Award No. 848
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance 11-T-76
Appeal 1469
Arbitrator: Terry A. Bethel
July 29, 1991
OPINION AND AWARD
Introduction
This case involves the discharge of grievant Delbert Browder for a violation of company rule 132-1. The discharge occurred on January 14, 1991 and concerned an incident that took place on December 31, 1990. The hearing was held in the company offices in East Chicago, Indiana on June 13, 1991. Bradley Smith represented the company and Jim Robinson presented the union's case. Grievant was present throughout the hearing and testified in his own behalf.
For the Company:
B.A. Smith -- Project Representative
R.V. Cayia -- Section Manager
D. Mills -- Section Manager, Continuous Lines
F. Jones -- Supervisor, Continuous Lines
C. Trowbridge -- Supervisor, Continuous Lines
B. Peterson -- Representative, Union Relations
For the Union:
J. Robinson -- Chair, Grievance Committee
D. Lutes -- Secretary, Grievance Committee
P. Litton -- Griever
D. Browder -- Grievant
J. Griffin -- Witness
Background
This case involves the discharge of grievant for a violation of rule 132-1, which provides:
The following offenses are among those which may be cause for discipline, up to and including suspension preliminary to discharge:
1. Stealing or malicious conduct, including destroying, damaging, or hiding any property of other employees or of the company and the destruction, damaging or pilfering of vending machines or any equipment made available to employees for the purpose of in-plant feeding.
The company's primary evidence against grievant was entered by his supervisor, Clarence Trowbridge. Although most of the relevant facts are in dispute, I have decided to credit Trowbridge's testimony.
The incident leading to discharge occurred on December 31, 1990. Grievant and Trowbridge were working the 11 p.m. to 7 a.m. turn. Although there was no direct testimony, I assume this was the turn that began at 11 p.m. on the 31st and ended at 7 a.m. on January 1, 1991. Trowbridge testified that at about 5 minutes after midnight he went into the canteen and observed grievant crouched in front of a vending machine that sold candy and snack cakes. Pictures of the machine were introduced at the hearing. In addition, I viewed the machine following the hearing. As described by Trowbridge, the machine is of the type that delivers an item by causing a pig tail device to turn and drop the selection in a tray at the bottom of the machine. The front of the machine is covered by plexiglass.
Trowbridge testified that when he first saw him, grievant was not only crouched in front of the machine, but he also had his arm in the machine up to his elbow. The plexiglass was loose along the bottom and up the left side. Trowbridge went and stood next to grievant who saw him and removed his arm. Although grievant initially said nothing, ultimately he said he had lost 75 cents in the machine and was trying to retrieve a 55 cent package of crumb cakes. Grievant claimed the pig tail device had turned, but that the cakes had "hung up." Trowbridge said there were no crumb cakes, or any other items, hung up in the machine. Indeed, he said there were not even any crumb cakes in the first slot.
Trowbridge took grievant to his office. He said grievant did not seem to take the incident seriously until he realized that Trowbridge intended to report it to the section manager. At that point, grievant asked if

Trowbridge would just forget it, claiming that it was "no big deal." Grievant argued that the items in question were not of significant value.

After the meeting with grievant, Trowbridge went back to look at the machine again. As noted, the plexiglass was loose across the bottom and up the left side. Trowbridge noticed two pieces of metal in the machine that had apparently been used to secure the plexiglass. He had no difficulty reaching in and retrieving both pieces. Trowbridge said he uses the machine at least twice on every turn. He had used it the previous day and, while he noticed that the machine had, in his words, been "tampered with" and kicked and abused, the plexiglass was secure. I understood Trowbridge's testimony to mean that he had noticed signs of recent abuse.

Trowbridge was also present at the investigation of the incident held on January 3, 1991. He said grievant's explanations differed from those offered on the 31st. Indeed, he said grievant even changed his story during the Investigation. Grievant first claimed that he had only his hand (but not his arm) in the machine holding the plexiglass. He then said he didn't have even his hand in the machine. Rather, he claimed he had been holding the machine with his left hand and hitting it with his right. At the investigation, Grierant also asserted that he put 55 cents in the machine, although he said 75 cents at the time of the incident.

Fred Jones, who was filling in for the section manager on the 31st, confirmed much of Trowbridge's testimony. Although he did not observe grievant, Jones said he did see the machine after the incident and that he put his hand and arm inside it. He also agreed with Trowbridge's account of grievant's comments in the investigation. Dennis Mills, section manager, testified that grievant stuck to his story about not having his hand in the machine during the third step hearing.

Grievant's testimony did not differ significantly from that attributed to him at the investigation. He said he had his left hand on the side of the machine and that he was hitting it with his right hand. He said he had put 55 cents in the machine and that the pig tail had revolved right around the crumb cakes, but that they hadn't come out. He also claimed that he could not have put his left arm in the machine since he was wearing a wrist brace that would have prevented him from bending his wrist.

Joe Griffin also testified for grievant. He said he saw the machine about 20 minutes before grievant's encounter with Trowbridge and that the plexiglass was pulled loose at that time. He also said he had used the machine the previous night and it was in the same condition. Griffin testified that he did not think anyone could get his arm in the machine, though he acknowledged that he had not tried.

Discussion

I think the company would like me to conclude that grievant not only attempted to steal from the vending machine, but that he also damaged it. As I will explain in more detail below, I think the company has proven that grievant did, in fact, attempt to steal from the machine. But I am unable to conclude that he was responsible for the damage. There was no direct evidence that grievant damaged the machine. I realize that it puts a significant burden on the company to produce such testimony. I cannot say that circumstantial evidence would never be sufficient in such a case. But here there is significant evidence that casts at least a reasonable doubt about whether it was grievant who actually damaged the machine.

Griffin testified that he saw the machine about 20 minutes before grievant's encounter with Trowbridge and that it was already broken. He also asserted that the plexiglass was broken when he used the machine the previous night. Trowbridge also used the machine the night before and he reported that, while it was the target of recent abuse, the plexiglass was intact. Nevertheless, the testimony of these two men is not necessarily inconsistent since Griffin may have used the machine after Trowbridge.

The principal difficulty with Griffin's testimony is why the ARA service man would not have repaired the machine, had it been broken the previous night. There is, of course, no answer to this to be found in the record. I note above, however, that the incident occurred on the tour that began on December 31. This was not only New Year's Eve, it was also a Sunday. It may be, then, that the ARA service man had not been in since the previous night, either because of the holiday or because it was Sunday. I can't say whether this speculation is accurate, but there was also no evidence that the serviceman actually appeared, which would have been important to the company's case. In any event, I thought Griffin's testimony was credible and there is at least a plausible explanation about why the serviceman would not have repaired the machine.

In addition to Griffin's testimony, I am also influenced by two other factors. First, Trowbridge acknowledged that the machine in question sometimes malfunctioned and he said that on the night before his encounter with grievant he could tell that it had been abused. In addition, I observed the machine myself on the day of the hearing. Admittedly, this was several months after grievant's discharge, but the company did not assert that the machine was in a substantially different condition on the day I saw it, except that the plexiglass had obviously been fixed. It is fair to observe that the machine is not an object of great affection

among the employees in plant 1 galvanize. It had obviously been the target of abuse. Indeed, the sheet metal at the bottom was virtually concave. Its condition overall was consistent with a malfunctioning machine on which would-be vendees had tried self help remedies.

Given these circumstances, I cannot conclude that it was grievant who did the damage. It is fair to conclude, however, that grievant tried to take advantage of the machine's condition. I found credible Trowbridge's account that he discovered grievant with his arm in the machine. I base this conclusion on several factors. First, I simply thought Trowbridge was telling the truth. Grievant's demeanor on the stand did not give me the same confidence in his veracity. Also, grievant's stories about this incident have not been entirely consistent and not all of them have made sense. Had the snack cakes been hanging, as he claimed once, then it is reasonable to think that banging on the machine would free them. I have done that myself. But grievant acknowledged in the hearing that the cakes were not hanging there. Indeed, Trowbridge testified that there were not even any crumb cakes in the first slot. Thus, it is hard to see what hitting the machine might accomplish, causing me to believe that grievant's story just isn't true.

I also discount grievant's claim that his wrist brace would have prevented him from putting his arm in the machine. Trowbridge admitted that grievant had a wrap on his arm, which he said grievant usually wore. He could not say whether there was a brace under the wrap. Even if there was, the brace I saw would not have prevented grievant from bending his wrist backwards, which would have allowed him to snag or hit some of the selections. He might even have been able to do that without bending his wrist at all. Finally, I note that I have heard grievant testify in one other case and I raised doubts about his credibility there as well.

At base, then, this case comes down to whether an attempt to steal a snack cake from a vending machine is proper cause for discharge. I recognize that the conventional wisdom is that the value of the stolen item is of no consequence. I also recognize, however, that arbitrators sometimes cite the rule more readily than they apply it, especially in the case of a long service employee like grievant.

As I alluded to above, this is not the first time I have seen grievant. A little over two years ago I reinstated him without back pay and with a stern warning in Inland Award 799. The reasons for the reinstatement are, frankly, not glaring apparent from the opinion I wrote. Even so, grievant apparently heeded the warning, at least until this incident. Grievant's five year disciplinary record contains numerous offenses (although none similar to that at issue here) but, except for an absenteeism warning, all of them predate his 1989 reinstatement.

I would find this case to be somewhat easier if grievant had been honest about what happened on the 31st. He may have seen the broken plexiglass and decided on impulse to take advantage of it. Or he might really have lost his money in the machine and decided to reach in and retrieve his selection. His failure to tell the truth at his hearing, however, precludes me from reaching any such conclusion. Nevertheless, although I think this is a close case, I think discharge is too severe a penalty for grievant's infraction. I would feel differently about this if grievant had less service, if he had incurred other discipline in the last two years, or if there was evidence that he damaged the machine.

I will, therefore, order that the company reinstate grievant, but without back pay. The period off work shall serve as a disciplinary suspension. I also observe that grievant has about used up his reservoir of second chances.

AWARD

The grievance is sustained in part. The company is ordered to reinstate grievant but without back pay. The period off work shall serve as a disciplinary suspension.

/s/ Terry A. Bethel
Terry A. Bethel
Bloomington, IN
July 29, 1991