Award No. 849
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL CONPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 5-T-36
Appeal No. 1460
Arbitrator: Terry A. Bethel
August 1, 1991
OPINION AND AWARD
Introduction
This case concerns the grievance of Wallace Smith, who was discharged by the company on March 7, 1991 as a result of an incident occurring on February 21, 1991. The case was tried in the company offices in East Chicago, Indiana on July 24, 1991. Jim Robinson represented the union and Patrick Parker presented the company's case. Grievant was present throughout the hearing and testified in his own behalf. Both sides filed a prehearing brief.
Appearances
For the company:
P. Parker -- Project Representative
B. Smith -- Project Representative, Union Relations
N. Prabhu -- Day Supervisor, No. 2 BOF/CC
B. Sammons -- Section Manager, No. 2 BOF/CC
D. Ostrozovich -- Turn Supervisor, No. 2 BOF/CC
L. Pabey -- Captain, Plant Protection
C. Jones -- Officer, Plant Protection
For the union:
J. Robinson -- Chair, Grievance Committee
Alex Jacque -- 1st Vice Chair, Grievance Committee
Mike Bochenek -- Griever
Memo Garza -- Ass't. Griever
Wallace Smith -- Grievant
Background
This case involves the discharge of grievant for alleged violation of three plant rules, 132.n., 132.o. and 133. The rules provide:
132. The following offenses are among those which may be cause for discipline, up to and including suspension preliminary to discharge:
n. Leaving employee's working place or visiting around the plant away from your usual or assigned place of duty at any time, either during or outside your regular working hours, without permission of your supervisor.
o. Entering or leaving plant without compliance with plant rules.
133. The enforcement of the foregoing rules and other rules is important for the safety and well being of all company employees and for plant security. Accordingly, please be notified that all employees must cooperate with a request by Plant Protection or supervisory personnel to submit to a search of their person or personal property, including personal vehicles. Any employee who refuses to submit to a search will be subject to severe disciplinary action, including suspension preliminary to discharge. Such a refusal may also be considered evidence of the violation of one or more of the above listed company rules, or other company rules.
Most of the significant facts are in dispute. Prior to his discharge grievant had been employed in the No. 2 BOF/CC. He had been a level 1 withdrawal operator until December 31, 1990, when he was demoted to laborer. The reasons for the demotion are not an issue in this case. Subsequently, in early February, grievant and the company (apparently with the support and cooperation of the union) agreed to a document headed "Confidential, Wallace Smith-Action Plan." This memorandum set forth certain plans and conditions intended to reestablish grievant as a withdrawal operator. Bill Sammons, section manager of casters at no. 2 BOF testified that this was a unique program set up for grievant. Neither the program nor its

specific terms are an issue in this case, although the union does assert that the company violated the commitment to hold the plan in confidence.

The facts which form the basis of the grievance occurred on February 20, 1991. On the morning of the pervious day an unidentified bargaining unit employee approached Dan Ostrozovich, the caster supervisor, and told him that grievant had told this employee he had a gun in his car and that sometimes he felt like bringing it into the plant and shooting. Ostrozovich relayed the conversation to Sammons and to Day Supervisor Nick Prabhu. He did not reveal the identity of the informant to either one. Sammons testified that he had never received such a complaint before, so he called the union relations department for advice abut how to proceed. Apparently based on that advice Sammons decided that he wanted grievant's car to be searched.

As it happened, Sammons had already scheduled a meeting with grievant and his union representative for later that afternoon, February 20. Sammons explained that the action plan to reestablish grievant as a withdrawal operator provided for meetings every three weeks. Sammons, however, believed grievant was not progressing sufficiently under the plan, so he had scheduled an earlier meeting. Grievant appeared for the meeting on the 20th, but expressed concern that Memo Garza, his usual union representative, was unavailable and had been replaced by an alternate. At grievant's request, the meeting was postponed until the next day, February 21.

The meeting on February 21 began at 2:00 p.m. Grievant attended along with Garza and Ed Harvey, a griever and steward. Sammons, Ostrozovich and Prabhu attended as company representatives. The first part of the meeting proceeded without incident. The participants discussed a reprimand grievant had received for leaving the plant early on February 17. They also agreed to withdraw a charge that grievant had been tardy on February 19. They then discussed the third item on the agenda, which was the action plan itself. According to Ostrozovich, they reviewed training plans, discussed grievant's progress under the plan, and discussed a lack of communication. The meeting then proceeded to grievant's relationship with his colleagues.

Sammons told grievant that some of his coworkers preferred not to work with him. Ostrozovich testified that the participants discussed the grievant's need to work on the perception others had of him so that he could be accepted as a member of the crew. Sammons then brought up the allegation about the gun. Sammons testified that he thought this charge was related to the way crew members felt about grievant, but I did not understand it to be the sole reason coworkers had voiced reservations about working with him. There is no dispute, however, that Sammons told grievant he was going to have his car searched. There is also no question that the tone of the meeting changed abruptly at that point.

Both grievant and his union representatives objected to the company's plan to search the car. Garza and Harvey both asserted that the company's action was harassment and that it was based on grievant's race. Harvey said that there could be a lawsuit if the company searched grievant's car. Grievant's initial reaction was to claim that he had not driven to work; he said that his girl friend had dropped him off. Sammons indicated that he would have Plant Protection check the parking lots for grievant's car in order to verify that claim. Grievant then acknowledged that he had driven. He then contended that he had a permit for a gun and that his car was personal property and couldn't be searched. Grievant said he told Sammons he owned several guns but that he would not have left them in his car because they were expensive and he leaves his car unlocked. Both Ostrozovich and Sammons testified that Sammons was insistent that the car be searched. The discussion over this issue lasted about 10 minutes, was heated and, apparently, loud. There is significant dispute about what happened next.

Prabhu testified that in the midst of this discussion, he got up, went behind Sammons' desk, called Plant Protection, and, in a loud voice, asked them to send an officer to search grievant's car. Prabhu testified that he made the call because he thought the discussion was getting out of control and he wanted "everyone" (which I understood to mean grievant and his union representatives) to know that the company intended to move ahead with the search. Grievant, Harvey and Garza denied that Prabhu made any such call during the meeting or, if he did, they said they didn't hear him. After the call -- or at least after the time Prabhu said he called -- Garza announced that he needed to call the union hall for advice. He got up and left the room. Harvey said he had another meeting elsewhere, and he left as well. Grievant went with them. There is some dispute about whether the meeting was over at this point, which I will discuss below.

All three employees -- Harvey, Garza and grievant -- went downstairs to the office used by the griever. Harvey and Garza entered the office, but grievant did not. Rather, for at least some period of time, he stood in the doorway. Prabhu testified that he waited at the top of the stairs for the Plant Protection officer. He then realized that he was looking right down at the entrance to the office and that he could see grievant

standing in the door. Prabhu said he thought the union representatives were caucusing and that it was probably inappropriate for him to stand and watch them. Thus, he moved back a few feet so the door to the griever's office was out of his view. A short time later, Captain Louis Pabey of Plant Protection came the stairs.

Prabhu took Pabey to Sammons office. Sammons told them to escort grievant to his car in the parking lot and to search the car for a gun. Pabey, Prabhu and perhaps Sammons went to the griever's office. The door was closed and locked. When the door opened, Pabey and Prabhu could see Garza and Harvey in the office, but not grievant. When Pabey entered the office, Garza greeted him, shook his hand, and inquired about the weather. Prabhu asked where grievant was and Garza replied that he was probably down the hall. Both Prabhu and Pabey searched, but were unable to locate grievant. Pabey then called the clock house and asked the employees to detain grievant if he appeared and to hold him for Pabey. Prabhu and Pabey then went to the second floor lockerroom and finally to the first floor lockerroom. Another employee in the first floor lockerroom told them grievant had just left through a door that apparently leads to the outside. Prabhu described it as the door that leads to the south gate.

Pabey and Prabhu then got into Pabey's squad car and drove to the south clock house. Grievant was not there and had not gone through the clock house. Pabey drove through the plant gates in the direction of the parking lots. Pabey and Prabhu then noticed grievant walking toward the plant and away from lot 29. Prabhu said grievant was running toward the plant. Pabey summoned grievant to the car and grievant got in the back seat. Prabhu asked grievant where he'd been. Prabhu said grievant replied "what do you mean? I'm just coming in." It was, in fact, about 2:15 or so, which is about the time grievant would ordinarily report for work. Prabhu said he responded to grievant by saying grievant had just been in Sammons' office, to which grievant replied "that wasn't me." Pabey told grievant he wanted to search his car and grievant replied "there's nothing there to search" and got out of the car.

Grievant acknowledged that Prabhu asked where he'd been, but grievant said he answered only "what do you mean." He said Prabhu then said something else (grievant didn't say what) and grievant said "you've got the wrong man."

Grievant said he meant that he thought Sammons was going to search his car and he was telling Prabhu that Pabey was the wrong man. This comment, however, is not inconsistent with Prabhu's testimony that he told grievant he had just been in Sammons' office and grievant responded "that wasn't me." "You've got the wrong man" would convey essentially the same thing. In any event, grievant then left the car. Pabey and Prabhu drove by him to the gate house and waited. Grievant, however, reentered through the vehicle gate (which was the same way he had left). Prabhu and Pabey caught up with him and told him he was suspended for refusing to allow a search of his car. Grievant then left. At no point did grievant ever admit or deny that he had a gun in his car.

I think the company would like me to believe that Garza and Harvey were aware that grievant had left the office to go to his car. In that regard, the company would point to Garza's conversation with Pabey as an attempt to stall for time. Both Garza and Harvey were a little vague about the circumstances under which grievant left them. Nevertheless, there is no evidence that they knew what grievant was up to and not even a suggestion that they advised him to leave. Grievant, in fact, testified that he acted on his own.

Although both Pabey and Prabhu saw grievant leaving lot 29, neither saw him at his car. In fact, it is not clear that either one even knew where he was parked. Grievant, however, admitted going to his car. Grievant said that after he and his representatives left the meeting, it occurred to him that it might be, in his words, a "set up." That is, he thought someone might have planted something -- perhaps a gun -- in his car. Thus, he went to the lockerroom to retrieve his car keys and proceeded to the parking lot. On cross examination, Mr. Parker asked grievant why it was necessary to get his car keys since he had testified on direct that he always leaves his car unlocked. Grievant replied that he thought someone might have tried to "jam" something into his trunk through the back seat.

Grievant said he left the plant through the south vehicle gate and that Charlotte Jones, the guard on duty at the gate, had waved him through. He said after he got to the lot he found a brown paper bag on the ground and that he used it to cover his hand when he opened the car door. This was apparently an attempt to preserve any fingerprints that might have been left on the door handle. He said he opened the door and was about to check the glove compartment when he noticed the plant protection car. Grievant said he did not look in the glove box or anyplace else in the car. He just closed the door and started back to the plant. He acknowledged that Pabey summoned him to the car. He also said that when he left the car he was headed back to Sammons' office. Previously, grievant had testified that he thought the meeting was over when he and his representatives left Sammons' office. Mr. Parker asked why he was returning to the office and

grievant responded "where else would I go?" Grievant acknowledges that he returned to the plant through the south vehicle gate. Once again, however, he claims that Jones was on duty and waved him through. Grievant not only denies that he had a gun in his car on February 21, he also denied that he refused to grant permission for the search. The union points out that at no point did grievant ever say "I refuse." Indeed, grievant said he thought Sammons was going to search the car and that he was concerned by Sammons' absence and Pabey's presence in the car with Prabhu, It is also true, of course, that grievant did not expressly grant permission for the search.

The company suspended grievant preliminary to discharge and converted the suspension to a discharge on March 7, 1991. The company argues that any of the three rule violations standing alone would support its decision to discharge grievant. The union denies that grievant violated any rule at all. It also asserts that the alleged violations of rules 132 n. and o., even if proven, are not of sufficient gravity to support a discharge. The union contends that the only serious issue involves the allegation that grievant violated rule 133, which the union vigorously denies.

Discussion

I tend to agree with the union's observation that the violations of rules 132 n. and o. are not the principal issues in this case. I do not mean to say that the conduct described in those rules is not serious or that a violation could never lead to serious disciplinary action, including discharge. Moreover, I think grievant did violate both rules. What makes his conduct serious, however, is not just the fact that he left the work place or that he went through the wrong exit. Rather, the seriousness of those violations depends on grievant's primary motive, which was to deny the company access to his car. The rule 132 violations alleged in this case become serious only when viewed in the context of grievant's primary offense, which was a violation of rule 133. As I will explain below, I think grievant did violate that rule by refusing to submit his car for a search and that his conduct justifies the penalty assessed by the company.

The union does not attack the reasonableness of rule 133. Nor, at least in the circumstance of this case, would it have seem reasonable to do so. The company surely has an interest in insuring the safety of its employees and in safeguarding its property from theft. Rule 133 is reasonably related to those ends. It is not necessarily the case that employers have unfettered discretion to effect searches, no matter what their rules say. Thus, arbitrators typically have required some reasonable suspicion -- usually expressed as probable cause -- in order to justify a search of an employee's private property.

I need not decide here whether rule 133 is over-broad to the extent it seems to authorize searches without any cause whatsoever. Those facts are simply not before me because here the company did have a complaint from another employee. Although the union has raised concern about the extent of the threat grievant may have posed <FN 1>, it did not attack the company's justification for the search. Rather, its principal defense is that grievant did not actually refuse to submit his car for examination. This seems to be to be a sound strategy, though not necessarily a winning one. The union, however, did not create the facts; grievant did that. The union merely offered the best available defense, given the circumstances it had to explain.

Arbitrators often use the term "probable cause" to describe the circumstance that must exist before an employer can search employee property, but it does not follow from that terminology that legal precedents are of great value. Probable cause for a search is, in its most common usage, a constitutional concept used in criminal cases. In those cases, and others to which the rule applies, probable cause protects individuals from intrusive action by the government, as contemplated by the fourth amendment to the Constitution. Those same constitutional protections do not apply, however, in relations between private parties. That doesn't mean the private employment relationship is unregulated, even though there may be an absence of constitutional or even statutory provisions.

In a union environment, arbitrators apply concepts of what they call due process which, in reality, are merely ways of insuring some fundamental fairness. In privacy questions, like the one at issue here, the typical requirement is that the company have some reasonable suspicion to justify its action. The term "due process," then, is not to be confused with the more restrictive requirements imposed on government under the constitution. In short, while the employer must demonstrate some reason to justify its decision to search, its justification need not rise to the level of constitutional due process.

The company's decision here was not unreasonable. It takes significant courage for an employee to lodge a serious complaint against a coworker. Ostrozovich received a complaint which he thought was worthy of investigation. The subject matter of the complaint is also of some significance. Perhaps the company would have needed more cause for a search if a single employee had asserted that a coworker was merely stealing toilet paper from company rest rooms. The allegation here, however, was of a more serious nature. Unless

there are reasons to discount the informant's veracity, the company has some obligation to investigate such allegations. Although there may have been no such occurrences at Inland Steel, there have been occasions elsewhere in recent years in which disgruntled employees have brought weapons to the workplace and shot and killed coworkers. An employer, then, cannot easily ignore reports that an employee keeps a gun in his car, especially when the employee allegedly has fantasized about bringing into the plant and shooting.

I also think the actions grievant took after Sammons informed him of his intention to search are relevant. First, grievant denied that he had driven to work, an assertion that was blatantly false, as he later admitted. Clearly this lie was intended to deny the company access to grievant's car. Grievant then claimed that he had a permit for a gun, an assertion that would have been irrelevant if he didn't actually have a gun in his possession. The company, after all, had not accused him of merely owning a gun. I don't mean to suggest that an employer can create probable cause simply by threatening to search employee property and then claiming that the employee's reluctance justifies reasonable suspicion. Those are not the facts here. The employee complaint would have probably been sufficient to justify the search. Grievant's comments to Sammons only added further grounds for suspicion.

I realize that grievant never said expressly that the company could not search his car. I also understand that he now claims he was willing to have Sammons look in the car, but objected to the presence of plant protection. I place little credence in this explanation. In the first place, the vehemence of grievant's objection to the search did little to communicate to Sammons grievant's alleged intent to cooperate. In addition, grievant could not reasonably have believed that plant protection had no right to be involved in the process, whether Sammons accompanied them or not.

In my view, this case cannot be decided on the basis of what grievant did or did not say to Sammons, Prabhu or Pabey, though I do note that he responded to Pabey's request by saying "there's nothing to search." But I think grievant would have been guilty of a rule 133 violation even if, at that point, he had given Pabey permission to look in the car. I also think it is clear that grievant violated the other two rules and that those violations were an integral part of his refusal.

I simply don't believe grievant's claim that he thought the meeting in Sammons' office was over. In fact, I doubt that Harvey or Garza thought so either. During the heated discussion, Harvey got up and announced that he was leaving because he had to attend another meeting. He testified that, because of this other meeting, he did not intend to return to Sammons' office. I'm willing to believe that Harvey had another meeting that day (although I note that Harvey was still with Garza several minutes later when Pabey arrived, so I assume the pressure to leave wasn't immediate), but that doesn't settle the issue of whether the meeting with Sammons had been completed.

I think there is no question that both grievant and his representatives realized there was still an issue pending about the search. In the first place, Garza testified that he left the meeting to call the union for advice. That can hardly be viewed as a flat refusal to submit to the search, followed by a termination of the meeting. Rather, the inference is that the meeting participants would continue the discussion about what to do after Garza contacted the union hall. Also telling is grievant's comments at the hearing. Parker asked why he was returning to Sammons' office after he visited his car and grievant responded "where else would I go." If he really believed the meeting was over, as he claimed, then he would go to work, since he testified that he was already late. But he was instead headed back to Sammons' office because, I believe, he knew the issue of the car search was still pending.

Further support for this conclusion is found in grievant's claim that he had just started to look in the car when he saw the Plant Protection car and, thinking they were coming for him, abandoned the search. During the hearing, there was significant dispute about whether Prabhu actually called Plant Protection from Sammons' office and, if he did, whether grievant heard the call. I don't think it matters whether grievant heard the call or not, though I suspect he did. The important fact, however, is that grievant knew Plant Protection was on the way. The 4th step minutes seem to say as much. More important, there is no other way to explain grievant's claim that he stopped looking in his car when he saw the Plant Protection vehicle. He could only have thought they were looking for him because he knew that Prabhu -- or at least someone -- had called them to begin the search.

I also discount grievant's claim that Jones gave him permission to enter and leave through the vehicle gate. Actually, I'm not convinced it would matter if she had. Grievant had to know that at the time he visited the parking lot, he was supposed to enter and leave the plant only through the clock house, that he needed his gate pass, and that he needed the appropriate permission form from his supervisor. Grievant knew that neither Ostrozovich nor Prabhu were going to give him permission to leave the plant so he went anyway. I suspect that he waited until Jones was busy collecting passes from trucks or other vehicles and just ran

through the far side of the gate. In any event, he knew when he left that he was supposed to be in or around Sammons' office and that he had no right to use the vehicle gate. He was determined to do so, however, so he could get to his car.

I don't know whether grievant had a gun in his car or not. That, of course, was not asserted as a reason for the discharge, though it is not irrelevant, as I will discuss below. I found it curious that grievant said, without being asked, that he stopped to pick up a brown paper bag. It could be that he retrieved the bag in order not to disturb fingerprints, as he claimed, though I must say I found his "set up" story to be far fetched, to say the least. <FN 2> It is also possible that he picked up the bag to put something in it and that he brought up the fact on his own in order to have a ready explanation in case Pabey or Prabhu said they saw him with the bag in his hands.

I was also troubled by other portions of grievant's testimony. He testified that he always kept his car unlocked, yet he stopped to get his car keys before going to the lot. I don't believe his claim that he feared someone might have "jammed" something into his trunk. In fact, I have serious doubts about his fear of a set up at all. Grievant, after all, admitted that he didn't even bother to search his car until more than 24 hours after he left the plant. The more reasonable explanation for getting his car keys is that grievant needed access to the trunk himself.

I can't say whether grievant actually had time to look in his car or to retrieve something he might have had there. The union claims that it would have made no sense for grievant to return to the plant if he had a gun in his car. But the company asserts that he was headed back to the plant because he had already had a chance to remove the gun. In my view, at that point it didn't matter whether grievant had a gun in his car or whether he gave permission to search. Grievant's principal mistake was going to his car at all.

As I have already said, I think the company had reasonable grounds to search grievant's car. Moreover, grievant knew of the company's plans. Once he went to his car, however, he effectively compromised the search. No one but grievant knows how long he was at his car or what he was able to do there. It may be true that he had just gotten to the car when he saw Prabhu and Pabey. Or he may have been there a few minutes before they arrived. In either event, the company could no longer search the car with the belief that it was still in the condition it had been in when grievant arrived for work. Grievant's conduct, then, was as effective a denial as express words to the same effect. <FN 3>

In summary, then, I find that grievant did violate rules 132 n. and o. and rule 133. As noted above, the rule 132 violation are significant because they were part of grievant's scheme to reach his car before the company could. I reject the union's contention that grievant did not leave his work place or assigned place of duty. Grievant knew he was supposed to be in Sammons' office and he left there as a way of frustrating a legitimate company objective.

I turn now to the question of the appropriateness of the discharge. As noted above, grievant was not discharged for violation of the company's rule about firearms on company property. And, of course, no one can testify that he actually violated that rule. As I observed above, however, the likelihood that he had a gun in his car is relevant to the company's choice of penalty.

There are apparently only two reported arbitration cases at Inland Steel dealing with employees found in possession of guns on company property. One is Inland Award No. 637, in which arbitrator Burt Luskin upheld the discharge of an employee who was a member of an auxiliary police force and kept his gun under the seat of his car. Nothing in the opinion discloses other aggravating circumstances. Moreover, the arbitrator noted that the employee had been cooperative in the investigation. Nevertheless, the arbitrator found proper cause for discharge, citing the "terrible dangers" inherent in keeping firearms on company property.

As other arbitrators have recognized, (see Orgill Brothers, Company Exhibit 4), employees should not be able to escape the consequences of a rule violation by refusing reasonable requests for searches. Here, while there is no proof that grievant had a gun in his car, there are reasonable grounds to suspect that he did. I base that conclusion not merely on the employee complaint and grievant's statements about the permit and about not having driven to work. Those factors justified the company's decision to search. In considering the appropriateness of the remedy, however, I am also entitled to consider other actions taken by grievant. His decision to visit his car and to do so by knowingly breaking two company rules are relevant here. One must question why grievant was so anxious to get to his car that he left the area where he knew he was supposed to be and left the plant without permission.

I am also troubled by grievant's decision to retrieve his car keys before going to the lot and by his declaration that he picked up a paper bag on the way to the lot. None of this proves that grievant had a gun

in his car. But it adds to the seriousness of the rules grievant did violate. It makes it look more like grievant's refusal to submit his car for a search was influenced by his desire to escape detection.
In conclusion, I find that grievant clearly violated rule 133 as well as rules 132 n. and o. Under the circumstances, I am persuaded that the company had proper cause to discharge him for those violations.
AWARD
The grievance is denied.
/s/ Terry A. Bethel
Terry A. Bethel
August 1, 1991
<FN 1> It is true that Sammons heard the report about the gun in grievant's car on February 20, and afterwards agreed to postpone the meeting until the following day. Sammons explained that he thought all of the concerns he had about grievant -- his performance, his relationship with coworkers, and the gun allegation -- were related and he wanted to discuss them at the same time. This is not entirely persuasive. Nevertheless, the fact that the company apparently did not regard grievant as an immediate threat does not defeat its right to insure that he didn't keep a gun in his car.
<FN 2> In fact, the only evidence grievant tendered supporting his belief in a set up is that the company allegedly had disclosed the terms of his action plan to coworkers. Even if true, however, that doesn't explain why someone would want to plant a gun in grievant's car.
<FN 3> I also believe that nothing grievant said to Sammons, Prabhu or Pabey could reasonably be construed as permission to search his car. His words and actions implied the contrary.