

Mr. Jim Robinson, Griever

Mr. Porfiria Dominguez, Steward

Mr. Linc Cohen, Steward

Mr. Lester McCullough, Jr., Grievant

Arbitrator:

Mr. Bert L. Luskin

BACKGROUND

Lester McCullough, Jr. was employed by the Company on August 18, 1975. He was primarily assigned to work in the No. 4 BOF and Slab Caster Department.

On October 8, 1978, McCullough reported for work on the 11 to 7 shift as a mold yard hooker. At approximately 11:30 P.M. McCullough was moved up to the stopper rod occupation where McCullough and a fellow employee were assigned to make stopper rods for the balance of the shift. At approximately 4:00 A.M. the foreman approached the area where McCullough and another employee had been working. Both employees were not in the immediate area and the foreman thereafter proceeded to the canteen. The foreman (Earl Morrison) entered the canteen where he saw McCullough seated. McCullough's fellow employee was seated at a lunch table with his head down and in a position where the foreman believed him to be asleep. Both employees were then asked to come to the foreman's office. Both employees were informed by the foreman that they were being sent home for being out of their assigned work area. McCullough's fellow employee was informed that he had been observed sleeping. McCullough left the foreman's office and was then escorted from the plant at approximately 4:35 A.M.

Foreman Morrison left the plant at approximately 8:00 A.M. He entered his car which was parked in an area adjacent to the No. 4 BOF and Slab Caster Department. He drove out of the plant onto Commonwealth Avenue and then entered Cline Avenue where he proceeded in a southerly direction, intending to drive to his home in Crown Point, Indiana.

Some time thereafter Foreman Morrison called the plant and spoke with the General Pit Foreman. He informed the General Pit Foreman that while driving south on Cline Avenue he (Morrison) had been tailgated by a late model maroon Cadillac automobile. He reported that as he drove past U. S. Route 20 the Cadillac pulled alongside of his car and the driver of the Cadillac pointed a gun in Morrison's direction. Morrison reported that he stepped hard on the brake of his car and dropped his body toward the seat of his car, after which he heard what he believed to be a gun shot. Foreman Morrison reported that he looked up and saw the Cadillac pull ahead and stop at the side of the road several hundred feet ahead of Morrison's car. Morrison reported that he (Morrison) then proceeded to pick up speed. He passed the Cadillac and, just before he reached the exit at 169th Street, the Cadillac again pulled alongside of his car and the driver again pointed a gun in Morrison's direction. Morrison reported that he again stepped hard on his brake, dropped his body to the seat and the Cadillac went past his car, after which Morrison looked up and noted that the Cadillac had pulled off Cline Avenue and onto an exit ramp leading to 169th Street. Morrison reported to the General Pit Foreman that the driver of the maroon Cadillac was Lester McCullough, Jr., who had been sent out of the plant by Morrison at approximately 4:30 A.M. on that same morning. The General

Pit Foreman then asked Morrison to return to the plant. Morrison did return to the plant where he spoke with members of supervision and a member of the Company's plant security forces. Morrison then went to the Hammond Police Station where he made a police report of the incident naming McCullough as the driver of the maroon Cadillac in question.

The Company thereafter checked the license registration on the car normally driven by McCullough. The registration indicated that the license plates had been issued to a Lester McCullough for a 1976 maroon Cadillac automobile.

McCullough was charged with having pointed a gun at a member of supervision on two occasions on October 8, 1978. He was informed on October 9, 1978, that he was suspended for five days and would be subject to discharge. The contractual procedures were followed. A hearing was held and on October 16, 1978, the suspension was converted to a discharge. McCullough filed a grievance on October 17, 1978, contending that his suspension and discharge was unjustified and unwarranted "in light of the circumstances." McCullough requested restoration to employment with pay for the time lost from work.

The grievance was denied and was thereafter processed through the remaining steps of the grievance procedure. The issue arising therefrom became the subject matter of this arbitration proceeding.

DISCUSSION

McCullough and a fellow employee were charged with being out of their work area without permission when they were found in the canteen at approximately 4:00 A.M. McCullough contended that he was on a break, was entitled

to be in the canteen and had never been informed that it was necessary to obtain a foreman's permission before going to the canteen on a mid-shift break. McCullough slammed the door to Morrison's office when he left the office after being informed that he was being sent home for the balance of the shift. There was no exchange of profanity between Foreman Morrison and McCullough. There was no evidence of prior animus or hostility between McCullough and Morrison, nor was there any form of threat made by McCullough to Morrison. There is nothing in the record that would indicate that there were any prior difficulties between Morrison and McCullough. The arbitrator must assume from the evidence in the record that, during his period of more than three years of employment with the Company, McCullough's record was free of any significant form of disciplinary penalties. McCullough's job was not in danger when he was sent home before the end of the shift, and McCullough was not informed that any additional periods of suspension would be invoked against him.

The incident that led to McCullough's termination from employment occurred approximately 3 1/2 hours after McCullough had left the plant. McCullough lived in Gary, Indiana. If he had remained at the plant (or in the vicinity thereof) he would have had to stay in the area for some 3 1/2 hours before Morrison left the plant and he would have had to position his car in some manner where he would have been able to follow Morrison on the route Morrison customarily used to exit from the plant and to reach the point on Cline Avenue where the incident occurred. It would have been theoretically possible for McCullough to have returned to his home and driven back to the plant to "lay in wait" for Foreman Morrison.

There is some question concerning alleged conflicting statements made by McCullough at the 3rd step hearing and his testimony at the arbitration hearing. The 3rd step minutes indicate that McCullough stated that he did not own a gun. A Company witness testified that when McCullough was asked whether he owned a gun, he denied owning a hand-gun, but he stated that he did own a shot-gun. McCullough insisted that he, at all times, admitted owning a hand-gun, and a Union Committeeman who was present at the 3rd step meeting testified that McCullough readily admitted that he owned a hand-gun.

Throughout this proceeding and in the preliminary meetings between the parties held at the 3rd and 4th steps of the grievance procedure, the Union (at all times) conceded that Foreman Morrison may have been tailgated by a car which he identified as a maroon late-model Cadillac. The Union conceded that Foreman Morrison had seen the driver of that car pull alongside Morrison's car and point a hand-gun in Morrison's direction. The Union conceded that Morrison may have heard what he believed to be a shot fired by that person from that hand-gun. The Union conceded that someone had, for a second time, driven alongside of Morrison's car and pointed a hand-gun in Morrison's direction. However, the Union denied that the automobile described by Morrison was an automobile owned by McCullough or being driven by McCullough, and the Union denied that McCullough was the driver of the automobile involved in the assault committed upon Morrison when someone pointed a gun in Morrison's direction in a threatening manner.

The Union pointed to what it believed to be serious inconsistencies in Morrison's testimony. The Union pointed to the fact that Cline Avenue at

8:00 A.M. (shortly after shift-change time) is an extremely busy and well-traveled stretch of road. The Union contended that Morrison's testimony cannot be fully credited in all respects since he testified that he first noted that he was being tailgated while he was driving at 60 miles an hour; that he recognized the driver by looking into his rearview mirror; that he moved over into an outside lane to permit the tailgating car to pass; and that the Cadillac then drove alongside of his car and he again saw the driver (whom he described as being McCullough) point a gun in his direction. Morrison testified that he heard what he believed to be a shot. Although one window of his car was fully closed and one window was "cracked open" slightly for air, there was no visible damage to Morrison's car when he examined the car after the incidents occurred. Morrison's car did not completely stop when he applied the brakes and dropped his body to the seat of the car. He noted that the Cadillac had pulled off on the side of the road. Morrison again picked up speed and passed the Cadillac at approximately 45 miles an hour, after which the Cadillac started, caught up with Morrison's car, passed Morrison's car and, while passing, the driver whom Morrison identified as McCullough again pointed a hand-gun in Morrison's direction. Morrison did not hear a shot on that occasion. Morrison's reaction was identical to his reaction in the first instance. He applied the brakes hard, dropped to the seat, his car slowed, and as he looked up he noted that the Cadillac had driven off of Cline Avenue and onto the ramp leading to 169th Street. According to Foreman Morrison, those incidents and those events occurred between a bridge at Highway 20 and the 169th Street exit ramp, a distance of one mile. The Union contended that if Morrison's car was

initially traveling at 60 miles an hour (as he testified) and after slowing down he again picked up speed to 45 miles an hour, the tailgating observed by Morrison, Morrison's movement to a different lane, the action of the driver of the maroon Cadillac in pulling alongside of him, and all of the other events which transpired thereafter would have had to take place within a time span of approximately one minute.

Morrison's identification of McCullough was positive and certain. He was an eyewitness and, since he knew McCullough, his identification of McCullough must be given serious consideration. Credibility is not the issue in this case. What strengthens Morrison's testimony is the fact that McCullough readily admitted that he regularly drives a late-model maroon Cadillac automobile, owned by his father. McCullough readily admitted that on the day in question he drove that car to work and he drove that car home. The car that was admittedly driven by McCullough fits the description of the car which Morrison described as the automobile that was driven by his assailant on the morning in question.

McCullough's testimony consisted of a firm denial of his participation in the incident described by Morrison. He testified that while he was in the canteen, Foreman Morrison approached him, stated "get your clothes, you're going home," and then stated that McCullough was being sent home because McCullough had been out of his assigned work area without permission. McCullough testified that he left the plant at approximately 4:30 A.M., drove to his home located approximately eight miles from the plant, and that he regularly drives

down Industrial Avenue and state roads and does not use Cline Avenue in driving home or driving to the plant. He denied any knowledge of the type of car owned by Morrison and he denied that he knew anything about Morrison's driving habits. He denied that he had any problem with Morrison and he denied that there was any animosity existing between him and Foreman Morrison. He testified that some time after arriving at home he received a telephone call from a member of the Plant Protection Department who informed him of an incident involving Foreman Morrison. He testified that although he initially agreed to immediately return to the plant he did not do so because he was unable to locate a Union representative who could accompany him to the plant.

McCullough's father testified in this proceeding. McCullough's father testified that he is employed at U. S. Steel (Gary Works) and has been an employee of that company for approximately 32 years. He testified that he works steady days and that his record of some 32 years of employment with U. S. Steel is free of any record of suspension or discharge. He testified that he awakened on the morning of October 8, 1978, at 6:55 A.M. He testified that he looked out of his window and noted that his car (a maroon 1976 Cadillac automobile) was parked in front of his house. He testified that he noted (at 6:55 A.M.) that the door to his son's room was closed and that he next saw his son emerge from his room at 1:30 P.M. He testified that he and his son were home all day on October 8, 1978, and that he was positive and certain that his son was at home all morning and that his car (a maroon Cadillac) was parked in front of his home all day on Sunday, October 8, 1978.

It is conceivable that **the** testimony of Lester McCullough, Sr., (where it may be in conflict with **the** testimony offered by Foreman Morrison) may have been motivated by a father's love and affection for a son who was charged with a serious offense. That does not, however, explain away the testimony of a man with a record of approximately 32 years of continued employment with one employer and with an otherwise impeccable record.

The arbitrator is confronted in this case with the positive and certain testimony of an honorable man who underwent a terrifying experience and who appeared to be positive and certain at all times that he could readily identify his assailant. What must be noted, however, is the fact that Morrison made his initial identification of McCullough by viewing the driver of the tailgating Cadillac through his rearview mirror while driving a 1974 Vega at approximately 60 miles an hour and while passing automobiles in a lane to his right. If Morrison believed from his first view of the tailgating automobile (and its driver) that the driver was McCullough, it is conceivable that his two subsequent views of the driver would not have changed his opinion as to the driver's identification.

The arbitrator cannot find from the evidence in this record that the identification of McCullough by Morrison, under all of the prevailing circumstances (including Morrison's being tailgated while driving at 60 miles an hour, the appearance of a hand-gun pointed in his direction, his instantaneous reaction in applying the brake of his automobile and dropping toward the seat, and a repetition of that incident), might conceivably have had an impact upon Morrison's ability to make an identification so positive and certain as to remove all doubt that the assailant was McCullough.

If the arbitrator was convinced from all of the evidence in the record that the driver of the maroon Cadillac that tailgated Morrison's car and who pointed a hand-gun in Morrison's direction was, in fact, Lester McCullough, Jr., then and in that event the grievance would have been denied and the discharge would have been sustained. The arbitrator must again emphasize that he believes Foreman Morrison to be an honorable man who firmly believes that the driver of the car was Lester McCullough, Jr. The fact remains, however, that, in the opinion of the arbitrator, the evidence in this record will not permit the arbitrator to reach a firm conclusion that it was McCullough who was Morrison's assailant on the morning of October 8, 1978, and, under those circumstances, he must find that just cause did not exist for McCullough's termination from employment.

For the reasons hereinabove set forth, the award will be as follows:

AWARD

Grievance No. 4-N-63

Award No. 656

Just cause did not exist within the meaning of the language appearing in Article 3, Section 1, and Article 8, Section 1, of the Collective Bargaining Agreement for the discharge of the grievant. The grievance of Lester McCullough, Jr., is sustained. Lester McCullough, Jr., should be restored to employment with full seniority rights and with back pay computed in accordance with the applicable provisions of the Agreement between the parties.

Bert L. Luskia
ARBITRATOR

March 16, 1979

CHRONOLOGY

Grievance No. 4-N-63

Grievance filed	October 17, 1978
Step 3 hearing	October 24, 1978
Step 3 minutes	November 9, 1978
Step 4 appeal	November 15, 1978
Step 4 hearing	December 7, 1978
Step 4 minutes	January 17, 1979
Appeal to arbitration	January 24, 1979
Arbitration hearing	February 22, 1979
Award issued	March 16, 1979