Arbitration Award 744
IN THE MATTER OF ARBITRATION
Between
INLAND STEEL COMPANY
Indiana Harbor Works
and
UNITED STEELWORKERS OF AMERICA
Local Union No. 1010
Grievance No. 26-R-2
Arbitrator: Clare B. McDermott
Opinion and Award
June 16, 1984
Subject: Removal from Job for Physical Inability (Seriously Deteriorated Vision) to Perform It Safely.
Statement of the Grievance: "Mr. J. Barrera, #8377 contends that the medical restriction placed on him by the Company is unjust and unwarranted.
"Relief Sought - To give Mr. Barrera a capability performance test, by the Company, so he can prove himself on the R.C. job and Switching job. To pay all monies lost."
Agreement Provisions Involved: Article 3, Section 1, and Article 14, Section 1 of the March 1, 1983 Agreement.
Statement of the Award: The grievance is denied.
Grievance Data
Grievance Filed: June 16, 1983
Step 3 Hearing: July 21, 1983
Step 3 Minutes: September 16, 1983
Step 4 Appeal: September 21, 1983
Step 4 Hearing(s): October 13, 1983
Step 4 Minutes: February 20, 1984
Appeal to Arbitration: February 22, 1984
Arbitration Hearing(s): March 12, 1984, and April 27, 1984
Appearances
March 12, 1984
Company
Robert B. Castle -- Arbitration Coordinator, Labor Relations
Robert H. Ayres -- Manager of Labor Relations, Ind. Relations
Dr. Rex R. Hooker, M.D. -- Medical Department
Louis W. Harding -- Superintendent, Transportation
Dewey J. Wenzel -- Superintendent, Safety & Protection Ser.
Michael O. Oliver -- Sr. Representative, Labor Relations
Dr. Jack Lang -- Assoc. Director Medical
Union
Tom Barrett -- Staff Representative
Joe Gyurko -- Chairman Grievance Committee
Don Lutes -- Secretary Grievance Committee
John Deardorff -- Insurance Representative
Galvino Jiminez -- Acting Griever
Juan Barrera -- Grievant
Rob Persons -- Secretary Base Rate Committee
April 27, 1984
Company
Robert B. Castle -- Arbitration Coordinator, Labor Relations
Robert H. Ayres -- Manager of Labor Relations, Ind. Relations
L. W. Harding -- Superintendent, Transportation
M. O. Oliver -- Sr. Representative, Labor Relations
D. J. Wenzel -- Superintendent, Safety & Protection Ser.
Union
Tom Barrett -- Staff Representative

Bobby Joe Thompkins -- Acting Chairman, Grievance Committee
Don Lutes -- Secretary Grievance Committee
Galvino Jiminez -- Acting Griever
Juan Barrera -- Grievant

BACKGROUND

This grievance from the Transportation Department claims that Management's demoting grievant from jobs in the Switching Sequence (Train Operator, Locomotive Engineer, Conductor, and Switchman) because of defective vision was without proper cause, in violation of Article 3, Section 1, and Article 14, Section 1, of the March 1, 1983 Agreement.

Grievant began with the Company in 1971 in Field Force Labor. He became established in the Switching Sequence of jobs in April of 1975. He worked as a Switchman, the bottom job in the Switching Sequence, for about one year, as Conductor for approximately six, and as a Train Operator for over two years.

Since about 1953 the Company has administered a policy requiring that employees who operate mobile equipment be licensed. The policy covers two categories of jobs, noncritical and critical. The former includes Fork Lift Truck Operators and Payloader Operators. The latter covers more massive mobile equipment, such as electric overhead travelling cranes, ore bridges, coal bridges, hydraulic mobile cranes, locomotive cranes, trackmobiles, locomotives, and all radio, remote-controlled mobile equipment. The thought was that it was necessary that employees operating such equipment possess and employ greater care for precise movements, requiring greater visual acuity, depth perception, and peripheral vision. The visual requirements for a Noncritical Mobile Equipment License were normal color vision and distant visual acuity of 20/50 or better in each eye, with or without correction. The more severe critical license demanded normal color vision, 90 percent depth perception on the Company's standard test or, if less, satisfaction of all of three other factors, and distant visual acuity of 20/40 or better in each eye, with or without correction.

Grievant's preemployment physical examination in 1971 included examination of his vision, and his distant and near vision was found to be 20/20 in his right eye without glasses and 20/30 in his left eye without glasses.

His peripheral vision was examined again in 1975 in order to determine whether or not he met the visual standards necessary for promotion to the Switchman job. His peripheral vision was seen as 105° in each eye, which was said to be normal. He thus qualified for a Noncritical Mobile Equipment Operator's License.

Number 7 Blast Furnace started up in October of 1980, and the job of Train Operator was established to move engines and cars by radio, remote-control equipment. The job must, among other duties, place pugh ladles rather precisely underneath the Cast House. The job then required only a noncritical license. Grievant began working that job in January of 1981.

In September of 1982, the parties agreed to expand use of the Train Operator job throughout the plant, and in November of that year Management changed the requirements for the Train Operator and Switchman jobs, so that incumbents thereafter were required to obtain a critical license in order to work either job. Since grievant was in the Switching Sequence, eligible by seniority and operation of the system to move to Train Operator as occasion might arise, he was required to qualify for a critical license then.

He was examined for that purpose on May 5, 1983, and his distant visual acuity was found to be 20/20 in his right eye, without and with glasses, and 20/100 in his left eye, without and with glasses. His near visual acuity was 20/30 in his right eye without glasses and 20/20 with glasses, and his left eye was 20/100 without and with glasses. Thus, he could not satisfy the visual-acuity requirement for either a critical license or the less demanding ones for a noncritical license. He was removed temporarily from the Switching Sequence jobs, pending successful completion of an eye examination for a critical license. On the day of that test, grievant had only nonprescription safety glasses and regular, nonsafety prescription glasses. He was advised to get prescription safety glasses and to return for another examination.

He did so and was examined again on May 9, 1983. His distant and near visual acuity tested at 20/20 in his right eye and 20/100 in his left, with glasses. Those readings meant that grievant failed to meet the requirements for both the critical license and the lower ones for the noncritical license.

Grievant was examined again on May 24, and the results were no better. Those medical findings were sent to the Transportation Department on May 27.

Sometime in mid-June the Company received a letter from the office of grievant's opthomologist Flood, reading in pertinent part as follows:

"To Whom It May Concern:

"Mr. Berrara was seen today by Dr. Flood who is a retinal specialist dealing with retinal diseases and surgery.
"Mr. Berrara's visual acuity in the left eye has been the same as found to day with no changes in that time. His visual acuity of the right eye is excellent.
"Since Mr. Berrara has been performing his work and job duties without difficulty for 9 years Dr. Flood sees no reason why Mr. Berrara can not continue in the same capacity at work."
On June 17, 1983, the Company held its Placement Meeting on this matter, attended by representatives of the department involved (Transportation) and of the Medical and Safety Departments. The problem was reviewed, and the Transportation Department Supervisor then concluded that grievant's vision was so deficient that he no longer could perform the Switching Sequence jobs safely. Grievant then was demoted to the Labor Section, and the highest-rated job he was entitled to hold by his seniority was the Job Class 2 General Laborer.
This grievance followed, with grievant contending that the medical restriction imposed by Management was unjust and unwarranted. He asked that he be given a capability-performance test so that he could prove himself on the Train Operator and the Switchman jobs.
On July 1, Dr. Flood wrote again, this time to grievant's physician, Dr. Trachtenberg, in pertinent part as follows:
"OCULAR HISTORY: The patient states that for the past 8 years he has had difficulty with his left eye in that he sees 'only parts of objects' with that eye. He states that his doctor told him he had retinal scars in that eye. Mr. Berrara has no problems with his right eye.
"OCULAR EXAMINATION: Vision in the right eye without correction was 20/20-1. Vision in the left eye without correction was 20/200, not improved with pinhole. . . . There was a small posterior sub-capsular cataract in the right lens."
The Union argues that grievant has shown by his performance of these jobs over the years that he had the ability to function as a Switchman and as a Locomotive Engineer, even with deficient vision in his left eye. It says he has worked as Switchman and as Train Operator, without problems or accidents attributable to his deficient vision, and that the Company has not cited him with instances of poor work performance. The Union notes also the June 13 letter from grievant's personal physician, saying that, since grievant had been performing the jobs without difficulty for nine years, he could see no reason why he could not continue to do so. That letter said also that grievant's visual acuity in his left eye had been the same as found on June 13, 1983, with no changes.
The Company replied that grievant's 1971 vision in his left eye was 20/30; that he passed a partial vision test in 1975; but that by May of 1983 the visual acuity in his left eye had deteriorated to 20/100, uncorrectable by either glasses or surgery. Management insists that employees working in railroad jobs must have good visual acuity, including depth perception and peripheral vision. It notes that the Switchman must be able to see protruding objects at distances while riding on cars and engines in all kinds of weather in day and night conditions, with good and poor light. The Company says grievant's vision prevents him from being able to perform Switchman Sequence jobs safely.
The Company said that the fact that grievant so far has been able to work these jobs without accident because of his impaired vision is not controlling. It cites Inland Award No. 625, where Arbitrator Cole held that Management would not meet its Article 14, Section 1, obligation to make reasonable provisions for the safety and health of its employees at the plant, if it waited for an accident to occur before it took action appropriate to the employee's proved poor vision. The Company relies also on Inland Award No. 304.
Following the Step 3 Meeting, Dr. Flood was contacted and provided additional information. He said grievant had acknowledged that he sees only parts of objects with his left eye; that his vision in his left eye was 20/200 and was uncorrectable; and that there was no known treatment to repair the macular damage to grievant's left eye.
The Company said that grievant was not given a Statement of Demonstrated Ability License because the working environment of the Switching Sequence jobs is highly variable, ranging from good to poor vision in good and poor weather, by natural daylight, artificial light, or none, at night. The Company says that such licenses are granted only where, in the opinion of the operating department and with approval of the Safety Department, an employee can demonstrate that he can operate mobile equipment safely even though his medical condition prohibits his getting the appropriate license. They are issued only where the job's environment remains relatively constant, as for example with Crane Operators, always in the same artificial light and at the same distance from the floor to the cab and various hoist positions. The Company said that no Statement of Demonstrated Ability License ever has been granted for jobs in the Switching Sequence.

The Union notes that grievant's Indiana driver's license has no restriction. Four arbitration decisions were cited to support grievant's claim here. The Union offered to prove, by a demonstration to be performed in the motel hallway outside the hearing room, that grievant could see well enough to perform the Switching Sequence jobs safely. The Arbitrator held then, and reaffirms now, that such a test would not be at all job related and, therefore, could shed no meaningful light on this problem, and the suggested test was not held.
The material stated above represents all pertinent information gained at the first hearing. As noted, the Company there had said that no Demonstrated Ability Licenses ever had been granted for jobs in the Switching Sequence to employees who could not pass the initial, formal, medical requirements.
A few weeks after the initial hearing, a Company representative discovered by accident that, to the contrary, two such licenses had been granted to employees and that its statement denying prior issuance of such licenses was incorrect. The Company spokesman so informed his Union counterpart and the Arbitrator, and the parties jointly asked that the record be reopened for another hearing to develop the newly discovered and accurate information.
The Arbitrator joins wholeheartedly in the Union's commending the Company's representative for bringing out the post-hearing discovery that incorrect evidence had been introduced at the first hearing and for disclosing all the newly discovered evidence at the second one.
At the reconvened hearing, limited to introduction of, and arguments about, the new information, it was disclosed that, during a Staff Meeting with Safety Engineers relative to a serious injury, a little over a week after the first hearing in this case, one of the Company witnesses in the first hearing said to the group that his search of the records had shown that no Demonstrated Ability Licenses had been issued to employees in the Switching Sequence. At that, a Safety Engineer said that was not true, that he had processed two such licenses in 1983.
It is clear that no one responsible for preparation or presentation of the Company position in the first hearing had been aware of that. Failure to dig up the two other Demonstrated Ability Licenses apparently arose from the way in which the Medical Department computer had been programmed. The witness asked it for a list of all employees with an "M" Code, used to designate an employee with a serious and uncorrectible medical condition restricting him from fulfilling the requirements of a job. The answer listed such employees, and a check disclosed that none were in the Transportation Department, Switching Sequence, aside from grievant. Thus, the Company said at the first hearing that no Switching Sequence employees had been issued a Demonstrated Ability License. The trouble apparently was that the "M" Code designates only those employees who have a serious medical problem, so serious that it cannot be corrected, but an employee who had just barely failed a medical examination might not be "M" Coded, so that the computer would not identify him as such. The computer was used for this purpose since there were about 300 Switching Sequence employees and a manual search would have required that 300 personnel files be checked.
At any rate, the fact of the two Demonstrated Ability Licenses on Switching Sequence jobs was discovered, and Labor Relations was told of that. Thus, there are two Demonstrated Ability Licenses covering employees with defective vision and a further search of Transportation Department files disclosed one more, relating to defective hearing.
After discovery of that information, the relevant Company representatives met, considered those Demonstrated Ability Licenses and their possible effect on the Company position in grievant's case. The Company then decided they should not change its position in grievant's situation, and, therefore, its denial of such a license for grievant was continued.
One of the three Demonstrated Ability Licenses was issued to employee Weidner in 1982 even though he had lost 40 percent of his hearing. He is a Locomotive Engineer and is required, as such, to take voice signals over a speaker system in the cab from the Train Crew and from the Yardmaster. He was tested (accompanied) by a Company representative for over four hours in his cab, and he responded to all voice signals, showing, says the Company, that he could hear well enough in all changing circumstances of his job to perform it safely. He was approved for both a noncritical and a critical license. The Company says also that hearing is not so critical as sight on these jobs.
The Company says, moreover, that the cutoff point between getting a license (noncritical or critical) at the medical-examination stage and without necessity for a Demonstrated Ability License is 39 percent loss of hearing. Since grievant measured a 40 percent loss of hearing, without a hearing aid, only 1 point below the passing point, the Company thought he was borderline and entitled to a Demonstrated Ability test. The employee then got a hearing aid, but no one could say whether or not he was retested with the aid. He was given a Demonstrated Ability test for four hours in the cab, and it was decided that he passed. He was given

the Demonstrated Ability License because his impairment related to hearing and not vision, was borderline, and he got a hearing aid.
The Company says that is altogether different from grievant's situation, since he is industrially blind in his left eye and is, therefore, one eyed.
As to the two employees with slight depth-perception defects and who were given Demonstrated Ability Licenses, the Company notes that both were on jobs requiring only a noncritical license and that both continue to qualify medically on the visual tests for the old, noncritical license. Both are said to be borderline in depth perception, with good peripheral vision and good visual acuity in both eyes. They were tested (observed for three to three and one-half hours) while operating the equipment, and they passed and were given the Demonstrated Ability Licenses.
The Company contrasts those two situations with grievant's by stressing that those employees have good visual acuity in both eyes, while grievant has only one sighted eye, and both have good peripheral vision and have only a slight defect of depth perception. The word "slight" is not used by the Company here as a scientific measurement of the degree of depth perception those employees still retain that is less than an assumed "normal" person. Moreover, says the Company, when tested for visual acuity in 1983 grievant could pass neither the old nor the new tests for either the critical or the noncritical equipment.
Accordingly, the new information did not change the Company's position. It simply reinforced the Union's insistence that grievant be given a Demonstrated Ability test. If he should fail a fair test, the Union says it and he would be satisfied. If he should pass it, the Union says he would be entitled to continue working Switching Sequence jobs.
FINDINGS
Several basic points are clear and, indeed, not disputed, even after the second hearing. One is that by May of 1983 grievant's visual acuity had deteriorated to 20/100, with correction. That deteriorated level of visual acuity does not satisfy the visual requirements for either a noncritical or a critical Mobile Equipment Operator's License. No attack is made here against the visual standard set for either of those two licenses. It is agreed also, surely as Article 3 recognizes, that Management has appropriate authority to remove an employee from a job or jobs he no longer can perform with the degree of safety required by Article 14, Section 1.
Thus, the Union agrees that grievant no longer can meet visual standards for either license. It makes two major arguments, however, The first arises from Dr. Flood's office Nurse's June 18, 1983, letter. It said that grievant's left-eye visual acuity had been the same as found that day, with no change, and that, since grievant had been performing his job duties without difficulty for nine years, Dr. Flood could see no reason why he could not continue in the same capacity at work.
But those statements cannot carry the weight imposed upon them by the Union argument. So far as the Company was aware, there certainly had been changes in grievant's visual acuity. Perhaps the Company should have discovered the serious deterioration in grievant's vision sooner, but recriminations on that subject will serve no useful purpose here, especially since the Company acted as soon as it did find out that grievant's vision in his left eye had deteriorated to 20/100, corrected. Moreover, grievant had not been performing the same job duties for nine years. He had moved to the Train Operator job only about two and one-half years before May of 1983 when he was removed from that job for poor vision, Thus, on that point, Dr. Flood's statement was not advanced and cannot be accepted as that of a medical expert.
Finally, a later report by Dr. Flood (July 1, 1983), seriously undercuts his June 13 statements. He wrote on July 1 that grievant for the past eight years had had difficulty with his left eye in that he sees only parts of objects with that eye. Dr. Flood reported that grievant's left-eye vision without correction, as determined by the June 13 examination, was 20/200 and that there was a polar cataract in the lens of the left eye. Dr. Flood's general impression was that there was bilateral inactive chorioretinitis, with macular involvement in the left eye.
He said it was clear that grievant had experienced an episode of posterior and anterior uveitis in both eyes, with resultant macular scars in both eyes; that the macular scar in the left eye most certainly could explain grievant's poor vision in that eye. Dr. Flood explained to grievant that those scars in the left eye had permanently damaged his central vision and that there was no known treatment that could repair the macular damage.
In light of the July 1 report, Dr. Flood's nonexpert conjecture that grievant could continue to perform in the same capacity as before is not persuasive. On the whole, therefore, Dr. Flood's June 13, 1983, statements are not sufficient to negate the Company decision challenged here.

The second Union argument is that, since grievant had performed several Switching Sequence jobs over the years without obvious problems, he was entitled to continue to do so under a Statement of Demonstrated Ability License. This position was seen as strengthened by the Company's showing at the second hearing that three other Transportation Department employees had been given such licenses.

The Company then explained that it refused to give a Demonstrated Ability test to grievant because it feared that, with vision in only one eye and necessarily impaired peripheral vision and depth perception, necessity to test him in all the changing conditions in which he would have to work (natural and artificial light, all degrees of dawn, day, and dusk light, darkness, and in all-weather surroundings), he might be hurt or might hurt others during the very conduct of the test if he should not see some obstruction. It characterized that as very like a "destructive" test. Management says it could not set up a meaningful test, with representative risks of the jobs--pinch points, objects protruding from cars on parallel tracks or buildings, and such--without at the same time putting grievant at substantial risk if he should not see them. The Company urges that the Demonstrated Ability test process should be restricted, as it always has been, to those employees who failed the medical standards by only a very little and should not be open to those with extreme and uncorrectible medical conditions who have failed the old and the new noncritical and critical standards by a wide margin.

The Union feels that a test could be devised that would not endanger grievant.

This problem is very important to grievant, for through no fault of his, he has been reduced from jobs ranging from Job Class 11, through 14, 15, and 16, to Laborer jobs. His safety and life are at least equally important, however, as are the safety and lives of others. Accordingly, viewing the record as a whole it is clear enough that grievant's left-eye vision had so deteriorated over time that he could not perform the very dangerous Switching Sequence jobs with the degree of safety, his own and others', required by Article 14, Section 1.

Factors supporting that conclusion and distinguishing grievant's situation from others mentioned, include his being for all practical purposes industrially blind in one eye, with the significant reduction in his depth perception and peripheral vision that serious loss of binocular vision entails; the jobs in question involve rather frequent exposure of grievant and others who are in the crew to very serious injuries, including death in the congested areas and close clearances involved in these railroad activities; the severity of grievant's visual impairment, that it, it was not just a slight loss of visual acuity.

In light of those considerations, Management's removing grievant from the Switching Sequence jobs was a legitimate exercise of its authority, under Articles 3 and 14. Thus, the only matter remaining for decision is whether or not that conclusion is undermined by the Company's having issued Demonstrated Ability Licenses to the three other employees, as brought out at the second hearing. Here, too, it is clear that the removal remains warranted and that grievant was not entitled to a Demonstrated Ability test. The only element tending to support his being so tested is the fact that three other employees were given such tests and licenses. But their situations were so different and so mild, when compared to grievant's, as to make the suggested analogy inapt. The impaired-hearing case of the employee with a hearing aid is obviously different, and the other two cases deal only with slight loss of depth perception and no loss of visual acuity or peripheral vision.

In stark contrast, grievant is industrially blind in one eye so that, in addition to the loss of acuity, the fear that he might be "blind sided" by an obstruction from a building or car that he simply could not see on his-left side is not an idle one. It is sufficient to make very real the concern that he could be so imjured during the process of any Demonstrated Ability test that would be in any degree realistic. Only a meaningless test would be safe for grievant. Any such test that really did encounter the many, actual hazards of these Switching Sequence jobs, clearly would subject him to risk of serious injury. Accordingly, in light of those inevitable hazards and the history of administration of the Demonstrated Ability test process, there was no contractual obligation to give one to grievant.

The arbitration decisions relied upon by the Union do not involve sufficiently similar circumstances to support grievant's position. These are railroading, not recording, jobs,

Consequently, since grievant's seriously deteriorated vision justified his removal from the Switching Sequence jobs and since any meaningful Demonstrated Ability test necessarily would subject him to hazards of the same seriousness and frequency, there was no requirement that he have such a test, and the grievance must be denied.

AWARD

The grievance is denied.

/s/ Clare B. McDermott

Clare B. McDermott
Arbitrator