Award No. 859
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America,
Local No. 1010.
Grievance No. 25-S-115
Appeal No. 1470
Arbitrator: Jeanne M. Vonhof
April 29, 1992
REGULAR ARBITRATION
INTRODUCTION
The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Friday, March 13, 1992 at the Company's offices in East Chicago, Indiana. The Company and Union filed pre-hearing briefs in the case.
APPEARANCES
For the Union:
J. Robinson, Chairman, Grievance Committee
A. Reeves, Grievant
F. West, Inspector, 80" Hot Strip Mill
E. Rose, Inspector, 80" Hot Strip Mill
R. Young, former supervisor, 80" Hot Strip Mill
For the Company:
W. Peterson, Project Representative, Union Relations
B. Smith, Senior Project Representative, Union Relations
B. Binkley, Section Manager, 80" Hot Strip Mill
RELEVANT CONTRACT PROVISIONS:
ARTICLE 3
PLANT MANAGEMENT
Section 1. Except as limited by the provisions of the Agreement, the Management of the plant and the direction of the working forces, including the right to direct, plan and control plant operations, to hire, recall, transfer, promote, demote, suspend for cause, discipline and discharge employees for cause, . . . and to manage the properties in the traditional manner are vested exclusively in the Company. . . .
ARTICLE 13
SENIORITY
The Company and the Union recognize that promotional opportunity, job security when decrease of forces takes place, and reinstatements after layoffs should merit consideration in proportion to length of continuous service. It is also recognized that efficient operation of the plant greatly depends on the ability of the individual on his particular job.
Section 1. Definition of Seniority. Employees within the bargaining unit shall be given consideration in respect to promotional opportunity for positions not excluded from said unit, job security upon a decrease of forces, and preference upon reinstatement after layoff, in accord with their seniority status relative to one another. "Seniority" as used herein shall include the following factors:
a. Length of continuous service and, except where a local seniority agreement provides for some greater measure of service length than plant continuous service, plant continuous service shall be used for all purposes in which a measure of continuous service is utilized;
b. Ability to perform the work; and
c. Physical fitness.
It is understood and agreed that where factors "b" and "c" are relatively equal, length of continuous service as hereinafter made applicable shall govern. In the evaluation of "b" and "c" Management shall be the judge, provided that this will not be used for purposes of discrimination against any member of the Union. If objection is raised to the Management's evaluation, and where personnel records have not established a differential in abilities of two employees, a reasonable trial period of not less than thirty (30) days shall be allowed the employee with the longest continuous-service record as hereinafter provided.
Section 2. Personnel Records. Records as to each employee's service with the Company shall be maintained in the department in which he is employed, and such records shall include matter relative to an employee's

work performance and length of service. Each employee shall at all times have access to his departmental personnel record and in case of those employees whose departmental record indicates unsatisfactory workmanship, the manager of the department or his assistant will call the employee in and acquaint him with the reasons for unsatisfactory rating.
The managers of departments will, when necessary, continue the program of acquainting the employee with written notices of discipline or warning to stop practices infringing on regulations or improper workmanship. These letters are recorded on the personnel cards. In all cases where one (1) year elapses after a violation requiring written notice, such violation will not influence the employee's record.
These records of the employee's individual performance have much influence on the "Ability to perform the work" clause in Section 1 of this Article, but in no case will the Company contend inability to perform the work when the procedure as outlined in this Section has not been strictly complied with. Should any dispute arise over the accuracy of the personnel record, it shall be disposed of through the normal grievance procedure.
Section 6. Filling of Vacancies and Stepbacks Within a Sequence.
a. Temporary Vacancies:
(1) Known at the time that schedules are posted to be of at least (5) days' duration in the payroll week, shall be filled by the employee within the sequence in which such vacancy occurs in accordance with the provisions of this Article. . . .
BACKGROUND
The instant case involves issues arising when the Grievant attempted to qualify for a job in his seniority sequence. The Grievant, A. Reeves, was working as a Mill Utilityman in the 80" Hot Strip Mill and had been employed by the Company for twenty-six years at the time of the events giving rise to this dispute. Sometime during 1987 the Grievant began filling temporary vacancies as a Coiler Operator, which is two steps above the job normally occupied by the Grievant at that time in the Mill Crew Sequence. The evidence indicates that the Coiler Operator is responsible for overseeing the coiling of long hot rolled strips of steel. Although the machines which actually coil the strips operate automatically to a certain extent, the evidence establishes that often the Coiler Operator must intervene and operate them manually. The evidence further indicates that the job is difficult because when something goes wrong the operator must assess the situation, make the correct judgment as to what action would correct the problem, and complete that action. These judgments and responses must occur very quickly, as the hot rolled strip is moving at a very fast rate of speed by the time it approaches the coiler.
The Grievant received training on twenty-nine (29) turns for the job of Coiler Operator. Between July 19 and October 13, 1987 he worked an additional fifty-three (53) turns as a Coiler Operator, without a trainer. The evidence indicates that on August 13, 1987 the Grievant met with Mr. Bruce Binkley, the Hot Mill Section Manager, who told the Grievant that his work performance was not up to par, based upon the number of coiler stops that occurred when the Grievant was acting as Coiler Operator. The Manager told the Grievant that his performance must improve or that further disciplinary action would be taken. The discussion was memorialized in a VODG (Verbal Orders Don't Go), dated August 17, 1987.
A coiler stop occurs when the hot rolled bar does not proceed correctly through the sequence of steps which brings it from the finishing mill through the coiler. Coiler stops may occur for reasons attributable to the Coiler Operator or for other reasons outside his or her control. Because the strip must be coiled at a particular temperature, coiler stops often result in steel which is downgraded or scrapped.
The evidence indicates that the Grievant experienced coiler stops on twenty-nine (29) of his fifty-three (53) turns, for a total of forty-seven (47) actual stops. Of that number eight (8) were definitely attributed to "Operator Failure," by the team assigned to investigate coiler stops, which is composed of management and bargaining unit members. Another eight (8) occurring on Grievant's turn were assigned to a catch-all category (called "Stopped in Coiler") in which operator failure is a possible, perhaps even probable, but not definite cause, according to the Company's evidence.
Management reviewed the statistics regarding the Grievant's coiler stops, which showed that the other two full-time operators each had four (4) coiler stops attributable to Operator Failure and three (3) and two (2) coiler stops respectively attributable to "Stopped in Coiler" during that time period. Management concluded that the Grievant's operation of the equipment was getting worse after he was counseled about his poor work performance.
Management decided to permanently deny the Grievant promotion to the Coiler Operator position. The Grievant was informed of this decision on October 13, 1987 and the Union grieved it. The Parties were unable to resolve the dispute and it proceeded to arbitration.

THE COMPANY'S POSITION

The Company contends that the grievance should be denied and the denial of promotion upheld. In support of this position the Company argues first that the burden of proof in this case lies with the Union. According to the Company Article 3 gives management the right to demote and Article 13 permits the Company to be the judge concerning the ability of an employee, as long as there is no discrimination against any member of the Union in that decision. The Company cites several arbitration cases to support its view.

The Company argues that there is a distinction between this case and one in which an employee has proven over a substantial period of time that he is capable of performing the duties of a job, and then the employee's performance deteriorates due to carelessness or negligence. In such a case the Company acknowledges that it must establish a pattern of progressive discipline. However, in this case the Grievant had never obtained the ability to perform the job, the Company contends, and therefore it need not employ progressive discipline while he continued to make expensive mistakes.

According to the Company, the Union has failed to establish that the Company acted in a discriminatory manner towards the Grievant when it decided to demote him. Furthermore, the Company argues that it has established that the Grievant lacked the ability to perform the duties of the job.

The Company contends that the Coiler Operator job is a crucial occupation within the Mill Crew Sequence, involving significant responsibility and the possibility of costly errors. The Company notes that five other employees have failed to promote into the position as well as the Grievant.

According to the Company, the evidence that the Grievant was getting worse was critical to its decision to demote him. The Company points to evidence that after management talked to the Grievant he had more coiler stops per turn than in the period prior to that session. Therefore, the Company contends that it had a reasonable basis for concluding that the Grievant's performance would not improve with further reminders or discipline.

The Company also argues that it was justified in relying upon the delay sheets to determine the Grievant's ability to perform the job. According to the Company, the Union did not attempt to discredit this information or conclusions reached on the delay sheets until the arbitration.

The Company argues further that the testimony of the Union's witnesses about the Grievant's abilities or mistakes is not relevant or credible. According to the Company the two trainers did not work with the Grievant after the training incident and the supervisor who testified did not directly supervise the Grievant.

For all of the above reasons the Company contends that it had sufficient cause to demote the Grievant, and that the grievance should be denied.

THE UNION'S POSITION

The Union argues that the grievance should be granted and the Grievant restored to his position as a Coiler Operator. As a preliminary issue, the Union suggests that the burden of proof is on the Company to show that the employee lacks the basic ability to do the job. The judgment regarding ability is fact-based, the Union contends and the Company must present facts to substantiate its claim that the Grievant was not able to do the job in question. The Company may make the initial determination regarding ability, the Union concedes, but when the Company acts to demote an individual, it must substantiate its actions.

The Union argues that the Company's action here cannot be judged solely on the grounds of whether it was arbitrary or capricious, because then the protections against demotion for cause would be written out of the Agreement. The Union notes that in the Inland arbitration case relied upon by the Company, the arbitrator also held that an error of fact is grounds for overturning such an action.

The Union contends that the Company made the determination that the Grievant had the ability to perform the job, because there would be no other reason for the Company to place the Grievant on the job after his training period. This initial ability to perform the job may not be frozen in stone forever, but the Company has failed to establish that the Grievant never had the ability to perform the job, the Union contends.

In support of this argument the Union contends that the evidence shows that the decision to demote the Grievant was made solely on the basis of the delay sheets, and not on any observation of the Grievant's operation of the equipment. According to the Union, management made a decision that the Grievant's errors were not correctable without an investigation that could determine whether the errors were correctable.

In further support of this argument the Union notes that the Company relied upon raw percentages of coiler stops without regard to whether the coiler stops involved operator error. According to the Union the only stops for which the Grievant should be held accountable are those in which he made errors.

The Union argues particularly that the Company's conclusion that the Grievant was becoming progressively worse cannot be supported by the use of the aggregate number of coiler stops. The Grievant should not and

cannot be held accountable for those coiler stops not attributable to operator failure, the Union argues. The Union also relies upon the testimony of its witnesses which suggests that not all of the coiler stops attributed to the Grievant through the delay sheets should be attributed to him.

The Union relies further upon the evidence of the former day supervisor, who testified that he thought the Grievant was treated unfairly. The Union notes that it is highly unusual for a supervisor to testify on behalf of a bargaining unit member in such a case.

On the basis of all the evidence the Union argues that the grievance should be sustained. The Union requests that the Grievant be restored to his position and be made whole.

OPINION

This is a case involving a permanent demotion or denial of promotion to the Grievant. In many cases there is a clear distinction between these two management actions. However, this is an unusual case and the Parties themselves have used the terms interchangeably here.

The Grievant, who now has thirty (30) years in the plant, was trained for and began performing the work of the Coiler Operator in 1987, two steps above his established position in the Mill Crew Sequence. The evidence indicates that there was no permanent vacancy as a Coiler Operator, but that employees often qualify for positions several steps above their current established position through temporary vacancies. The Grievant trained for about six (6) weeks, held the position for three (3) months, and then was permanently removed from the position due to an alleged inability to perform the job.

Standards to Be Applied

The threshold issue in this case involves the standards under which the case should be decided. The Union contends that the Employer must establish by clear and convincing evidence that the Grievant lacks the basic ability to perform the job. The Company, on the other hand, contends that its action may be overturned only if the Union demonstrates that it was arbitrary, capricious, or discriminatory.

The Union relies primarily upon the language of Article 3, which states that management may "demote for cause." According to the Union, the Company's "arbitrary or discriminatory" standard would eviscerate the "demote for cause" clause. The Company also relies upon Article 3, and upon Article 13, Section 1, the seniority clause which states that, in determining ability to perform a job, "(m)anagement shall be the judge, provided that this will not be used for purposes of discrimination against any member of the Union." Both Parties have provided the Arbitrator with decisions by astute arbitrators in the basic steel industry; because this kind of case relies so heavily upon questions of fact, none of them is precisely on point. However, they are helpful to the Arbitrator in eliciting standards from the divergent positions taken by the Parties in this case.

Clearly, in cases where an employee has held a job for a number of years, and then is demoted, the Employer has a substantial burden to establish that the employee in fact cannot (or will not) perform the job. Where there is carelessness or negligence the demotion is of a disciplinary nature, and the standards of proof generally involved in any "for cause" determination come into play, this Arbitrator concludes. But even where the issue involves a lack of ability, (due, for example, to a decline in physical ability), there is a substantial burden on the employer to establish that the employee no longer has the basic ability to do the job.

The Arbitrator concludes that the rationale underlying these cases is that management determined at some point that the employee in question did have the basic ability to perform that job, and therefore management must demonstrate that that ability has been lost. In cases where an employee is still in a training or qualifying period, however, management has not determined that the employee ultimately is qualified for the job. In such a case the Employer has greater leeway to remove an employee from a position than in a case where the employee has held the job for a number of years.

This approach was taken by Arbitrator Kelleher in an Inland case relied upon by the Company here, upholding the Company's demotion of an employee after a twenty-seven (27) day training period. There he stated that the Union could challenge the Company's demotion only where "it can show that the Company's determination was arbitrary, discriminatory, capricious, or based upon a substantial error of fact." (Inland Award No. 378).

The Arbitrator concludes that the case at issue here falls somewhere in between the two types of cases described above. This is not an employee who has held the job in question for many years. This also is not a case where the Grievant was disqualified during the initial training period. The Grievant did last through the training period, and worked on the job for three (3) months alone before the Company demoted him. This course of events suggests that at the time the Grievant finished the training period and was put on the job the Company had decided that the Grievant had the basic ability -- in some sense -- to perform it

adequately. Therefore it seems reasonable in this case to impose a somewhat higher standard on the Company's action than that employed in Inland Award No. 378, where the Company decided the employee was unable to perform the job during or immediately after the initial training period.

However, for reasons discussed below, it was not unreasonable for the Company to consider the Grievant as not fully established in the job at the end of his training period. Therefore the Arbitrator will not apply the same standards as if the Grievant had held the job for a number of years. Whatever standard is applied, the Parties concur that the analysis in this case focuses on the evidence of inability provided by the Company.

The Merits of the Case

The primary evidence regarding the Grievant's alleged inability to perform this job involves two documents regarding the number of "coiler stops" which occurred while the Grievant was working. The evidence indicates that the Grievant had forty-seven (47) coiler stops during the fifty-three (53) turns he worked alone as a Coiler Operator in July through October, 1987. The other two full-time Coiler Operators had thirty (30) and thirty-two (32) coiler stops respectively in approximately the same number of turns.

More relevant are the statistics concerning the coiler stops which are attributed to operator failure rather than to other factors beyond the operator's control. In the category of "Operator Failure," the Grievant had twice as many coiler stops as the other two Coiler Operators. In the catch-all category of "Stopped in Coiler," which may be but are not definitely attributable to the Coiler, there were more than twice as many stops on the Grievant's turn as on the other operators' turns.

The Arbitrator notes that the Grievant's failure rate is based upon a comparison to employees with far more experience than him. The Company presented testimony, however, that even if the Grievant were not compared to other employees, his failure rate was still unacceptable. The Company, which has the primary right to determine ability, also has the primary right to determine the standards of acceptable performance for a job.

However, in the instant case there was no evidence that there were definite, well-known performance standards for this job. In addition, the Company presented testimony that there was not a definite probationary period; as the Grievant acquired more time on the job, the Company witness stated, the presumption would be that the Company acquiesced to his performance.

The Arbitrator does not conclude that the Company must have precise performance standards or a defined probationary period on this job in order to comply with the Agreement. However, the Company has portrayed a murky picture regarding when an employee knows that he has qualified for this job, and what level of mistakes is acceptable. (In this regard the Arbitrator notes that even the two established Coiler Operators, with years of experience, each had four (4) coiler stops attributed to "operator failure" during the same three-month period, without any evidence of discipline for poor performance).

The Company has argued that the Grievant was provided with a verbal warning regarding his work performance, after his first month alone on the job. The VODG states that continued poor workmanship could result in future discipline. However, there is no evidence that anyone ever talked to the Grievant again before demoting him two months later. The Grievant might have thought that he was performing adequately during that period, because he did not hear anything to the contrary, and there are no clear-cut performance standards.

The Company has stated that critical to its decision to demote the Grievant was the fact that he was getting worse. But if that is so, and if Grievant had been warned again at any time during his final two months, he might have applied himself more diligently or he might have asked for additional help. In the only case cited by the Company involving a demotion after a similar amount of time, the employee received three reprimands over a three-month period. (Republic Steel Corp., Award No. 4788).

In the Republic Steel case there was evidence that the grievant was basically qualified for the job, and his mistakes were the result of carelessness. The Company here suggests that repeated reprimands are not required when the employee is not able to do the job, because they would have no effect. However, there was no evidence here of any physical inability of the Grievant, as was suggested in Inland Award No. 378. The Company's case would be stronger here if, as in most of these cases, there were testimony from the Grievant's immediate supervisor about specific limitations which made him incapable of performing the job. Here it is not clear whether the Company ever determined that the Grievant's mistakes were correctable with guidance, or were caused by an inherent inability to keep up with the pace of the job, or some other problem.

Article 13, Sec. 2, cited in the grievance, requires that managers of departments will, when necessary, acquaint employees with written notices regarding poor workmanship (emphasis added). These notices are

considered part of the employee's record, the contract states, and are very important in determining ability to perform a job. The contract states further that the Company will not contend inability unless these procedures have been strictly complied with.

The Company's position suggests that, because the Grievant was in this in-between state, he was entitled to less feedback under this section than if he were still in training or if he had been established in the job for a longer period of time. However, the language requires managers to let employees know, when necessary, of their poor workmanship, and the Arbitrator concludes that the Company did not meet that obligation, under the circumstances of this case. Because the performance standards of the job are somewhat indefinite, and because the Grievant had passed the initial training period, the Arbitrator concludes that the Company had a responsibility to provide him with more than one notice that he was not meeting these standards before permanently denying him promotion.

Therefore the Arbitrator concludes that the Company violated Article 13, Section 2 of the Agreement. As a remedy the Union seeks the reinstatement of the Grievant to the Coiler Operator position, on the grounds that he was qualified for the job. The Union has argued that the Grievant definitely was qualified at the end of his training period because the Company put him on the job.

Even though the Arbitrator concludes that the Company violated the selection procedures, she does not consider that she has the authority to reinstate the Grievant to the job if the evidence indicates that he lacks the ability to perform its duties. There was evidence that at least three and perhaps five other employees had failed to qualify for the job in recent years. This suggests to the Arbitrator that the Company has consistently enforced high standards in filling this job.

Furthermore the Arbitrator concludes from the evidence that the high standards for the job are related to the severe consequences of mistakes. The evidence indicates that the downgrading or loss of at least one hot rolled strip is common with a coiler stop; in fact, more than half of the stops occurring on the Grievant's turn resulted in the loss of more than one strip. The evidence also indicated that monetary loss to the Company is between $100 - $300 per ton for the strips, and that the strips weigh approximately nineteen (19) tons each. In addition, according to the evidence, eighty (80) percent of the Company's product passes through the 80" Hot Strip Mill. From these statistics the Arbitrator concludes that the evidence supports the Company's position that this is a pivotal job in the mill.

The Union presented two witnesses who trained the Grievant and who testified that some of the coiler stops attributed to the Grievant as operator failure might have been the result of other factors beyond his control. The witnesses did not have any actual knowledge regarding any of the specific coiler stops in question, however; their testimony was of a general nature concerning what might have caused a particular kind of stop.

Each of the coiler stops was investigated by a coiler stop team, composed of bargaining unit and management employees, who conduct an investigation and assess responsibility for each coiler stop, close to the time of the incident. In light of these facts, the Arbitrator has not given much weight to the testimony of the Union's witnesses regarding whether the stops should have been attributed to operator failure.

The Union also relied upon the testimony of a retired supervisor who worked in the 80" Hot Strip Mill and testified that he thought the Grievant was progressing well. However, he did not directly supervise the Grievant, and therefore probably was not aware of his overall record of performance.

The Union also has attacked the Company's use of "aggregate" numbers in this case, i.e. statistics which incorporate coiler stops attributable to operator failure and those attributable to other factors. The statistics provided by the Company at the arbitration hearing were broken down to indicate which stops were due to operator failure. The Section Manager who demoted the Grievant stated that he was aware of the proportion of stops attributable directly to the Grievant at the time he made his decision, although his testimony was somewhat vague on this point.

The use of the aggregate numbers overall would be more troubling if it presented a substantially worse picture than the more relevant statistics regarding operator failure. However, the aggregate figures show that there were about fifty per cent (50%) more coiler stops on the Grievant's turn than on those of the other operators; in comparison the figure for operator failure is one hundred percent (100%) higher for the Grievant than for the other operators.

The use of the aggregate numbers to support the claim that the Grievant was "getting worse" presents a more serious problem. The statistics for each category are not broken down by month, so it is impossible for the Arbitrator to determine from the aggregate figures whether the number of operator failures was increasing in the Grievant's last two months. The use of the aggregate figures does not bolster the Company witness' vague testimony that the Grievant was getting worse. Furthermore, whether the Grievant was

getting worse can be an important factor in determining whether he ultimately has the ability to perform the job.

In considering all of the evidence above, the Arbitrator cannot conclude that the Grievant definitely has the ability to do this job. The job is difficult and important, and the consequences of mistakes can be substantial. The number of the Grievant's mistakes is substantial enough that the Arbitrator cannot conclude that the proper remedy is to reinstate him to that position.

However, there is no way to reconstruct what might have happened if the Grievant had been counseled as necessary about his job performance during the last two months he was on the job, in accordance with Article 13, Section 2. In light of this situation the Arbitrator concludes that the Grievant is entitled to some backpay.

In addition, it is difficult for the Arbitrator to determine, from the evidence before her, what was the cause of the Grievant's mistakes and whether he was getting worse. Therefore the Arbitrator cannot conclude that the Grievant did not have the ability to perform the job, or that the Company's decision that he did not was reasonable. In light of all the evidence here, the Arbitrator concludes that the Grievant should be offered another opportunity to attempt to establish himself in the job, if he still desires one.

In reaching this decision the Arbitrator concludes that the Company has not consistently treated the Grievant as though he absolutely cannot do this job. The Arbitrator has discussed the seriousness of any coiler stop. However, the Company allowed the Grievant to perform the job for the three months alone, with only one discussion. Furthermore, the Grievant testified that he has been working as a Coiler Operator Assistant for some time, which requires him to perform as a Coiler Operator alone, when the Coiler Operator is not present. If he were totally unable to perform this job, the Company undoubtedly would not permit him to perform it for any amount of time. In addition, the contract states that seniority sequences are designed specifically to provide an employee with experience in the next job up from the one he or she occupies.

The nature of this job indicates that experience may well help to reduce the number of errors. Therefore the Grievant, with experience in the Assistant's job, may be in a better position today to qualify for the job than he was in 1987.

The Grievant shall be offered another opportunity to qualify for the job under whatever the current procedures are for such qualification. The Company shall provide a training period, if necessary. As in this case the Grievant will not be regarded as fully established in the job simply by virtue of having completed the training period. The Company shall provide appropriate communication to the Grievant regarding his progression and error rate throughout the trial period.

AWARD

The grievance is granted in part and denied in part. The Company violated Article 13, Section 2 of the Agreement when it failed to provide the Grievant with adequate communication regarding his work performance. The Grievant will be awarded six months' backpay in the amount of the difference between the rate of the Coiler Operator and the rate of the job into which he was demoted.

The Grievant will not be reinstated to the Coiler Operator position, because there is not sufficient evidence for the Arbitrator to determine that he is qualified for the job. If he so desires, the Grievant may have another opportunity to establish that he is qualified for the job, in accordance with the discussion above.

/s/ Jeanne M. Vonhof
Jeanne M. Vonhof
Labor Arbitrator
Decided this 29th day of April, 1992.
Chicago, Illinois