Award No. 897
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
March 19, 1995
OPINION AND AWARD
Introduction
This case concerns three separate grievances, all involving grievant Marge Kendall and all concerning her performance of her duties in the caster sequence at No. 2 BOF/CC. The case was tried on October 20, 1994 at the company's offices in East Chicago, Indiana. Pat Parker represented the company and Mike Mezo presented the case for grievant and the union. Grievant was present throughout the hearing and testified in her own behalf. The parties submitted pre-hearing briefs. In addition, each party filed a post hearing brief and a post hearing reply brief. I received these last four filings in one packet on or about January 20, 1995.
Appearances
For the company:
P. Parker -- Sen. Rep., Union Rel.
N. Prabhu -- Op. Coord., Casters, 2 BOF
R. Kostyo -- Process Trainer, 2 BOF
J. O'Barske -- Caster Coord., 2 BOF
W. Sammons -- Section Mgr., 2 BOF
S. Nelson -- Human Res. Generalist
R. Allen -- Human Res. Generalist
For the union:
M. Mezo -- President, Local 1010
P. Fernandez -- Witness
D. Stevenson -- Witness
M. Kendall -- Witness
M. Bochenek -- Griever
A. Jacque -- Chrm., Grievance Comm.
J. Robinson -- Staff Rep., Dist. 31 USWA
Background
As noted above, there are three separate grievances involved in this case. Although each was separately identified and discussed at the hearing, and although each stands on its own merit, the grievances are also related, which accounts for their combination in this one arbitration. While other issues are involved, the principal matter to be resolved is the company's decision to permanently demote grievant out of the caster sequence. Facts in each of the three grievances, taken together, influenced that decision.
The first grievance at issue is 5-T-188, which resulted from the company's decision to temporarily demote grievant following the occurrence of three incidents in a five day period. The first incident occurred on August 28, 1992, and involved a mold overflow while grievant was operating the strand. The company asserts that after a BOP alarm, grievant tried to close the gate, but that it did not close. One of the company's principal complaints is that grievant did not react properly after the gate failed to close. Another employee reached over and fired the blank. The company asserts that grievant should have taken this action herself and questions what might have happened if the other employee hadn't acted.
The second incident occurred two days later, on August 30, 1992. The company says that grievant lost control of the level in the mold, which overflowed, causing a hanger. On September 1, 1992, grievant's supervisor, Nick Prabhu, called grievant in and talked to her about the two occurrences in the previous three days. He discussed his concern about the apparent difficulty she was having controlling the mold level, and asked if she was having any problems that might account for it. Grievant responded that she was all right. But grievant experienced another problem that same day, when the company says, she failed to react properly when she lost level in the mold. Prabhu said that grievant failed to react when the mold level dropped suddenly and that the level could have gone below the bottom of the mold and caused an explosion had a coworker not reached over and turned down the rheostat.

During the hearing, the union asserted that the first two of these incidents were not really at issue. Obviously, these two incidents form part of the basis for the company's action, so I understood the union's assertion to mean that it was not contesting the company's version of these events. The grievant did testify, however, that had her coworker not fired the blank on August 28, she would have done so herself. Although it does not necessarily contest the facts as to the August 28 and August 30 incidents, the union does not concede that the company's response was appropriate, a matter I will discuss below.

The union did contest the company's version of the September 1 incident. In particular, the union says it was grievant, and not her coworker, who ramped down the machine, which was the proper response to the drop in level. Following the hearing, I had the opportunity to view the video tape. Although substantial time passed between the time I viewed the tape and the time the record was closed, my recollection of the tape -- which I recorded immediately after the hearing -- favors the company's version. That is, despite contrary testimony from grievant and another union witness who viewed the tape, I thought it was the coworker, and not grievant, who turned down the rheostat.

As a result of these three incidents, the company temporarily demoted grievant and gave her refresher training on the caster. Grievant's occupation was caster utilityman, the bottom step of a two step skill-based sequence. As a caster utilityman, grievant was sometimes required to promote to the caster operator occupation. That assignment required that she be proficient in all of the duties of caster operator, which includes strand operator. It is the company's contention that the temporary demotion and retraining were proper because of grievant's inability to function effectively as a strand operator.

Grievant's temporary demotion, which is the subject of Grievance 5-T-118, apparently became effective on September 13, 1992. Presumably, grievant would have been eligible to promote to the caster operator occupation in the week beginning October 4, 1992. The record does not reveal exactly when the period of demotion ended, though I note that her training apparently lasted through most of October. Company Exhibit 4 indicates that grievant's training was not completed until October 21, 1992. In any event, on October 24, 1992, grievant was again involved in an incident that gave rise to one of the grievances in this case, Grievance 5-V-006.

This incident involves the company's claim about certain deficiencies in grievant's actions during a breakout on October 24. The discipline letter lists four areas of concern. First, the company asserts that grievant was reading at the time the breakout occurred, and was thus inattentive to the case, a charge grievant denied. Second, the company charges that grievant failed to recognize the situation as a breakout and, therefore, failed to push the breakout button. In fact, the company says that grievant's first action was to push powder and to open the gate, thus putting even more steel in the mold. When that didn't work, grievant went through a normal shutdown, rather than pushing the breakout button. Third, the company says that grievant and her coworker then waited too long before cutting the bloom out of the caster. Finally, the company charges that grievant failed to report for an investigation of the incident at the end of her turn. Grievant acknowledges that she did not attend, though she says her failure was not intentional and that she merely forgot about the meeting.

This incident was probably the most litigated issue in the hearing. As was the case with the September 1 incident, the breakout on October 24 was recorded on videotape, and several of the witnesses at the hearing had seen the tape. The tape was apparently lost prior to the hearing, however, and was not available for viewing. Obviously, this omission hurts the company more than the grievant. The company not only had the tape in its possession, but it also has the burden of proof. Its failure to produce eyewitness evidence of an occurrence is a significant omission. Nevertheless, the company is not precluded from relying on the testimony of others, including those who had seen the tape.

The company asserts that grievant should have recognized the breakout. Jeff O'Barske, caster supervisor, testified that the visual signals of a breakout include a drop in the mold level, steam, and excessive flames. O'Barske said he reviewed the video tape of the breakout and noticed steam (but no flames) as well as a bright flare up in the mold, accompanied by sparks. Grievant was sitting near the mold, in the chair near strand 2A. When the mold flared up, she got up, threw some papers down, pushed powder into the mold, and opened the gate, which would increase the flow of steel. O'Barske said that even if the glow and the excessive amount of steel hadn't alerted grievant to the breakout, she should have realized the problem when she opened the gate and the level didn't come back up. As O'Barske said, "the steel is going somewhere."

The union questioned whether there were sufficient indicators of a breakout to have alerted grievant. Pete "Chico" Fernandez, an experienced caster operator, viewed the videotape and testified that the breakout was "unusual." He said there was a glow in the mold, but that the level did not drop suddenly, which would

indicate a breakout. Rather, it "lowered slowly," and that in such instances, the proper response is to push powder, which is what grievant did. He also pointed out that grievant's coworker, Curtis Lee, who operated the other strand, was on the board and that it would have been his responsibility to hit the breakout button. The company does not contest that Lee also failed to recognize the breakout, but it asserts that he was less culpable than grievant. Lee had left the immediate area in order to take himself out of the breeze created by a fan. He did come back to the strand operator's area after grievant got up and started to push powder, but the company says that grievant should have recognized the breakout and pushed the breakout button before he got there. In contrast, Fernandez says Lee came back right away and that neither he nor grievant recognized the breakout. Both were disciplined for their failure, but grievant received a three day suspension and Lee received only a reprimand.

In addition to their failure to recognize the breakout and respond appropriately, Lee and grievant were also faulted for their failure to act appropriately after the breakout. Company procedures require that the bloom be cut out following a forty-five minute cooling period. Lee and grievant did not begin that task, however, until about two hours after the breakout. The union points out that they tried other methods before they began cutting, which accounted for some of the delay. The company responds that those methods would either work or not and that they could not excuse a two hour delay. More troubling for the company is the fact that the supervisor may have been present throughout the delay period and there was no evidence that he instructed grievant or Lee to begin cutting. I find it significant that O'Barske did not even talk to the supervisor during his investigation of the incident.

The culminating event occurred about seven months later, on May 21, 1993. It was this incident that prompted the company to permanently demote grievant, an act that gave rise to Grievance 5-V-7. Grievant was once again the strand operator. There is no dispute that there was a mold overflow which caused an unplanned turnaround. Grievant observed the level rising in the mold, an event that should have caused her to hit the close button. Instead, she hit the open button repeatedly, ultimately causing the mold to overflow. Grievant testified that she knew she was supposed to hit the close button and that she hit the open button by mistake. The union points out that, while grievant's actions were incorrect, this incident does not indicate an inability to operate the strand. Grievant knew what to do, but simply implemented the procedure incorrectly.

As noted, the company imposed a three day discipline following the October 24, 1992 incident. It also conducted a record review and warned grievant that if there was another occurrence, she would be suspended preliminary to discharge. The company did not discharge her as a result of the May 21 incident. Rather, it suspended her for five days and permanently demoted her to labor. Although each of the company's actions against grievant is at issue in this case, the demotion is the principal complaint.

Discussion

Much of the union's case is factual. That is, while the union does not necessarily contest the fact that a breakout, overflows and lost levels occurred, it argues that grievant was not at fault and could not properly be disciplined for the incidents. In addition, the union asserts that the company has improperly combined discipline and demotion. The union argues that employees may be disciplined for negligent job performance, but that discipline is not appropriate when employees lack the ability to perform the work, which is the reason the company gave for demoting grievant. Conversely, permanent demotion is not an appropriate response to negligent performance. Here, however, the company has imposed disciplinary action and demotion as the result of the same occurrences.

a. The factual issues

The company asserts that grievant's performance demonstrated an inability to operate the strand and, equally important, her experience and refraining indicate that she does not have the ability to learn the job. As part of that argument, the company points out that in the 12 month period from May 1992 to May 1993, there were only four mold overflows and grievant was responsible for three of them. Even more damning, the company says, is that only three of the four were caused by operator error and grievant was responsible for all three. The other fifty-some operators had none.

The union countered, in part, by introducing research intended to prove that mold overflows were a more common occurrence than the company admits. This evidence was principally in the form of a review of 24 hour cast summaries by witness Dan Stevenson. His testimony did show some discrepancies between the 24 hour summaries and the turn-around reports, which the company used to compile its figures. However, I was persuaded by William Sammons' explanation that the turn-around reports, which follow an thorough investigation of incidents, are more reliable. Moreover, the company was able to show, principally through Sammons' testimony, that many of the occurrences relied on by the union to show overflows were, in fact,

hangers that had occurred in some other manner.<FN 1> Thus, while I acknowledge the union's efforts, I am persuaded that mold overflows are relatively rare, a conclusion supported even by the testimony of union witness Fernandez.

Unlike overflows, the loss of level in the mold is more common and is more often not due to the operator's error. The only lost level incident involved in this case was the September 1 incident. The company asserts credibly that its concern with grievant on September was not necessarily the lost level, but grievant's failure to respond properly. Despite the union's argument and the grievant's testimony, my viewing of the videotape convinced me that the company's charges have merit. I think it was Mike Powers -- not grievant-- who turned the rheostat.

I am also convinced by the company's evidence with respect to the incidents on August 28 and August 30. As noted, grievant does not really contest the company's account of the August 30 incident. She asserts that on August 28, she was about to fire the blank but her coworker did it first. Obviously, I have no way of determining the truth of that assertion. The important fact is that she did not act and her coworker did. Similarly, I cannot know whether grievant intended to hit the close rather than the open button on May 21, 1993. I note, however, that she apparently continued to hit the open button even after the level continued to rise in the mold. I recognize that such events happen very quickly and that grievant had little time to think. The company's point, however, is that employees must react instantly. Thus, if hitting the button did not have the expected result, grievant should have realized that some other action was needed. But she continued to press the wrong button, which supports the company's claim that she panicked under pressure.

The most difficult incident involves the breakout on October 24, 1992. As already noted, the company's failure to produce the tape operates to its detriment. That does not mean, however, that the company is estopped from offering proof. I thought O'Barske's testimony about the tape was credible, as was Sammons' who also saw the tape. Fernandez was also a credible -- and knowledgeable -- witness, who said that there were no visible clues of a breakout, which grievant also claimed. On this contentious issue, however, I have decided to credit the company's witnesses.

Although I respect Fernandez' account of the tape, my decision is influenced, in part, by his testimony about the videotape of the September 1 incident. When I later saw that tape, I thought that Fernandez' account of it was more charitable to the grievant than it should have been. That is not to suggest that Fernandez lied, which he certainly did not. I understand his tendency to view the tape more favorably to grievant. I also understand that company witness gave an account that probably resolved any doubts in the company's favor. Nevertheless, I thought O'Barske's account of the September 1 tape was more accurate than Fernandez', and the way they described that tape (which I saw) influences what I'm willing to believe about breakout tape (which I didn't see.) In short, I have some difficulty crediting Fernandez over O'Barske and Sammons.

In addition, though I thought grievant was credible, I am troubled by her comment that she did not know that the October 24 incident was a breakout until the following day. Even union witnesses acknowledged that she should have realized there had been a breakout when the bloom had to be cut out. Her failure to acknowledge that there was a breakout at that point makes me question her claim that she didn't recognize the breakout earlier, while it was occurring. Moreover, I am troubled by her failure to appear for the investigation on the day of the breakout. Given the importance of this incident, I have difficulty believing that grievant simply forgot about the meeting.

Finally, I must observe that there comes a point where explanations are no longer adequate. Grievant was involved in five serious or potentially serious incidents in a period of a little more than one year. There may be some mitigating explanations for some of them. But I cannot ignore the number of incidents that she seeks to explain away, and this number affects my willingness to credit all of the explanation. In my view, then, the issue is not whether the incidents occurred but whether the company responded to them in an appropriate manner.

2. the discipline and demotion

The union argues that different standards apply in discipline for cause and demotion for cause and that the two may not be intermingled. Stated differently, the company may not substitute demotion for discipline. Permanent demotion is appropriate only in those circumstances in which the company proves that an employees lacks the ability to do the job. It may not be imposed as a penalty for poor job performance. Here, however, the company penalized grievant for the October 24 incident by suspending her for three days and threatening her with discharge. Similarly, the company disciplined grievant with a five day suspension in May, 1993, and also permanently demoted her. These actions, the onion says, cannot stand.

The company's decision to discipline grievant demonstrates that the demotion was merely an additional penalty.

I don't question the union's contention that permanent demotion cannot be used as a substitute for discipline. It does not necessarily follow, however, that the chain of events for a particular employee might not include both discipline and demotion. In U.S. Steel Case No. USS-5393-s, cited by the union, the company had imposed both discipline and demotion. Ultimately, the arbitrator found that the demotion was not justified but, importantly, he did not base his decision on the fact that the company had previously disciplined the employee. Rather, he merely found that the company had not proven an inability to perform.

Rather then merely observing that grievant's record includes both disciplinary action and a demotion, it is important to view each incident in context. The company's first action followed the series of three incidents in five days, on August 28, August 30, and September 1, 1992. Although I have held that a temporary demotion may sometimes be an appropriate disciplinary measure, see Inland Award 887, there is nothing in the record which convinces me that this action was intended as discipline. Indeed, the letter sent to grievant on September 8, 1992 informing her of the demotion cites Prabhu's concern about grievant's "ability to control the level while working as a strand operator." His decision, then, was to demote her temporarily while she was "retrained and recertified." Given grievant's actions -- most of which she does not even contest -- and the extremely short time period involved, I think the company's response was appropriate.

The next incident occurred just three days after grievant completed her training. Admittedly, the company had some concerns about grievant's competency even after the training, a matter I will discuss below. Nevertheless, she had been retrained and she had passed the test. Thus, when she failed to recognize the breakout, the company might legitimately believe her failure was more the result of negligence than incompetence.

This is especially true if grievant was reading while she was supposed to be watching the mold, as the company charges. In context, then, the three days suspension was a reasonable response to grievant's failure to react properly to the breakout.

The final incident occurred in May, 1993. As I have already explained, the reasonable inference to draw from the facts is that grievant did not react properly under the stress of the situation. By this time, the company could reasonably determine that grievant did not have the requisite ability to operate the strand competently. She had been involved in three serious incidents the year before and had been retrained. Even after retraining, however, similar problems continued to arise. I recognize, as the union contends, that a period of several months transpired between the last two incidents. Nevertheless, the company is not required to show that grievant experiences problems every time she operates the strand. Most days are probably routine and, in any event, grievant is not a regular operator. Also, in determining the number of incidents required in order to establish an inability to do the work, it is reasonable to take the work and the risk of error into account.

Grievant was in charge of machinery that turns molten iron into slabs and blooms. A failure to respond properly would not only endanger equipment and production, but could also have far more tragic consequences. The company was not required to wait until such a tragedy occurred. Whatever the standard might be for employees in less hazardous occupations, I am satisfied that the company has met the standard here of proving, by clear and convincing evidence, that grievant did not have the ability to operate the strand.

In addition to grievant's performance on the job, I am also influenced by the results of her retraining. Ron Kostyo, the process trainer at 2 BOF, testified credibly that grievant's knowledge level was "very low" when the retraining process began. He said that, on a scale of 1 to 10, with 10 being a competent (though apparently not an excellent) caster operator, grievant was a 3. At the conclusion of her training, she had improved herself only to a 8, which obviously raises a question about her competency. The union correctly points out that grievant passed the test, which is a matter of some significance. That evidence is tempered, however, by the fact that Kostyo used actual test questions to train grievant. Importantly, Kostyo's training report concluded that grievant lacked a comprehensive knowledge of the casting process and that she "exhibited a great nervousness in inclement conditions." It was this latter trait, obviously, that grievant demonstrated in the last two incidents.

The union argues that it is inappropriate to conclude that grievant cannot adequately perform when there were no complaints about her service prior to 1992, even though she had been qualified in the sequence since 1988. The company asserts in response that grievant's standing in the sequence is quite low, meaning that she may not have promoted into the operator's position very often from 1988 to 1992. In response, the union claims that this would raise as an issue whether grievant had an adequate opportunity to learn the job.

Other arbitrators have held that an employee cannot be disqualified unless he or she has been given such an opportunity.

The union asserts in its reply brief that I will have to determine how often grievant promoted into the operator's job. Obviously, in the absence of testimony, I can make no such determination. I think it is sufficient to observe that grievant made no claim that she had not received adequate exposure or training. In fact, the company retrained her in late 1992. Moreover, this case differs significantly from Connors Steel Company Case No. 1274, cited in the union's brief. There, the employee had no formal training and only a few weeks on the job. In the instant case, the fact that there were no performance related issues prior to 1992 is relevant, but it cannot detract from the fact that there were serious problems between August of 1992 and May of 1993. Moreover, I am unable to say that those problems were caused by negligence or indifference. Rather, it seems more likely that grievant simply was unable to react properly.

There remains the issue of whether the company could properly impose both discipline and demotion for the May 21 incident. <FN 2> The company submitted Alexander Porter's opinion in Republic Steel Corp. Decision No. 267, in which the arbitrator upheld a demotion for a string of negligent acts, including the last one, for which the company had also imposed (and a different arbitrator had upheld) a five day suspension. I think the instant case raises different issues.

In the Republic case the arbitrator noted that the grievant's actions were negligent and said that, after some period, the company was justified in determining that the employee was incapable of acting appropriately. The instant case, however, does not involve negligence. This is not a case in which grievant's indifference or her unwillingness to conform to company procedures have rendered her incapable of performing. Rather, I think the company has established that she lacks the requisite ability to make the split second decisions required of a caster operator in an emergency situation. Whether or not it is appropriate to discipline an employee for repeated acts of negligence that render him subject to demotion, there is no justification for disciplining an employee who tries to perform, but just cannot do the work. In such cases, it is not possible for the discipline to have the desired effect of reforming her behavior.

I conclude, then, that it was inappropriate for the company to discipline grievant after it had already determined that she was incapable of performing the job. At that point, the proper response was demotion, which the company legitimately took. The company urges, however, that I cannot legitimately set aside the suspension because the union's grievance does not ask for such relief. The union's grievance does, however, ask for payment of "all monies lost." In the absence of arbitration cases offering a contrary conclusion, I will apply the standards ordinarily applied by arbitrators in such cases. In brief, arbitrators have held that grievances do not have to meet the standards of judicial pleadings. Rather, they must serve to put the company on notice of the claims made and the remedies requested. In my opinion, the grievance at issue here does that.

AWARD

Grievance 5-T-118 is denied.

Grievance 5-V-8 is denied

That part of grievance 5-T-7 protesting grievant's demotion to labor is denied. That part of grievance 5-T-7 protesting the company's decision to suspend grievant for 5 days is sustained. The company is ordered to remove notice of the suspension from grievant's file and provide make-whole relief of five days pay.

/s/ Terry A. Bethel

Terry A. Bethel

March 19, 1995

<FN 1> The evidence did show that overflows can cause hangers. But there was also credible testimony that hangers can be caused in other circumstances. In fact, in one of the incidents at issue in this case, there was a hanger without a mold overflow.

<FN 2> The company did not impose both discipline and demotion for the October 24 incident. Moreover, I have already concluded that the company's response, at that time, was reasonable. It is true that grievant was disciplined more severely than Lee. However, unlike Lee, grievant had recently been retrained. Moreover, the company had reason to believe that grievant had been reading on the job and that she should have hit the breakout button before Lee reached the board. These facts justify the disparate discipline.