility of all witnesses. My analysis is based upon several areas of comparison and examination of testimony as presented at several stages of this grievance. The first problem is Grievant's own memory. In order to credit his story I need to believe that as of November 28th he no longer recalled where he slept on November 23rd that he could not recall the names of any persons who had gone out with him on the bus, and could not recall if he left the shop with Mr. Burns.<FN 4>

The greatest problem of course is posed by the time element. Grievant was reported very early on in the investigation to be very unsure of his times. In view of the Company truck exit report and driving time, the

earliest that any exchange could have been made at the parking lot of Denny's Restaurant would be 11:20 P.M. Another Union witness (McMahon) said 11:30 P.M. was the time Mr. Burns gave at the Department investigation for when the Denny exchange took place. According to Mr. Wyrick, when Grievant went back to the tavern on Tuesday night to report his suspension pending discharge, he reported that at 11:30 he was supposed to have been making an exchange in Denny's Restaurant. It was for that time which Mr. Maynard, therefore, originally offered to provide an alibi. As noted Grievant did not offer Mr. Wyrick as an alibi witness that very next morning, November 30th, during the investigatory meeting. This raises considerable question in my mind as to whether Grievant did not offer him as an alibi witness because he was still not at that time certain as to what time he needed an alibi for. In fact, at arbitration Mr. Smith places his tavern arrival at 11:15 or 11:20 while his alibi witnesses place it at "about 11:00" or at 11:10. I also note Captain Nanney's testimony that when he interviewed Mr. Smith on Monday the 28th, Mr. Smith could "not remember hardly any of the events that transpired on the evening of the 23rd." Later on, however, at least by the arbitration date, Mr. Smith knew exactly how long he had waited for the bus (three to five minutes) while still being quite unsure as to what time he had gone in to take a shower after putting away tools at the end of work. There is difficulty throughout with the times and the estimates given by Grievant Smith. At one point he estimated he could have finished work as early as 9:30 and taken 30 minutes to put away tools and another 20 to 30 minutes for showering and shaving. If that were the case, he could have been ready to leave the plant even before 10:30. However, then he estimated that he did not hit the shower until 10:15 or 10:20 and that he caught the Company bus "possibly at 10:45" That would have him leaving the plant perhaps closer to eleven o'clock and not getting to the Cline/Borman intersection until 11:10 or later. Company witness Parker reports that the Grievant by the December 12th Step 3 hearing stated that he left the plant at 11:10 and arrived at the tavern at 11:15 or 11:20. This was also his arbitration statement. Therefore Grievant's own estimate of arrival at the tavern is later than the estimate that his witnesses are now giving.

Mr. Burns has himself never been sure or particularly detailed as to time for the events in question. At arbitration he said he was not real sure of times including the time he met the Grievant at Denny's. There were many facts that he did, however, offer from early on in the investigation. He knew that Grievant had had access to a key to the cabinets in question, although Grievant denies telling him that. He knew the color and make of Grievant's car in use that night. He gave quite detailed testimony as to the steps both men took to become certain that there were no carpenters left from the South Shop before they took Mr. Burns's own truck into the inside of the Carpenter Shop and he, in fact, described the sequence of departure of the four Shop carpenters. I have already commented on the fact that Grievant was offered an alibi on Tuesday evening, November 29th that he did not think sufficiently important to offer by Wednesday morning, November 30th. I find it somewhat difficult to believe that Grievant was more concerned to protect the reputation of his girlfriend (who was of interest to the Company for ascertaining his whereabouts) than to protect his job. In view of the confusion and contradictions over times and the wide fluctuations in estimates of time from the Grievant or other witnesses, I cannot reach the conclusion that the alibis provided to him at arbitration were accurate or reliable so as to overcome what I again consider to be an internally constant and credible description of the entire evening's event by Mr. Burns.

I note that Mr. Burns is not the ideal witness. He has a prior history of theft of Company property. Mr. Burns's own reputation was not aided by his testimony at arbitration or at the prior steps. He described a premeditated plan, subsequent cautious behavior by both men to ascertain a moment of safety and certain other details which in total depicted a very believable event. The issue as to whether Grievant could have possessed keys to the cabinet for a sufficient length of time to make his own copies is really not disproved by the testimony that was before me. Carpenter employee Porter evidently merely reported to Captain Nanney that Grievant returned the loaned keys to him the next time they met which was sometime the next day (Porter did overtime that day, which could also place the return of the keys potentially in the afternoon.) There is simply insufficient information on the record for me to be persuaded that Grievant could not have taken the keys out of the plant to be copied.

It is also possible, as the Union suggests, that there is a third unnamed party involved in this entire episode who has not been discovered or who is in fact being protected. I have looked closely at this possibility but find no real evidence for it. Against this lack is weighed a very consistent story or description of the theft by Mr. Burns. In ranking an analysis of witness credibility one relies not only on demeanor and on the presence or absence of motive, but also on the degree of recollection of details and on the extent of consistency or lack thereof in testimony as it is presented at various points in time as matters are repeated or testimony is solicited.

I have indeed had some difficulty with the extent to which Grievant both changed his story and was unable to recall details. I was influenced by the fact that Grievant did not offer the potential alibi witness testimony of Mr. Wyrick at the first meeting where the theft was being investigated. I also note Mr. Parker's testimony that Grievant initially placed himself at the tavern at about 11:20, At arbitration Grievant said 11:15 or 11:20. In fact if Grievant was waiting in Denny's Restaurant parking lot for Mr. Burns and the exchange was made quickly it is possible that a few minutes after 11:20 he had arrived at "My Friend's Place."

The Union argues that remarks made by Mr. Burns when he learned he had to come to the arbitration hearing indicate that a "deal had been cut" between himself and the Company. I have no doubt but that the Company has put some real pressure on Mr. Burns to testify at arbitration but only to what he had been claiming from the very outset. Captain Nanney was of the opinion that Mr. Burns had been reluctant back at his residence November 28 to give the name of the employee who had the belt sander and microwave and that he only did so after being strongly urged/compelled. It would have required a split second decision on his part to decide to implicate Mr. Smith in place of a "true" accomplice. Therefore, the mere fact that Burns testified at the arbitration hearing only because of Company "urging" does not negate all accuracy of his testimony.

The Union further argues that Mr. Burns should not be found credible because of his history of problems with other employees and because of his friendship with his brother-in-law who was the object of car vandalism participated in (to Mr. Burns's apparent belief) by Mr. Smith. For reasons that I have stated above I simply find the evidence insufficient to tie in this old event to a motivation of Mr. Burns absent any evidence suggesting that for the four intervening years he has borne a grudge or had anything less than an amicable relationship with Mr. Smith. My difficulty again is in finding motivation for Burns to develop such an elaborate scheme against a co-worker with whom he evidently did not have a bad relationship. In view of the lack of evidence I consider it beyond the scope of my role to try and theorize on the existence of a third party in order to find that the Company has not met its burden of proof.

The Union notes that the minimum standard that the Company must meet is that stated in Inland Award 632 where Arbitrator David Cole cites Arbitrator Charles Killingsworth's comment that

The presumption of innocence which is a cornerstone of our laws must be interpreted to mean that the evidence of guilt should be stronger than the evidence of innocence to establish "proper cause" for discharge.

This describes the common burden "preponderance of the evidence." I would at least require finding along the lines quoted by Arbitrator Cole and the credible evidence here meets that standard.

For all of the reasons stated above I conclude that the Company has established just cause for discharge.

The grievance is denied.

/s/ Ellen J. Alexander

ELLEN J. ALEXANDER, Arbitrator

May 5, 1989

Evanston, Illinois

<FN 1>The Denny's restaurant in question is evidently on the southwest side of the intersection of Cline Avenue and the Borman Expressway. The tavern is located on the northeast side of that intersection. The two facilities are only 2/10-3/10 of a mile apart but there is a divided highway such that Cline cannot be crossed to reverse direction at any point between Denny's and "My Friend's Place." From the tavern it is necessary to go north on Cline for about eight blocks, cross over and turn back south. But no one testified to the distance going south from Denny's before crossing over to proceed back north to "My Friend's Place." The distance from the plant to that intersection is reported to be about seven miles and to take about ten minutes in light traffic, ignoring speed limits.

<FN 2>See Footnote #1 above at page 4.

<FN 3>During open gate time employee cards can be dropped off at several spots and the cards do not contain a notation either as to exit time or card drop location.

<FN 4>The four carpenters who took buses out were interviewed and none of them recalls seeing Mr. Smith that evening although he himself stated that some of the carpenters were on the bus with him.