

Award No. 681
In the Matter of the Arbitration Between
INLAND STEEL COMPANY
AND
UNITED STEELWORKERS OF AMERICA
AND ITS LOCAL UNION 1010

Grievance No. 6-N-28

Appeal No. 1286

Arbitrator: Bert L. Luskin

February 25, 1980

INTRODUCTION

An arbitration bearing between the parties was held in Harvey, Illinois, on January 31, 1980.

APPEARANCES

For the Company:

Mr. T. L. Kinach, Arbitration Coordinator, Labor Relations Department

Mr. R. T. Larson, Coordinator, Labor Relations Department

Dr. P. M. Dunning, Director, Medical Department

Mr. T. J. Mulligan, Superintendent, Power and Fuels Department

Mr. M. R. Zarowny, Coordinator, Insurance Department

Mr. W. P. Boehler, Assistant Superintendent, Labor Relations Department

Mr. V. Soto, Representative, Labor Relations Department

Mr. R. Jackson, Associate Representative, Labor Relations Department

Mr. M. Oliver, Representative, Labor Relations Department

For the Union:

Mr. Theodore J. Rogus, Staff Representative

Mr. Joseph Gyurko, Chairman, Grievance Committee

Mr. J. C. Porter, Acting Chairman, Grievance Committee

Mr. Phil King, Acting Secretary, Grievance Committee

Mr. James F. Bonewits, Griever

Mr. Jon R. Vasilak, Griever

Mr. John Deardorff, Insurance Representative

Mr. Michael Dietz, Grievant

BACKGROUND

Michael Dietz was employed by the Company on April 29, 1974. Dietz thereafter transferred into the Power Department. He became established as an Assistant Clarifier Operator in the Waste Water Sequence. On November 30, 1977, Dietz came to the Company's Insurance Office where he became involved in a serious confrontation. That incident, together with his prior work record, resulted in his suspension and termination from employment.

Dietz filed Grievance No. 6-N-5, protesting his termination from employment. The grievance was denied through all steps of the grievance procedure. At the Step 4 hearings the Union modified its position and indicated that it would waive any claim for back pay and would not ask for an immediate restoration to employment if the discharge action was set aside and Dietz would be restored to the roster of employees and placed on medical lay off. After a series of Step 4 meetings the issue was resolved by Dietz' restoration to employment with the Company, with seniority rights, but without any back pay. In accordance with the understandings reached between the parties, Dietz was immediately placed on medical lay off on or about March 1, 1979.

Dietz next came to the Inland Clinic on March 13, 1979, and presented a statement from a Dr. Teegarden dated February 12, 1979, which stated "Mr. Dietz is now able to return to work. He has recovered from the injuries sustained 10/29/77." Dietz requested immediate restoration to active employment. The Company thereafter concluded that it would not revoke the medical restriction nor would the Company alter Dietz' status as a laid-off employee. He was continued on lay off status for medical reasons.

On April 16, 1979, Dietz filed Grievance No. 6-N-28, contending that Dietz was "ready and able to return to work and is being denied the opportunity to do so." The grievance requested that Dietz be made whole for moneys lost and the grievance cited claimed violations of Article 3, Section 1, and Article 13, Sections 4 and 8, of the Collective Bargaining Agreement. The grievance was denied, and at the Step 3 meeting the Union sought to amend the grievance by including a charge that the Company had violated Article 13,

Section 11, in addition to those contractual Sections that were set forth in the grievance. The Union's request was rejected on the basis that the Union had not presented any new testimony at that hearing that would permit the grievance to be amended. The Company cited Article 6, Section 3 (marginal paragraph 6.9), to support its denial of the Union's request. At the Step 4 meeting the Union again requested the amendment to the grievance, and the Company denied that request. At the arbitration hearing the Union conceded that contractual procedures for the requested amendment to the grievance had not been followed and the Union withdrew its request for the amendment to the grievance that would have incorporated a claimed violation of Article 13, Section 11, of the Contract.

The Union contended that there was no sound or reasonable medical basis for denial of Dietz' request for immediate restoration to active employment.

The Company contended that the parties had recognized in Grievance No. 6-N-5 that Dietz was suffering from severe emotional problems and that an EEG had disclosed that Dietz had a temporal lobe form of epilepsy. The Company contended that his return to active employment was not warranted or justified until he had been medically treated and had undergone intensive psychotherapy on a "one to one" basis and had been recommended for restoration to employment by a neurologist and a psychiatrist (or by a doctor combining both specialties) who would have actively treated Dietz for the organic and emotional forms of illness.

The issue arising out of the filing of the grievance became the subject matter of this arbitration proceeding.

DISCUSSION

The issue concerning the discipline imposed upon Dietz as a result of his conduct on or about November 30, 1977, was resolved by the agreement reached between the parties in Grievance No. 6-N-5 in the 4th Step of the grievance procedure and is not in issue in this case.

The issue in this case concerns itself solely with the medical restriction imposed against Dietz by the original agreement between the parties on or about March 1, 1979. In Grievance No. 6-N-28, Dietz and the Union contend that on March 13, 1979, Dietz was physically, mentally and emotionally able to return to active employment with the Company. The Company, on the other hand, contends that Dietz was suffering from an untreated temporal lobe disorder and he would additionally require intensive psychotherapy for a prolonged period of time on a one-to-one basis by a qualified psychiatrist before any decision could be made that would permit Dietz' restoration to active employment with a reasonable degree of safety to himself and to his fellow employees. Much of the medical evidence is not in dispute and the relevant portions thereof will be set forth and analyzed.

In the 3rd Step hearings on Grievance No. 6-N-5, the Union requested that Dietz be restored to employment after he had received psychiatric counseling and treatment to overcome his problems. The Union requested only an immediate restoration to employment (without back pay) and immediate placement thereafter on medical lay off. The Union acknowledged the problems related to Dietz' mental and emotional condition, and the Union stated that it did not seek Dietz' immediate return to active work. It argued only that Dietz should be restored to employment in order that the Company's insurance benefits could be made available to him for treatment. It argued that after treatment and after certification by a physician, the question of Dietz' continued employment could then be decided.

The Union had continued to press for Dietz' restoration to employment on the grounds that his acknowledged emotional problems were responsible for the incident of November 30, 1977. The Company thereafter arranged to have Dietz examined by a psychiatrist who also specialized in neurology. The Company referred Dietz to its staff psychiatrist (Dr. Wigutow). That doctor was provided with Company records relating to Dietz' behavioral history while employed with the Company. He interviewed Dietz (in depth) on a number of occasions before he reached his conclusions concerning Dietz' emotional condition. Dr. Wigutow sent Dietz to the Methodist Hospital in Gary, Indiana, where a nasopharyngeal electrode study (EEG) was conducted and analyzed by a Dr. Merino. On September 29, 1978, Dr. Merino reported that the study indicated the existence of "intermittent sharp wave activity emanating from both mid-temporal areas and the nasopharyngeal lead studies corroborated that finding." Dr. Merino concluded his report with a statement that his findings were "consistent with a seizure disorder."

Dr. Wigutow conducted what he described as extensive physical and psychological testing and he concluded that Dietz was suffering from a "temporal lobe seizure disorder as well as a significant personality trait disturbance." It was Dr. Wigutow's opinion that, although the temporal lobe seizure disorder did not manifest itself in convulsions or tremors, it did cause personality changes consistent with those exhibited by Dietz. Dr. Wigutow was of the opinion that unless Dietz was treated for the disorder and received intensive psychotherapy on a one-to-one basis, he could not safely be restored to employment

since, without treatment, he would be, at all times, subject to uncontrolled outbursts that might be self-destructive or homicidal in nature. It was Dr. Wigutow's opinion that the treatment received by Dietz over a four-month period between January and April, 1978, at the Tri-City Mental Health Clinic, while somewhat helpful, did not serve to correct the condition from which Dietz was suffering. The report submitted by Dr. Wigutow concerning his findings and recommendations constituted the basis upon which the Company concluded that it would grant the Union's request in Grievance No. 6-N-5 to mitigate the penalty of discharge, restore Dietz to employment with the Company, and immediately thereafter place him on medical lay off until such time as medical and psychiatric evaluations would result in recommendations for Dietz' restoration to active employment with the Company.

The parties entered into the Step 4 grievance disposition of No. 6-N-5 on March 1, 1979. That agreement provided that, although Dietz' conduct served as cause for discharge, there were circumstances attendant to the case that "mitigated the employee's unacceptable conduct." The parties agreed that medical and psychiatric examinations indicated that Dietz was suffering from "severe emotional problems" and they agreed that a recent EEG indicated the existence of "temporal lobe epilepsy." Dietz was thereupon reinstated and placed on lay off status "for medical reasons, as requested."

Despite the fact that throughout the grievance procedure there was repeated reference to the fact that Dietz needed medical treatment and psychiatric treatment, within two weeks after Dietz' restoration to employment and his placement on medical lay off, Dietz requested restoration to active employment based upon a statement from his doctor (Dr. Teegarden). That statement was dated February 12, 1979, more than two weeks prior to the date of the resolution of Grievance No. 6-N-5 at the 4th Step of the grievance procedure. Dr. Teegarden merely stated that Dietz was able to return to work after recovery from injuries he sustained on October 29, 1977. It is evident that the injuries referred to by Dr. Teegarden were the injuries suffered by Dietz when he was badly beaten about the head with a two-by-four wielded by a male friend of Dietz' wife.

In May, 1979, Dr. Teegarden submitted a statement to the effect that he had "no knowledge that Dietz had ever suffered from epilepsy." Dr. Teegarden thereafter referred Dietz to Dr. Salberg, a neurological specialist, who conducted a neurological and an EEG examination. He concluded that the EEG was normal and he did not find any evidence of "potentially epileptogenic wave forms or abnormal slowing" Concurrent with the submission of that report, Dr. Salberg submitted the following statement: "Mr. Dietz is released for unrestricted work. Neurological w/o is neg. including EEG." At about the same time Dr. Salberg reported to Dr. Teegarden that he had seen Dietz and that Dietz' EEG (with sleep recording) was "completely within normal limits." The report also stated that Dietz had informed Dr. Salberg that he had had no temper bursts for the last year and one-half and that Dietz had informed Dr. Salberg that he (Dietz) had been "off drugs" and was having no problems with his temper. Dr. Salberg reported that he had released Dietz for return to work and that he believed that Dietz did "not have a seizure disorder."

When the Dr. Salberg findings and recommendations were brought to the attention of the Company's Medical Department, the Inland Medical Department noted that the EEG study made by Dr. Salberg did not include an EEG study that should have been made with nasopharyngeal electrode leads. When that matter was called to the attention of Dr. Salberg, he indicated that his office was not at that time equipped to perform that type of study and Dietz was then sent to Porter Memorial Hospital in Valparaiso, Indiana, where the nasopharyngeal electrode study (EEG) was conducted by Dr. Cohen, an electroencephalographer. The test was conducted because of "possible seizures" and the report indicated a negative finding with the exception of a mild, generalized disturbance that was described as an abnormality that was minimal and non-specific.

On August 17, 1979, an extensive report was submitted to the Union by Dr. Salberg. In that report Dr. Salberg stated that he had first seen Dietz in June, 1979, and was informed of the abnormal EEG finding made by Dr. Wigutow after Dr. Wigutow had received a confirming report from Dr. Merino of an EEG study made by Dr. Merino. Dr. Salberg referred to the history of Dietz' "bad temper problems" and the compatibility thereof with the Drs. Merino-Wigutow's diagnosis of "temporal lobe epilepsy." Dr. Salberg indicated that he did not "understand" the report analyzed by Dr. Merino since the report did not indicate the existence of "significant abnormalities." Dr. Salberg then reported that his June 11, 1979, examination of Dietz was normal, as was his initial EEG. He reported that the EEG was repeated with nasopharyngeal leads and was again described as "normal." An additional EEG with nasopharyngeal leads was conducted by Dr. Cohen, whose report did not indicate the existence of any form of significant abnormality. Dr. Salberg referred to the fact that Dietz was "off all drugs" and that he (Dr. Salberg) had released Dietz for return to work. He concluded there was an absence of "good evidence" that Dietz had a seizure disorder

and he had no explanation concerning Dietz' past temper tantrums "at least from an organic viewpoint." That report was submitted to the Company's Medical Director (Dr. Dunning) who wrote to Dr. Salberg requesting clarification. Dr. Dunning requested further clarification in the light of information that had been made available to the Company and to the Union.

On September 11, 1979, Dr. Salberg wrote to Dr. Dunning and stated that he (Dr. Salberg) felt that Dietz could "still have an organic disturbance." He further stated that "it is well known that in people with temporal lobe seizures that serial EEG's are very-frequently within normal limits between ictal episodes." He further reported that "it is also well known that in people with temporal lobe disorders, that their mental status may not be within normal limits and that these people have a tendency to have more aggressive behavior than the normal population." Dr. Salberg then went on to register the following opinion: "I feel at present I cannot label Mr. Dietz as a temporal lobe seizure disorder; however, I am not willing to say that he definitely does not have a temporal lobe seizure disorder "

It is evident that the first portion of Dr. Salberg's letter to Dr. Dunning sets forth general observations concerning persons suffering from temporal lobe seizures, and the second portion thereof indicates an unwillingness on Dr. Salberg's part to reach any conclusion that Dietz did or did not have a temporal lobe seizure disorder. It would appear that Dr. Salberg's opinion may have been changed from that of certainty to uncertainty concerning the existence or nonexistence of a condition of temporal lobe disorder. Dr. Salberg's September 11, 1979, letter addressed to Dr. Dunning was referred to Dr. Wigutow, who then submitted his extensive notes and test results to Dr. Salberg for his examination and analysis.

On December 19, 1979, Dr. Salberg wrote to Dr. Wigutow acknowledging the receipt of Dr. Wigutow's notes and test results, and then stated that, in his (Dr. Salberg's) opinion, "Mr. Dietz indeed has a personality disorder; however, one cannot ignore the fact that on at least one occasion he has had an abnormal EEG which is consistent with a temporal lobe seizure disorder." Dr. Salberg referred to that condition as a "gray area" in neurology and he agreed that people with temporal lobe seizure disorders had more trouble with their personality than do others. He agreed that they had a tendency to be more aggressive and explosive than others. He pointed out that Dietz had made good progress with psychological therapy and he had never suffered from a generalized type of seizure such as "loss of consciousness, tonic-clonic jerking, urinary incontinence or tongue biting." While Dr. Salberg indicated that Dietz had learned to better cope with problems, he could not guarantee that Dietz' problems would not recur. He referred to the absence of seizures, the fact that many of the EEGs were normal as a basis for concluding that Dietz' temporal lobe disorder was of a "minimal to moderate nature" although he could not say that Dietz did not have a seizure disorder. He suggested that if Dietz continued to have outbursts of violence or temper tantrums, a therapeutic trial of Dilantin or Tegretol would be indicated. He pointed out, however, that since Dietz had not been having "too many problems in this respect...a therapeutic trial could not be done accurately at present." He concluded with a statement that Dietz' may have a temporal lobe seizure disorder of moderate severity...mainly affecting his psychological make up." He further pointed out that if Dietz did have a temporal lobe seizure disorder, "then by history it has never generalized to become a full-blown convulsion."

The Company called attention to the fact that at the time that Dietz was terminated in 1977 it considered Dietz' employment record and a long history of reprimands and suspensions imposed against Dietz for absenteeism, poor work performance and a series of other offenses including a suspension because of threats and abusive language directed to a fellow employee that was coupled with damage caused to Company property, as well as the incident in November, 1977, that led to Dietz' termination from employment. Dr. Wigutow considered that record as evidence of the existence of personality traits that served to confirm his conclusion that Dietz was indeed suffering from a temporal lobe disorder.

Although Dr. Wigutow recommended neurological treatment, Dr. Salberg indicated conclusively that he would not prescribe drugs of the type of Dilantin or Tegretol for therapeutic trial purposes in the absence of any evidence that Dietz had ever been subjected to convulsions, seizures, spasms or tremors. It would follow, therefore, that since there is no recorded instance of any overt manifestation of the existence of a temporal lobe disorder either in the form of seizures, convulsions, tremors or spasms at least since 1977, there would be no apparent reason to require further neurological treatment at this time.

It is evident that only one EEG study performed by Dr. Merino indicated the existence of the disorder upon which Dr. Wigutow relied in reaching his conclusions relating to Dietz' organic and psychiatric problems. Dr. Salberg conceded that Dietz may have a temporal lobe seizure disorder, but the fact remains that there is nothing in this record that would in any way indicate that Dietz has exhibited the existence of personality

disorders since November 30, 1977, that would be so serious in nature as to preclude his return to active employment without the prerequisite of a long, intensive and costly period of psychotherapy. There is evidence in this record that since the November, 1977, discharge Dietz has been employed with a limousine service, as a gas station attendant, as a cab driver, and with a contractor performing services at a different steel company in this geographic area. Dietz testified that he had had no problems and had passed all the required medical examinations preliminary to his employment on those jobs. Dietz is fully aware of the fact that he had mental problems and that he had demonstrated forms of behavioral instability. He testified that he was "off drugs" and entered the Tri-City program voluntarily since he became aware of the fact that he had to learn to control his temper, re-evaluate his life, and to "seek out his goals." He testified that he has been divorced from his wife and that he had accepted and has become adjusted to the loss of his family relationship.

While there are ambiguities in the opinions expressed by Dr. Salberg, he had never changed his opinion that Dietz could be released for return to active employment with the Company. Dr. Salberg also equates the existence of temper outbursts and forms of irrational behavior with a condition of temporal lobe disorder. The fact remains, however, that Dr. Salberg sees no reason (from a neurological standpoint) for active medical treatment for the organic condition where the history does not indicate that Dietz suffered from convulsions, spasms or tremors. Dr. Salberg specifically refers to the fact that Dietz has not reported any form of aggressive behavior, temper outbursts or emotional disturbances of any kind since the November, 1977, episode.

Dr. Wigutow's psychiatric evaluation was based upon information provided to him by Dietz that led Dr. Wigutow to believe that the emotional problem was deep-seated and so from an unhappy childhood relationship that Dietz had with his father. Dr. Wigutow also expressed the opinion that Dietz' domestic problems, his erratic behavior while at work, his absenteeism, his propensity for sleeping on the job, and two specific instances of aggressive behavior while at work, could be traced to the temporal lobe disorder discovered by Dr. Merino. It was Dr. Wigutow's opinion that neurological treatment was warranted, as well as a long and intensive period of psychotherapy.

The arbitrator must note that there is nothing in this record that would indicate the existence of recent acts of irrational behavior by Dietz. He has encountered no problems while working at other jobs. The reports from Tri-City Mental Health after several months of group and individual therapy treatments were favorable. The opinions expressed by Dr. Salberg must be given serious consideration. He does not believe (from a neurological standpoint) that a therapeutic trial of control medication would be indicated at this time. Although Dr. Wigutow's opinions must be respected, the fact remains that there are other considerations that are compelling in nature. Many of the problems encountered by Dietz that could account for irrational acts on his part have been resolved. Dietz testified that he stopped the use of drugs several years ago. His domestic difficulties have been settled and Dietz has accepted his permanent separation from his family.

A restoration to active employment at this time would be justified. Dietz' activities could be reasonably monitored and, if some psychiatric treatment would be warranted and justified, there is no reason why Dietz could not receive such treatment while actively employed. The award, however, will not require any payment to Dietz for time lost from work preceding his return to active employment with the Company. For the reasons hereinabove set forth, the award will be as follows:

AWARD

Grievance No. 6-N-28

Award No. 681

Michael Dietz should be restored to active employment with the Company, with seniority rights, but without any back pay.

/s/ Bert L. Luskin

ARBITRATOR

February 25, 1980