

Award No. 909
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America,
Local No. 1010.
Grievance No. 13-V-030
Appeal No. 1520
Arbitrator: Jeanne M. Vonhof
November 30, 1995

REGULAR ARBITRATION
INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Friday, September 22, 1995 at the Company's offices in East Chicago, Indiana.

APPEARANCES

UNION

Advocate for the Union:

A. Jacque, Chairman, Grievance Committee

Witness:

S. W. Weliczko, Grievant

Advocate for the Company:

P. Parker, Senior Representative, Union Relations

Witnesses:

N. Andryuk, Section Manager, Maintenance, ISIP

R. Anderson, Turn Supervisor, ISIP

I. Ayala, Auxiliary Mechanic, Maintenance, ISIP

L. Harris, D-Line Inspector, ISIP

Also present:

P. Berklich, Project Representative, Union Relations

BACKGROUND

This case involves the discharge of a long-term employee for an incident which occurred at the mill after his turn was completed. The Grievant has been employed by the Company since 1974.

The Grievant was classified as a Mechanic at the 76" Hot Strip Mill. On Sunday, February 26, 1995 the Grievant was assigned to work on the pumps in the 76" Hot Strip Mill finishing end on the 6:00 a.m. to 2:00 p.m. shift.

Ms. Lula Harris, an Inspector, testified that she came to work and went to the women's locker room in her department at about 2:30 p.m. According to Ms. Harris the locker room door was locked from the inside. She testified that she banged on the door and a woman she did not know answered the door after a few seconds. Ms. Harris has worked in the 76" Hot Mill for twenty-nine (29) years.

Ms. Harris testified that she asked the woman why the door was locked and woman said, "I was just going to take a shower." Ms. Harris counseled her against locking the door and proceeded to begin getting ready for work. Then Ms. Harris went back to the woman and asked what she was doing there. The woman answered that she was new, and when Ms. Harris asked what her job was, she replied that she worked "down there," and "on the pumps."

Ms. Harris testified that she began getting ready for work again and she heard the shower curtain open. She testified that the Grievant came out of the shower hitching up his pants. According to Ms. Harris he said to her something like, "You know me, I'm Stan" and "I'm leaving." She replied "I know you are."

Ms. Harris testified that she then heard him speak a few words to the unidentified woman, although she did not see them talking. Ms. Harris told him to "get out of here" and then he left the room.

Ms. Harris testified that she went to get Supervisor Bob Anderson to report the situation to him and saw him begin to speak to the unidentified woman, asking her if she were new here, to which she replied "yes."

Ms. Harris testified he also asked her her name and badge number and she said she "couldn't remember."

Ms. Harris left at that point.

She also testified that the unidentified woman was in socks when she answered the door in the locker room, that Ms. Harris' work shoes were greasy, and that she does not work in an area where they would normally

get greasy. She testified that her shoes and helmet were not in their usual place when she came in, and that she suspected the woman had been using these items. She also testified that finding the Grievant and the unidentified woman in the locker room frightened her.

Mr. Anderson, the turn supervisor, testified that the unidentified woman was not a new employee in his department, and a new employee would probably have a hard time finding the woman's locker room in his department without orientation. He testified that when he asked the woman for her name or badge number, she gave no answer. According to Mr. Anderson, she allegedly said to him, "Please, sir this won't happen again." When he asked her to come to his office, she began walking towards the office, walked past the office, down the stairs and out the door. Mr. Anderson followed her outside, when he found her standing in between his car and a blue Pontiac, later identified as the Grievant's car. Mr. Anderson stated that she was looking at the Grievant's car, and did not try to enter it.

Mr. Anderson stated that he then went inside to call Plant Protection and Plant Protection came about five (5) minutes later. The Grievant's vehicle and the woman were gone. Mr. Anderson stated that he never saw the Grievant. He also stated that the Grievant was not supposed to park where he had parked, testimony also given by Mr. Nick Andryuk, Section Manager.

There also was testimony that the Grievant had been scheduled to work a down-turn that day, so no production employees were present in the 76" Hot Strip Mill. He was assigned to work in an isolated area, in the motor room basement, fixing pumps. Management witnesses also testified that the description of the unidentified woman, i.e. "a petite Mexican woman, under 5'6" and between twenty-five to thirty years of age," does not fit anyone scheduled to work in the 76" Hot Strip Mill that day, nor any new employee of the Department.

There also was evidence that the Grievant had been disciplined on a prior occasion for working overtime without authorization, along with several other employees, and for not doing the work they claimed to be doing. The Grievant testified that he thought, as a member of a self-directed team, that they should stay over to finish the job, as they had done before.

The Grievant testified that on February 26, 1995, he finished working, and went to his car to put his lunch back. He testified that he had to use the bathroom at that time and proceeded to the closest one. He stated that for nineteen (19) years this had been the foreman's locker room.

The evidence indicates that the locker room in question had been a women's locker room for about two (2) years prior to this incident. The Grievant had been off work on sick leave since 1993, and had been back to work about five (5) days at the time this incident occurred.

The Grievant stated that he did not notice that the locker room had been changed over before going in, and did not notice the writing on the door. He said he did not see anyone in there. He testified that he went into a stall to use it, and several minutes later, he heard pounding on the door. When he heard women's voices, he said he realized he was in the wrong place, pulled up his pants, and went into the shower stall to hide. After a few minutes he did not hear any more voices and he came out of the shower stall, he testified. When he saw Ms. Harris he apologized to her and to the other woman, and left. He also testified that he may have been adjusting his belt when Ms. Harris saw him, but he was not pulling up his pants.

The Grievant testified that he then proceeded to the men's locker room, showered and went home. He also testified that he parked where he had because it was very close to a public telephone, his mother was sick and he wanted to call her when he arrived at work. He testified that he had parked there previously on many occasions before his sick leave and had not been told not to do so.

The Company presented evidence that the Grievant swiped out at 2:51 on that day, and usually swipes out close to 2:00 when he works that turn. The Grievant testified that he was working alone that day, did not have a watch, and did not know precisely what time it was.

Mr. Ignatio Ayala testified that he had a conversation with the Grievant on the Grievant's first day back in the department, about five (5) days before the incident in question. He stated that the Grievant was talking about all the changes in the department since he had been off sick, and he specifically mentioned the change in the locker room from a foreman's locker room to a women's locker room. The Grievant stated that he does remember having the conversation regarding the changes in the department but not the change to a women's locker room.

The Grievant was discharged for: 1) being improperly in the women's locker room with the door locked; 2) being in the women's locker room with an unidentified woman not authorized to be in the 76" Hot Strip Mill; and 3) improperly bringing an unidentified woman into the plant. The Union filed a grievance, the Parties could not resolve the conflict and it proceeded to arbitration.

At the arbitration hearing the Union presented evidence that an employee must present his badge to a guard upon entering the parking area. A site visit was arranged for the Arbitrator to view the women's locker room at the end of the session.

THE COMPANY'S POSITION

The Company contends that the discharge should be upheld. According to the Company, there are too many facts supporting its case, which cannot be attributed to coincidence. The Company argues, for example, that the Grievant parked closer to the women's locker room than to the men's locker room, and would have rushed past several other bathrooms in his trip from his worksite to the women's locker room. In addition, the Company points out that when Ms. Harris found him, he was in the bathroom at the same time as the "mystery woman." The Company argues that no new employee would be started on a Sunday, without orientation, and there was no evidence of a new employee in the department that day. In addition, the Company notes other factors tying the unidentified woman to the Grievant, such as her statement that she "worked at the pumps," the Grievant was heard in conversation with the woman, and when she left she stood near his car, staring at it.

The facts establish that the Grievant brought the woman into the mill, and this fact alone merits discharge, according to the Company. The Company cannot afford to have strangers in the mill, both for reasons of safety and security, the Company alleges.

The Company asserts also that there is an issue of decency here. According to the Company, employees who sneak non-employees into the mill and lie about it are subject to discharge. The Company also contends that not all conduct which merits discharge is contained in the Company's rules.

According to the Company the Grievant already has been disciplined in the past for conduct relating to dishonesty, and that the Arbitrator also should consider this fact in determining the outcome in this case.

THE UNION'S POSITION

The Union contends that there is not sufficient evidence to conclude that the Grievant did what he is accused of doing. According to the Union the only thing the Company has proven is that the Grievant went into the women's locker room, and this is not grounds for discharge.

The Union also argues that there are no grounds for discharge even if the Company could establish all three (3) of the charges of misconduct against the Grievant. In support of its position the Union argues that the Company has not cited any specific rule which the Grievant is accused of violating.

The Union also argues that the Company has not established that the Grievant is tied to the "mystery woman" in this case. He has consistently stated that he does not know her, the Union notes. In addition, there are no witnesses who have said that he left with the woman. The Union also questions how he could have come past the guard to get her in in the morning, and how he could have had her in the plant for eight (8) hours without detection.

The Union argues that the woman could have been from another department, and it is because of the Company's actions that her identity remains unknown. In addition, the Union argues that just because she was seen looking at the Grievant's car does not mean she left with him.

The Union argues that the Grievant's story about why he went into the women's locker room is believable. The Union notes that he had been off work for several years, and prior to that, for a nineteen year-period, it had been the foreman's locker room. The Union also argues that it is believable that he would act as he did in the locker room because he was embarrassed.

The Union also contends that other aspects of the Grievant's testimony are credible. He could have left late because he did not have a watch on and was working in a place without other employees, the Union asserts.

The Union also notes his testimony that there were no signs stating he could not park where he did. As for the alleged conversation regarding the change in bathrooms, the Union notes that the third step minutes attribute that conversation to Mr. Anderson, not Mr. Ayala. In addition, the Union argues that there is an inconsistency in Ms. Harris' testimony between the arbitration hearing and the third step minutes in regard to the amount of time she spent knocking on the door.

The Union also notes that the Company permitted the Grievant to work another week after the investigation, and did not perceive any safety problem. Therefore, the Union argues that the Justice and Dignity clause of the agreement was broken when they did not permit the Grievant to continue to work. The Union contends that he should have been permitted to work until his discharge hearing, even if the Company were ultimately to prevail here.

For all the above reasons the Union contends that the grievance should be sustained and the Grievant reinstated and awarded full backpay.

OPINION

The Grievant in this case was discharged for three offenses: 1) improperly being in the women's locker room with the door locked; 2) being in the women's locker room with an unidentified woman who was not authorized to be there; and 3) improperly bringing an unidentified woman into the plant. I will address the last charge first.

A steel mill is inherently a very dangerous place. Bringing a non-employee into the plant, without any guarantees that that person has any knowledge of the dangers, or any training to deal with them, could subject the employer to enormous liability. The Company also has legitimate concerns about theft and the safety of its own employees and equipment when a stranger is brought into the plant. The Company indicated that it considered this a dischargeable offense against an employee.

However, when a long-term employee is discharged on the basis of a single incident, the proof of the charge against the employee must be very convincing. The "mystery" woman in this case remains unidentified to this day, a fact which significantly complicates the Company's case. It makes it especially difficult to determine whether the woman was a stranger, or an employee from some other part of the mill, and if she were a stranger, how she got into the mill.

Here, the incident occurred after the end of the Grievant's turn, and there is no evidence that he was not at work for the previous eight hours, or that he left the plant during his turn. Therefore, if the Grievant brought her in, the woman probably would have been at the plant for the entire turn. Although the Grievant was working in an isolated area, it would still be difficult for him to get her in and around the department for an entire day without anyone noticing.

Furthermore, the evidence indicates that employees must show employee identification to the security forces when they enter the plant parking lot, and it is not clear how the Grievant could have gotten a non-employee past this security checkpoint without detection. The Company has not offered any explanation for how she could have eluded security.

The woman's refusal to identify herself, her comments, her presence in the women's locker room at the same time as the Grievant and the way she left suggest that he may have brought her in from outside the mill. However, this is a huge mill, employing thousands of people, and her physical description fits other employees who work for the Company. Given the difficulty of getting into the mill, it is possible that the woman worked in another part of the mill and acted as she did because she was away from her work station improperly.

Thus there is not enough evidence for me to conclude that the woman does not work in the mill. <FN 1> The Company of course does not bear complete responsibility for the woman being unidentified, because she refused to identify herself and she left without doing so. But the Company does bear the burden of proving that the Grievant brought the woman into the plant. Although the Company put forth the best case it could, considering the facts, there is not sufficient evidence to conclude that the Grievant brought a stranger into the mill that day.

Some of the same evidence which is relevant to the above charge also applies to the charge that the Grievant was in the women's locker room with an unidentified woman who was not authorized to be there. These facts include her leaving the area when asked to identify herself, the fact that she was last seen looking at the area looking at the Grievant's car, which was parked in an unusual place, and that once his car was gone she was gone too. The strongest evidence connecting the two is that the Grievant was found in the locked locker room at the same time as the woman. In addition, the woman's comments about her "job" suggest a connection to the Grievant, and such a connection would explain her comment that "this would never happen again." I have also considered the fact that the Grievant punched out later that day than usual.

Ms. Harris testified that she had no doubt that the Grievant knew the unidentified woman. As the only person entering the locked room where the two were together, and viewing the conduct of both of them, her impressions are entitled to some weight, although their impact is limited by the fact that she did not see them talking together, but only heard it.

The Grievant has offered other explanations for his being in the bathroom, staying much later than he usually did, and parking where he did. I have considered the Grievant's testimony that the bathroom had been a foreman's locker room for at least nineteen (19) years while the Grievant worked in this department. There also was no dispute that the Grievant had been back to work for only five (5) days after an extended absence of about two (2) years, and that during his absence the locker room had been changed from a men's to a women's locker room.

However, it is difficult to imagine that Mr. Ayala would make up such specific testimony about his conversation with the Grievant several days earlier about the change in the identity of the locker room. In addition, the door to the room was clearly marked "WOMEN'S LOCKER ROOM" in good-sized letters. During his testimony the Grievant acknowledged that at some point after entering the room he noticed "feminine things" there. My own brief visit to the room indicated the presence of electric hair curlers and other "feminine" items which appeared to be there on a somewhat permanent basis. A person has to walk the entire length of the locker room to reach the toilet stalls. It seems very likely, therefore, that the Grievant would have seen items indicating that he was in a women's locker room on his way to the toilet stalls.

The Grievant's testimony concerning exactly when he first saw these feminine items was vague. He did state, however, that after seeing them and realizing where he was, he continued about his business, because he urgently needed to relieve himself at that point. The evidence indicates, however, that the Grievant had passed by several other bathrooms only minutes before, on his way to his car, <FN 2> a fact which undercuts his entire story.

In addition, the Grievant testified that he went into the shower stall to hide, out of embarrassment. It is true that people do strange things when they are embarrassed. However, if he were startled by women's voices in the room and wanted to conceal his presence out of embarrassment, it seems more likely that he would have remained "frozen" where he was, in the closed toilet stall, rather than leaving the toilet stall and entering the shower stall.

On the basis of all the evidence, I conclude that the Grievant's story about why he was in the women's locker room does not ring true. There is not sufficient evidence for me to determine exactly how he wound up where he did, or whether it was premeditated, and he brought the woman in from outside the plant. But I conclude that the Company has put forth enough evidence to establish that the Grievant was knowingly present in a women's locker room with an unidentified woman. There are too many unusual coincidences connecting the Grievant to the unidentified woman (not the least of which is that they were found in a locked room at the same time) to support the Grievant's statements that he was not with her.

The Union has argued that even if the Company had established all three charges, they involve no clear-cut rule violations. This case is a good example of the principle that an employer may discipline employees for certain actions, even though there is no rule specifically prohibiting the conduct. Given the incredible range of human behavior, there is no way that an employer could foresee every possible action an employee might engage in which is sufficiently objectionable to merit discipline.

Some actions are described as "mala in se," i.e. "wrong in themselves" rather than simply because they violate a particular rule. While most of these infractions are very obvious, i.e. fighting or theft, an employee who knowingly enters or remains in the locker room of employees of the opposite gender, and acts as the Grievant did here, may be subject to discipline, even though that particular conduct is not mentioned by any rule.

The only remaining issue is what level of discipline is appropriate. I conclude that the Company may not have discharged the Grievant if the Company had not concluded that he had brought a stranger into the plant, because of the very serious nature of that conduct, and its unique potential for danger and employer liability. Because there is not sufficient evidence to establish that the Grievant did bring the woman into the plant, discharge is not an appropriate penalty in this case.

However, significant discipline is merited on the basis of the Grievant's conduct which was established by the Company. When Ms. Harris entered the locker room she had a right to expect that there would not be any men there, and the Company has a legitimate interest in protecting the safety and privacy of its female employees. This is especially true in a workplace in which there are few women, and especially on a downturn, when there are few employees around at all.

Even remaining in the room after he knew it was a women's room would probably subject the Grievant to some discipline. However, being in a locked women's locker room with a woman is even more serious than ducking into a women's bathroom to use the toilet. Because of the gravity of the Grievant's actions in this case and his past record, a sixty-day discipline is appropriate. <FN 3> Although the Grievant will receive some backpay, he should realize that a sixty-day discipline is very serious, often just a step away from discharge, and any further serious misconduct could subject him to that final step.

AWARD

The grievance is sustained in part. The discharge is reduced to a sixty-day discipline. The Grievant shall be made whole for any losses beyond the sixty-day discipline.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof

Labor Arbitrator

Acting under Umpire Terry A. Bethel

Decided this 30th day of November, 1995.

<FN 1> My conclusion is also based, in part, on my judgment that the locker room was in a location in the department which was not difficult to find or see.

<FN 2> According to his version of events he went to his car first, before showering, to drop off his lunch, and then realized he urgently had to use the bathroom. He gave no reason why he went to the car before showering. This is not the normal sequence of activities for someone leaving work.

<FN 3> Because of the remedy in this case, there is no need to address the Union's argument regarding the Justice and Dignity clause.