Award No. 928
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America
Local Union No. 1010
Gr. No. 32-V-035
Arbitrator: Jeanne M. Vonhof
July 7, 1997

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Thursday, May 21, 1997 at the Company's offices in East Chicago, Indiana.

APPEARANCES

UNION

Advocate for the Union:
M. Mezo, President, Local 1010
Witnesses:
B. Boulware, Grievant
L. Aguilar, Vice Chairman, Grievance Committee
D. Jones, Griever

COMPANY

Advocate for the Company:
P. Parker, Arbitration Coordinator, Union Relations
Witness:
H. Harth, Plant Security

BACKGROUND:

This is a dispute over the ten-day discipline issued to the Grievant for allegedly threatening a Plant Security Officer. The Officer, Mr. H. Harth, who has worked at the Company for more than thirty (30) years, testified that on May 16, 1996 at about 6:40 a.m. he observed from his car the Grievant traveling in his car within the plant premises at what the Officer considered an excessive rate of speed. Mr. Harth testified that he pointed his radar gun at the Grievant's car and clocked him traveling at 40 mph on Rte. 60 within the mill, in an area which is a 20 mph zone.

The Officer stated that he turned the flashing lights on his car, and followed the Grievant's car. He testified that the security car is clearly marked. The Grievant did not pull over to the side of the road, and eventually pulled into a parking space near the No. 3 Cold Strip Mill. Mr. Harth testified that the Grievant got out of his car and began walking past the security car when Mr. Harth said something like, "Sir, I need to see your i.d." According to Mr. Harth the Grievant said, "No, you have been harassing me and if you don't stop, I am going to turn you in."

Mr. Harth testified that he fell in step behind the Grievant and asked again for his identification, and the Grievant again refused to provide it. Mr. Harth testified that he asked for the Grievant's identification a third time. According to Mr. Harth, the Grievant stopped in the middle of crossing Rte. 60, turned towards Mr. Harth, pointed his finger at Mr. Harth and said, "No, you better stop harassing me or someone is going to hurt you."

Mr. Harth testified that he felt threatened at that point and decided that the best course was to withdraw. He returned to his car, moved it about 100-200 feet away, he testified, and wrote up a report of the incident. He testified that he did not know the identity of the Grievant at the time he stopped him, and had not had any prior contact with him. He discovered the Grievant's identity through checking his car license. According to Mr. Harth, he has never been threatened by an employee during his years of service, other than this incident.

Mr. Harth also testified that when he stops someone for a traffic rule violation, it is his standard practice to request the person's identification first before telling the person why he was stopped. He also testified that there is another plant security Officer who looks a lot like him, and that people have mistaken one man for the other. The Griever testified that it is 1/2 mile from where Mr. Harth stated he first saw the Grievant until the point at which the Grievant stopped. He also testified that it is .2 mile from the substation to the place where the Grievant stopped. The Union presented testimony that Mr. Harth had stated at the third step

hearing that he first turned on his flashing lights at the substation; Officer Harth denied at the arbitration hearing making this statement at the third step.
The Griever also testified that the Grievant had been given a VODG about a traffic violation about ten (10) days prior to the incident in question. The evidence indicated that the prior traffic violation report had been given by the other Officer who looked much like Officer Harth.
The Grievant was suspended pending discharge via a letter dated May 23, 1996, "due to the violation of your last chance agreement dated December 22, 1995, culminated by the May 16, 1996, incident where you violated Inland Steel General Rules for Safety and Personal Conduct, Rule # 132 r."<FN 1> A suspension hearing was held and via letter dated June 4, 1996 the Grievant was informed that, as a result of the facts disclosed at the hearing, the suspension pending discharge would be modified to a 10 turn suspension.
Mr. Aguilar, Vice Chairman, Grievance Committee, testified that at the suspension hearing he specifically asked whether the discipline was based upon the Grievant's past record and was told "no." Mr. Aguilar's written notes from that meeting support his testimony on this point.
In the Company's position in the third step minutes several instances of past discipline are mentioned; the Company argued that the Grievant had been placed on notice in the past that his behavior towards authority is inappropriate: the minutes specifically mention a five day discipline for insubordination and threatening behavior towards a supervisor which required him to be escorted from the plant. The minutes also mentioned a discussion with a Supervisor in December, 1994, as a result of unspecified unsatisfactory behavior.
The Grievant testified that he knew the speed limit on Rte. 60 was 20 mph. He testified that he might have been speeding on the day in question, but that he did not think so, because he was moving with the flow of the traffic.
The Grievant testified that he never saw any flashing lights behind him. He testified that when Officer Harth told him to produce his identification the Grievant asked "For what?" and the Officer would not answer him. The Grievant testified that Officer Harth never told him why he had been stopped. The Grievant also denied that he refused to show the Officer his identification badge.
According to the Grievant he had been stopped in the plant for a traffic violation on another occasion about a week earlier by an Officer who looked like Officer Harth. He testified that the other Officer had told him first that he was being stopped for speeding, and then asked to see his identification, which he produced. He also testified that he believed this other Officer had followed him around in his car at the mill four to five times within a six month period. He acknowledged that he did not file a complaint about harassment against the Officer.
As for his past record, the Grievant stated that he does not recall the discussion with the Supervisor which is referenced in the third step minutes as having occurred in December, 1994. He stated that he never received any written documentation regarding this discussion. He also testified that the five day suspension for insubordination is being challenged in the grievance procedure.
He testified that he was familiar with the speed limit in the plant. He also testified that Officer Harth used a nasty tone of voice when talking to him on the day in question.
The record shows that after the suspension hearing the Grievant's discharge was reduced to a 10-day discipline, and it is that suspension which is the subject of this grievance. The Parties were unable to resolve the dispute and it proceeded to arbitration.
THE COMPANY'S POSITION
The Company argues first that the Union may not raise at the arbitration hearing for the first time the argument that the Company may not use the Grievant's past record to support the discipline. The Company cites Inland Award No. 184 for the proposition that neither Party may raise new arguments at arbitration which have not been raised previously. As reasons for this policy the Award notes that illuminating all the theories and facts relied upon by a party during the grievance procedure aids in the settlement of cases. In addition Arbitrator Seitz noted in Award 184 that the policy enables each Party to be fully prepared for arbitration, preventing the Arbitrator from being presented with "confusion rather than enlightenment." The Company argues that these reasons apply in this case as well.
The Company also argues that it may rely upon previous disciplines which have been challenged but not yet resolved in the grievance procedure. As support for this view the Company relies upon Inland Award No. 667.
The Company argues that Management takes threats very seriously, especially threats to Plant Protection personnel. The Grievant had no reason to continue driving, the Company urges, or to refuse to present his identification when requested.

In addition, the Company contends that Officer Harth had no reason for singling the Grievant out of 7,000 employees and erroneously charging that he had threatened him. Officer Harth never has charged any other employee with threatening him, the Company notes, in over 30 years, lending credibility to his charge in this case.

According to the Company the Grievant's claim regarding harassment does not ring true. The record shows that he had received only two traffic tickets, which is not unusual, the Company argues, and he had received no time off for these tickets. In addition, the Company notes that the Grievant never filed a complaint of harassment. The Grievant and the Union had the burden to establish that harassment occurred, the Company argues, and failed to do so.

For all of the above reasons the Company argues that the grievance should be denied and the discipline upheld.

THE UNION'S POSITION

The Union noted first that in Award No. 667 the Arbitrator did not reach a conclusion regarding the admissibility of the grievant's prior record, but rather overturned the discipline on other grounds. The Union argues that the Company may not rely upon the Grievant's prior record for a number of reasons. First, the Union notes that the Grievant never received any written documentation concerning the alleged verbal discipline, and thus did not have an opportunity to challenge it in the grievance procedure. Secondly, the Union argues, the other discipline for insubordination/threatening behavior is in the grievance process now. In addition the Union argues that the Company must cite in the suspension hearing all the reasons why an employee is being disciplined, including whether that discipline is based upon the employee's past record. The Union argues that it was not until the publication of the third step minutes that the issue of the Grievant's past record, other than his last chance agreement, was raised. The Union cites an arbitration award involving another steel company in which the Union was led to believe that the employee's past record was not in issue, and the Company was not allowed to cite it later in the process. The Union argues that the same rationale applies here.

The Union also cites another arbitration award which states that when an employee's past record has been improperly cited, and the Union challenges it, the Arbitrator should assume that the Grievant was prejudiced by the use of the past record, unless the Employer can show otherwise. Here, the Union argues, there has been no evidence from the Company that the Grievant would have been issued the same discipline, absent the consideration of his past record at the third step.

As for the merits of the grievance, the Union argues that it is not taking the position that Officer Harth deliberately charged the Grievant with misconduct for no reason. Rather the Union argues that Officer Harth simply misunderstood the Grievant's words and gestures, due to the distance between them, and the fact that the Grievant was standing in the middle of a four-lane road which can be busy when the turn is changing. The Union also cites the operating department just behind the Officer as another source of confusing noise.

As for the Grievant's failure to stop, the Union argues that the evidence from the third step indicates that the security car's flashing lights were turned on at the substation, only .2 mile before the Grievant stopped. In addition, the Union contends that Plant security has a responsibility to tell someone why they are being stopped before demanding identification.

On the basis of all the evidence the Union argues that the grievance should be sustained, the discipline overturned and the Grievant made whole.

OPINION

This is a case in which the Grievant received a ten-day suspension for threatening a Plant Security Officer. The Grievant originally had been discharged for the action, as a violation of the general language of a last chance agreement issued for absenteeism, but the discharge was reduced to a ten-day suspension.

Going first to the merits of whether any action was appropriate, the Union has presented sufficient evidence to raise doubt that the Grievant knew that the Officer was attempting to pull him over before he stopped. The Officer testified that Plant Security is not particularly aggressive in pursuing vehicles through the Company premises. More importantly, the flashing lights on the security vehicle were on for as little as .2 of a mile, or for as long as 1/2 mile, depending upon which version of the facts is true. In either case, it is believable that the Grievant did not pull over because he did not see the flashing lights.

It is conceivable that when the verbal exchange began then, the Officer was annoyed or angry that the Grievant had not pulled over. It is also believable that the Grievant was annoyed or angry that he was being stopped by the same Officer again. Whether or not I credit his testimony concerning the other times when he had been followed around the mill, the evidence clearly indicates that he was stopped twice within ten

days by Officers who looked very much alike. His immediate response to Officer Harth at the time of this incident supports his view that he believed he was being harassed. Officer Harth's asking for his identification before telling him why he was stopped may have exacerbated the Grievant's feeling that he was being stopped for no reason, or just to be harassed, even if there were nothing objectively wrong with the Officer's procedure.

The Grievant has denied uttering a threat. The evidence supports the view that there was some distance between the Grievant and the Officer when the threat allegedly occurred, perhaps as much as 20 feet, according to the Grievant.

However, the Officer has testified consistently about the words and gestures used by the Grievant in this exchange. Furthermore, although the Union raised examples of other possible sources of noise which might have interfered with the Officer's hearing on the day in question, neither party present at the time stated that these sources of noise existed.

The Officer testified convincingly about the Grievant's words and actions towards him. In addition, there is no evidence that the Officer had any bad feelings towards the Grievant -- or even any contact with him -- prior to the incident in question. The Officer has more than 30 years in security with the Company and testified that he had never been threatened by an employee prior to this incident. There was not sufficient evidence to indicate that he simply made up the words and gesture he attributed to the Grievant.

Thus, I conclude that the Grievant did point his finger at the Officer and utter the words attributed to him on the day in question. These actions constituted a threat. Uttering threats against anyone in the mill is very serious and Management clearly may discipline the Grievant for that serious offense. The fact that the Grievant may have believed that he was being harassed may help explain or even mitigate his offense, but does not excuse it.

The only remaining issue is whether the Company's penalty was too severe. There is credible evidence that a Management representative specifically stated at the suspension hearing that the Grievant was not being disciplined on the basis of his past record. However, in the written third step minutes there is evidence that Management considered the Grievant's past record in deciding what level of discipline to administer.

The Company has argued that the Union may not raise this issue for the first time at the arbitration hearing. In general I concur with the rationale in Inland Award No. 184 concerning raising new issues or theories at arbitration. However, in this case, the evidence shows that the Union clearly raised this issue during the grievance procedure and reasonably believed that it was resolved. The Union went the extra step of specifically asking about the issue at the suspension hearing and being told that it did not apply.

Thus, when the issue was raised very early in the grievance process the Company denied in essence that it was an issue. It is not clear exactly when Management resurrected the issue, but it was very late in the process. There is no evidence that it was discussed at the first step and the Union has raised doubt that it was discussed even at the third step.<FN 2> Given these facts I conclude that the Union should not be barred from raising this issue at arbitration.

As for the merits of the issue, the Company has a responsibility under the labor agreement to inform the Grievant and the Union at the time of the imposition of discipline of the bases for that discipline. The Parties here generally have a good record of disclosing information and positions to each other during the grievance procedure. In this unusual case, however, Management specifically told the Grievant and the Union that it was not relying upon the Grievant's past record and then changed that position at some later date. Under these circumstances, where there was an affirmative statement that the record was not being used against the Grievant in this discipline, I conclude that it was improper for the Company to rely upon it later in the process.

Having concluded that the company erred in discussing the Grievant's past record in the third step minutes, the question remains whether the discipline issued was proper. Given the seriousness of the Grievant's misconduct which gave rise to the instant discipline, I cannot conclude that no discipline would have been imposed. However, there was no evidence from Management that it would have imposed the same discipline, absent consideration of his past record; thus, I cannot conclude that the penalty would have been a 10-day suspension. A suspension is appropriate, but it should be reduced to five days.

AWARD

The grievance is sustained in part. The discipline is reduced to a five-day suspension.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof

Labor Arbitrator

Acting Under Umpire

Terry A. Bethel
Decided this 7th day of July, 1997.
<FN 1>Rule 132 r prohibits the "use of profane, abusive or threatening language towards supervisors or other employees or officials of the Company, or any non-Inland personnel." The Grievant was issued a Last Chance Agreement in late 1995 after he was discharged for failing to work as scheduled.
<FN 2>No evidence was introduced that a second step discussion occurred. A single reference to the issue occurs only in the Company's position section of the third step minutes.