

Inland Steel Award No. 706

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DISCIPLINE

GRIEVANCE NO. 2-P-49

APPEAL NO. 1311

AWARD NO. 706

SUMMARY: (1) The Contract provision barring an employee from testifying as a witness in grievance or arbitration proceedings regarding events involving reprimands and discipline "which occurred when the employee was assigned as a temporary foreman" is applicable whether the employee in question is a member of the bargaining unit or a non-bargaining unit employee at the time of the hearing. Testimony of an individual who had been a Temporary Foreman at the time of the events giving rise to disciplinary action, and who was a Foreman at the time of the arbitration hearing, will be stricken from the record. However, the Company had the right to receive and to rely upon oral and written statements made by the individual prior to the institution of the grievance proceeding, at which time he was a Temporary Foreman, and those statements were competent evidence. (2) The evidence supported the conclusions and findings that grievant had been guilty of sleeping on the job and also that he had threatened the Acting Foreman and trailed him in his car. Discharge was justified, particularly in view of the fact that grievant had been working under a last chance agreement.

COMPANY: INLAND STEEL CO.

PLANT: INDIANA HARBOR WORKS

DISTRICT: 31

ARBITRATOR: BERT L. LUSKIN

DATE OF DECISION: NOVEMBER 16, 1981

BACKGROUND

Harold O'Keefe was employed by the Company on November 17, 1970. On February 23, 1981, O'Keefe and an employee named Morales (Mechanical employees) were assigned by Temporary Foreman Duffy to clean steam sprays on No. 6 and No. 7 coke batteries. O'Keefe and Morales were working a shift that was scheduled to start at 7:00 a.m. Both employees went to lunch at noon and returned to their assigned area at 12:30 p.m. At about 12:30 p.m. Temporary Foreman Duffy looked for both employees and was unable to find them on the top of the battery. At approximately 1:30 p.m. O'Keefe and Morales were observed by Duffy seated at the south end of the No. 6 battery (bench level) with their backs against a pinion wall. A salamander was in operation nearby. Duffy allegedly called out to them. O'Keefe allegedly responded by raising his head and opening his eyes. Duffy continued to call out, and Morales then opened his eyes and raised his head. Duffy directed both employees to go to the mechanical office where Assistant General Foreman Lukrafka was notified. Both employees were sent out of the Plant, and an investigation hearing was conducted on the following day (February 24, 1981). Morales and O'Keefe were thereafter informed that they would be suspended from employment. O'Keefe was informed that he was being suspended preliminary to discharge. Both employees were charged with sleeping on the job. O'Keefe was charged with having violated a last chance agreement of July 6, 1980, that followed a suspension on June 23, 1980, for excessive absenteeism and his overall record of employment. The last chance agreement provided in part that O'Keefe would be required to meet with his Department Superintendent for the purpose of reviewing his record. All time lost from work as a result of that suspension would be considered to constitute disciplinary time off. The last chance agreement provided that any repetition of the conduct (that led to the suspension) or the violation of other Company rules or regulations would constitute cause for suspension preliminary to discharge.

The investigation hearing of February 24, 1981, which began at 8:00 a.m., was concluded at approximately 9:00 a.m. The Company was thereafter informed by Temporary Foreman Duffy that he had received a telephone call at approximately 12:45 p.m. on February 24, 1981, and that the caller had stated, "It will not be safe for you to walk the streets." Duffy informed the Company that he had recognized the voice of the

caller as Harold O'Keefe, and that he had immediately responded by stating, "I don't think so, Harry." Duffy thereafter asked Glenda Hodge, the clerk who had initially received the call, whether she knew who the caller was. Ms. Hodge responded by stating that the caller was "Harry." Duffy then informed her of the statement made by the caller. The matter was then reported to the General Foreman and was also reported to Duffy's immediate Supervisor. Duffy was told to leave the Plant some 30 minutes before the end of his shift.

Duffy reported to the Company that he thereafter left the Plant, entered his vehicle and drove home. He reported to the Company that he was followed by O'Keefe who was driving his brown station wagon anti that, although Duffy had taken diversionary measures, O'Keefe had followed him for several miles. Duffy informed the Company that he had seen O'Keefe at close range on several occasions, and had eventually "lost" O'Keefe when he (Duffy) "ran a red light." Duffy reported to the Company that he had then called the police and reported the "chase." He reported that he had thereafter called his Supervisor and related the incident to him. He reported that he had been able to observe O'Keefe at close range on two occasions during the 10 to 15 minutes that O'Keefe followed Duffy.

On February 27, 1981, O'Keefe was informed that he was suspended preliminary to discharge for violation of Company Rules No. 127-g and 127-p, and for his overall record. The two rules cited referred to "sleeping in the Plant" and the use of threatening language directed toward employees or officials of the Company.

A hearing was held in accordance with the Article 8 procedures of the Collective Bargaining Agreement. The Company thereafter concluded that O'Keefe should be terminated from employment. He was informed of the Company's official decision by letter of March 13, 1981.

A grievance was filed on March 16, 1981 (Grievance No. 2-P-49) contending that the discharge of O'Keefe was unjustified and unwarranted. The grievance requested that O'Keefe be reinstated to employment and paid all moneys lost. The grievance charged the Company with a violation of Article 3, Section 1, and Article 8, Section 1, of the Collective Bargaining Agreement.

The grievance was thereafter processed through the remaining steps of the grievance procedure. The 3rd step hearing was held on April 1, 1981, and the 4th step hearing was held on June 17, 1981. At both hearings the Company made reference to written statements submitted to the Company by Temporary Foreman Duffy concerning the events which had transpired on February 23 and 24, 1981.

On August 6, 1981, Duffy was promoted out of the bargaining unit and into the position of Mechanical Foreman.

The Union contended that the Company could not use the written statements prepared by Foreman Duffy to support its charge that O'Keefe was found asleep and out of his assigned working area on February 23, 1981. The Union contended that the Company could not use Duffy's written statement to support its contention that O'Keefe was the person who had allegedly called Duffy on the telephone on February 24, 1981, and had allegedly threatened Duffy. The Union contended that the Company could not use a written statement by Temporary Foreman Duffy to support Duffy's contention that he had been followed by O'Keefe on February 24, 1981, and that he had threatened Duffy by following closely behind Duffy's vehicle for a period of several miles.

The Union contended that the Collective Bargaining Agreement of August 1, 1980, contains a newly negotiated provision (Article 13, Section 14) which prohibits a Temporary Foreman from issuing reprimand and discipline letters to employees and prohibits either party from attempting to offer the testimony of an employee (either in the grievance procedure or the arbitration procedure) regarding any events involving reprimands and disciplines "which occurred while the employee was assigned as a temporary foreman." The Union called attention to the inclusion of newly negotiated language in the 1980 Agreement (Article 7, Section 1) wherein the Company agreed that it would not subpoena or call as a witness (in arbitration proceedings) any employee from the bargaining unit, and the Union agreed that it would not subpoena or call as a witness (in such proceedings) any non-bargaining unit employee.

The Union contended that in view of the newly included provision in the Collective Bargaining Agreement, the Company could not (in this arbitration proceeding) offer the testimony of Foreman Duffy who, at the time of the termination of O'Keefe, was employed by the Company in the bargaining unit and working as an hourly Temporary Foreman. The Union contended that the statements prepared by Temporary Foreman Duffy could not be offered into evidence in these proceedings since they violated the hearsay rule and served to prevent the grievant from the opportunity of cross-examining the person who had prepared the written statement.

The Union contended that the Company must sustain the burden of proof and that it failed to do so either in the grievance procedure or at the arbitration hearings.

The Company contended that at the time that it made its determination to suspend and to thereafter terminate O'Keefe from employment, it had a right to rely upon the oral reports and the written statements prepared by Temporary Foreman Duffy. The Company contended that in the preliminary investigations, Union representatives had the opportunity to hear Temporary Foreman Duffy's version of the incidents as they were related by Temporary Foreman Duffy. It contended that the grievant and the Union had the opportunity to confront Temporary Foreman Duffy and to question him concerning the events that led to the reports submitted by Temporary Foreman Duffy.

The Company contended that the newly negotiated language appearing in the 1980 Collective Bargaining Agreement as a part of Article 13, Section 14, does not in any way serve to preclude or prohibit a Temporary Foreman from submitting an oral or written report of an incident involving the misconduct of a bargaining unit employee. The Company contended that it had a right to rely upon Duffy's statements as being factual and that his statements, in the opinion of the Company, constituted the far more credible versions of the events than did the mere denial of the charges by the grievant O'Keefe.

The Company contended that sleeping on the job is an offense so serious in nature as to justify the imposition of discipline up to and including a suspension preliminary to discharge from employment. The Company contended that the threat to Duffy voiced by O'Keefe, followed by the incident involving the obvious threat directed toward Foreman Duffy when O'Keefe followed him in his car for a distance of several miles, constituted an act of misconduct so serious in nature as to justify termination from employment.

The Company contended that O'Keefe had signed a last chance agreement on July 6, 1980, a little more than six months preceding the events which occurred on February 23 and 24, 1981. The Company contended that O'Keefe knew that any violation of Company rules and regulations thereafter would constitute cause for suspension preliminary to discharge. The Company contended that the last chance agreement must be honored and, since the offenses committed by O'Keefe on the two days in question constituted serious violations of Company rules and regulations, O'Keefe breached the last chance agreement and thereby subjected himself to termination from employment.

The Company contended that it had a right to offer the testimony of Foreman Duffy in the arbitration hearing since Duffy had become a Permanent Foreman and had thereby left the bargaining unit in August 1981. The Company contended that the contractual prohibition against the offer of testimony of a Temporary Foreman in proceedings involving discipline would not be applicable in the instant case since Duffy had become a Permanent Foreman, was no longer in the bargaining unit, and he could not be characterized as an "employee" within the meaning of the definition of the term "employee" as it appears in Article 2, Section 1, of the Collective Bargaining Agreement. The Company contended that the term "employee" is defined as an employee of the Company who is employed in or about the Plant and who is "included in the bargaining unit hereinafter set forth." The Company contended that when Duffy was promoted to the position of Mechanical Foreman, he left the bargaining unit and could no longer be considered to be an "employee" within the definition of the term. The Company contended that the prohibition appearing in Article 13, Section 14, would not, therefore, be applicable.

The Company contended that proper cause existed for O'Keefe's termination from employment. The Company contended that the evidence would conclusively demonstrate that O'Keefe was found asleep on February 23, 1981, and that O'Keefe had, on February 24, 1981, voiced oral threats to Duffy after which he pursued Duffy (by car) for a distance of several miles of city streets before Duffy was able to evade the pursuit. The Company contended that Duffy was thereby threatened, and reported the matter to police officials, after which he reported the matter to the prosecutor's office and sent his family from his home to a safer place.

DISCUSSION

The provisions of the Agreement cited by the parties as applicable in the instant dispute are hereinafter set forth as follows:

"ARTICLE 2

"SCOPE OF AGREEMENT

"SECTION 1. This Agreement relates only to the Company's Indiana Harbor Works at East Chicago, Indiana. The term 'employee' as used in this Agreement applies to those employees of the Company employed in or about said plant who are included in the bargaining unit hereinafter set forth.

"ARTICLE 3

"PLANT MANAGEMENT

"SECTION 1. Except as limited by the provisions of this Agreement, the Management of the plant and the direction of the working forces, including the right to direct, plan and control plant operations, ... suspend for cause, discipline and discharge employees for cause, ... are vested exclusively in the Company, ...

"ARTICLE 7

"ARBITRATION

"SECTION 1.

"a ... The Company agrees that it shall not subpoena or call as a witness in arbitration proceedings any employee from the bargaining unit. The Union agrees that it shall not subpoena or call as a witness in such proceedings any non-bargaining unit employee." [Emphasis supplied.]

"ARTICLE 8

"DISCHARGES AND DISCIPLINES

"SECTION 1. In the exercise of its right to discharge employees for cause, as set forth in Article 3, the Company agrees that an employee shall not be peremptorily discharged ...

"ARTICLE 13

"SENIORITY

"SECTION 14. SENIORITY WITH RELATION TO SUPERVISORY OCCUPATIONS.

"Employees who are assigned as temporary foremen shall continue to be considered as employees under this Agreement, except that the selection and retention of employees for such job, the terms and conditions of their employment as temporary foremen, and their duties and responsibilities as foremen shall not be and are not covered by this Agreement. An employee assigned as a temporary foreman will not issue reprimand and discipline letters to employees, provided that this provision will not prevent a temporary foreman from relieving an employee from work for the balance of the turn for alleged misconduct. An employee will not be called by either party in the grievance procedure or arbitration to testify as a witness regarding any events involving reprimands and disciplines which occurred while the employee was assigned as a temporary foreman. An employee working as a temporary foreman shall not in the same workweek be permitted to work additional turns in the bargaining unit which result in a total number of turns greater than he would have worked had he not been temporarily working in a supervisory position." [Emphasis supplied.]

The italicized portions of the contractual language hereinabove set forth are words and sentences that were incorporated in the 1980 Collective Bargaining Agreement between the parties as newly negotiated language.

The Arbitrator permitted the Company to offer the testimony of Foreman Duffy over the objections of the Union with the understanding that he would thereafter rule upon the issue relating to the Company's right to offer Duffy's testimony. The parties were informed that if the Arbitrator found that the Company should have been precluded from offering the testimony of Duffy in this proceeding as the result of the newly included contractual language, then and in that event Duffy's testimony would be stricken from the record and the testimony that he offered at the arbitration hearing would not be considered by the Arbitrator in reaching his conclusion on the basis of the merits of the dispute.

The fact that Article 2, Section 1, defines the term "employee" to be employees of the Company "employed in or about said plant who are included in the bargaining unit hereinafter set forth," does not mean that when Duffy became Foreman in August 1981, and was thereafter excluded from the bargaining unit, he lost his status as an employee of the Company. The term "employee" as it appears in Article 2 is clearly intended to define those employees of the Company who would be included in the unit and who would be covered by the terms and provisions of the Collective Bargaining Agreement. The intention of the parties was clearly manifested in the language appearing in Article 7 when the parties agreed that the Company would not subpoena or call as a witness in arbitration proceedings any "employee from the bargaining unit." In that same provision the Union agreed that it would not subpoena or call as a witness "in such proceedings any such non-bargaining unit employee." It is evident that where the parties intended to distinguish a bargaining unit employee from a non-bargaining unit employee, they did so by the use of clear, precise contractual language that left no doubt with respect to their intentions.

Article 7, Section 1, is not dispositive of the issue in this case. The issue concerning the right of the Company to offer the testimony of Foreman Duffy in this arbitration proceeding must be determined on the basis of the language appearing in Article 13, Section 14, and that portion of the language thereof which was (for the first time) incorporated in the 1980 Collective Bargaining Agreement. A Temporary Foreman cannot issue reprimand and discipline letters, but he is clearly permitted to relieve an employee from work

for the balance of the turn for "alleged misconduct." The newly negotiated sentence that follows, serves to prevent either party from calling an employee (in the grievance or arbitration procedure) to testify as a witness regarding any events involving reprimands and disciplines which occurred while the employee was assigned as a Temporary Foreman. As the word "employee" is used in this sentence, it would have to include any employee of the Company who was a Temporary Foreman at the time of the event irrespective of whether he is a bargaining unit employee or a non-bargaining unit employee at the time of a grievance or arbitration hearing.

The fact that Duffy became a Foreman prior to the arbitration hearing would have no bearing on the primary issue in this case. The controlling sentence in the provision in question requires Duffy to be viewed to be an "employee" of the Company irrespective of whether his status (for the purpose of that sentence) is that of a bargaining unit employee or as a non-bargaining unit employee. As an employee of the Company he may not be called by either party to testify as a witness regarding the events which occurred with respect to the incident involving O'Keefe while Duffy was assigned to work as a Temporary Foreman.

Although the Company submitted a number of decisions of other Arbitrators to support its position in this matter, the only award cited by the Company that dealt directly with the issue in this case was the award of Arbitrator Lipson issued on September 11, 1981, in a matter between Interlake, Inc. and United Steelworkers of America. That Arbitrator found (in that case) that a Temporary Supervisor who later became a Foreman could testify in the proceeding. It should be noted, however, that the contractual language cited by the Arbitrator in that case is substantially and significantly different from the applicable language appearing in the 1980 Collective Bargaining Agreement between the parties to this proceeding. In the Interlake case the Arbitrator found that the contractual language prohibited the Company from calling (as a witness) a bargaining unit employee and the Union was prohibited from calling (as a witness) a non-bargaining unit employee. To that extent the language in the Interlake contract relied upon by the Arbitrator in that case was similar to the language appearing in Article 7, Section 1, of the Collective Bargaining Agreement between the parties to this proceeding. The issue in this case, however, must turn upon the language appearing in Article 13, Section 14, which contains language substantially and significantly different from the language relied upon by Arbitrator Lipson in the Interlake case.

The testimony of John Duffy in this proceeding will, therefore, on the Union's motion, be stricken from the record of this proceeding. It will not be relied upon by this Arbitrator in determining whether proper cause existed for O'Keefe's termination from employment.

This Arbitrator will find that the Company had the right to receive and to rely upon the oral and written statements attributed to Duffy at the time that he served as a Temporary Foreman and as a bargaining unit employee. The statements and reports submitted by Duffy were submitted prior to the institution of the grievance procedure in this case. There is no contractual language which would preclude the Company from receiving oral written reports from bargaining unit Temporary Foremen concerning events which occurred on their shift and which dealt with matters that could lead to the issuance of reprimands, suspensions or terminations from employment. Duffy made no recommendations. He merely reported the events that led to relieving O'Keefe from employment for the balance of the turn. That was a contractually permissible procedure and it was not prohibited by virtue of any of the newly added language appearing in the 1980 Collective Bargaining Agreement between the parties.

The oral statements attributed to Duffy and his written reports must be viewed as competent evidence. The weight to be given to the oral statements of Duffy and to his written reports, however, are matters which would have to be determined by the Arbitrator in reaching his conclusion with respect to whether the Company did or did not meet its required burden of proof in contending that proper and just cause existed for O'Keefe's suspension and termination from employment.

There is some uncertainty with respect to whether O'Keefe was sleeping when he was observed by Duffy seated in a position where he was motionless, with his back braced against a wall and with his eyes closed. Whether O'Keefe was or was not sound asleep is not the critical issue in this case.

The evidence would conclusively support the oral and written statements attributed to Duffy concerning the time elements in this case. Duffy looked for O'Keefe and Morales for a period of approximately one hour following the end of their lunch break. Although O'Keefe denied being away from his working area for a period of approximately one hour without permission, the fact remains that O'Keefe and Morales did little, if any, work during the entire portion of the shift between 7:00 a.m. and 1:30 p.m. The work which they were assigned to perform was either ignored or was performed in such a haphazard manner as to require that the work be performed almost in its entirety by another employee assigned for the precise purpose of performing those cleaning functions which had been assigned to O'Keefe and Morales on February 23,

1981. The testimony offered by a bargaining unit employee concerning his assignment on February 24, 1981, serves to completely support the original statements attributed to Duffy concerning the quality and the extent of the work performed by O'Keefe in the period between 7:00 a.m. and 1:30 p.m. on February 23, 1981. On the basis of the record in this case, Duffy had every right to reasonably conclude that O'Keefe had subjected himself to the imposition of disciplinary measures and he had every right to relieve O'Keefe from work for the balance of the turn until such time as appropriate members of supervision could determine what additional measures of discipline, if any, should be imposed against O'Keefe.

The events that occurred on February 24, 1981, have been referred to in the background portion of this opinion and award and need no further amplification. There may be some doubt with respect to whether it was O'Keefe who called and spoke with a clerk and thereafter spoke with Duffy and, in effect, stated to Duffy, "It will not be safe for you to walk the streets." Although the clerk testified that she had identified the caller (by voice) as O'Keefe and although Duffy had reported to several members of management that he had recognized the caller's voice as that of O'Keefe, the fact remains that an identification of that type, without further supporting evidence, is not sufficient to draw a firm conclusion that the caller who made the threatening statement was, in fact, O'Keefe. The events which transpired shortly thereafter, however, would cast direct suspicion on O'Keefe as the person who made that call.

Duffy's oral and written accounts of the events that occurred after he left the Plant cannot possibly be characterized as a figment of his imagination. The incident occurred in broad daylight. Duffy had several opportunities at close range to view the driver of the car that was pursuing him. His identification of O'Keefe as the driver of that car was positive and certain. Duffy had been trained in police work and he had a number of opportunities to view the car that O'Keefe was driving. He identified the car as one belonging to O'Keefe. He recognized O'Keefe as the driver of the car, and he was certain and positive that it was O'Keefe who was driving the car that pursued Duffy over several miles of city streets while Duffy was attempting to take evasive action and was attempting to elude O'Keefe and the possible consequences that would flow from any subsequent confrontation.

The identification of O'Keefe as the driver of a vehicle that was parked on the overpass at about the time that Duffy left the Plant was made by the same clerk who had "identified" O'Keefe as the person who had called earlier that day when the threat was made to Duffy. That witness was leaving the Plant, saw O'Keefe's car, and identified O'Keefe as the person who was seated in the parked car. She was concerned enough to have called at a later point in time in order to make certain that Duffy was safe and had not been harmed.

O'Keefe generally denied pursuing Duffy. He denied calling Duffy and threatening Duffy. His testimony concerning the events and the time elements differed somewhat from the statements which he had made in the grievance procedure. He conceded at the arbitration hearing that he had returned to the Plant on the afternoon of February 24, 1981, and was in the vicinity of the Plant at about the same time that Duffy left the Plant. He testified that he had returned to the Plant in order to talk to an employee.

The Union correctly contended that the Company must carry the burden of proof, and in a proceeding of this type the proof of O'Keefe's guilt must be positive and certain. In the opinion of the Arbitrator, the Company has sustained its burden of proof by a clear and convincing preponderance of the evidence in this case. The evidence will support a conclusion and finding that O'Keefe was seated in an area away from his immediate working position and in a manner which led Temporary Foreman Duffy to believe that O'Keefe was sleeping. O'Keefe had failed to carry out the working directions of Temporary Foreman Duffy. The vast majority of the work that had been assigned to O'Keefe and Morales on February 23, 1981, had to be performed by a different mechanic on the following day. The evidence will support a conclusion and finding that O'Keefe was waiting for Duffy as Duffy left the Plant on February 24, 1981. The evidence will support a conclusion and finding that O'Keefe pursued Duffy in a manner so threatening in nature as to cause Duffy to reasonably conclude that O'Keefe intended to physically assault Duffy.

O'Keefe was working under the last chance agreement reached between the parties on July 6, 1980. The offenses committed by O'Keefe were so serious in nature as to have justified the imposition of severe disciplinary measures including the penalty of termination. When those offenses are viewed in the light of the fact that O'Keefe was working under a last chance agreement, the only reasonable conclusion that can be reached is that just and proper cause existed for O'Keefe's termination from employment.

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

AWARD NO. 706

Grievance No. 2-P-49

The Company had just and proper cause for the termination of Harold O'Keefe from employment. The grievance is hereby denied.