

Arbitration Award 745
IN THE MATTER OF ARBITRATION
Between
INLAND STEEL COMPANY
Indiana Harbor Works
and
UNITED STEELWORKERS OF AMERICA
Local Union No. 1010
Grievance No. 24-P-75
Arbitrator: Clare B. McDermott
Opinion and Award
June 16, 1984

Subject: Claimed Right of Employee To Be Given Copy of Written Memorial (VODG) of Oral Notice of Poor Work Performance, Not Placed in The Official "Departmental Personnel Record"--Practice.

Statement of the Grievance: "That the VODGs which are in the records of the Grievants mentioned in this grievance are unjust. By not giving copies of these VODGs to these people is denying them their right to Union Representation.

"P. Kangrga -- #12251

E. Baimakovich -- 274

S. Clayton -- 12576

P. Johnson -- 13837

D. Zapata -- 22512

D. Cooley -- 18806

A. Slacian -- 107

"Relief Sought - That the VODGs be taken out of the grievants records. That this practice of not giving the grievants copies of these VODGs cease."

Agreement Provisions Involved: Articles 2, Section 2, 3, 13, Section 2 of the August 1, 1980 Agreement.

Statement of the Award: The grievance is denied.

Grievance Data

Grievance Filed: April 8, 1981

Step 3 Hearing: October 29, 1981

Step 3 Minutes: February 24, 1982

Step 4 Appeal: March 8, 1982

Step 4 Hearing(s): March 25, 1982; April 1, 1982; May 20, 1982; May 28 1982

Step 4 Minutes: March 6, 1984

Appeal to Arbitration: March 6, 1984

Arbitration Hearing: March 13, 1984

Appearances

Company

Robert B. Castle -- Arbitration Coordinator, Labor Relations

Robert E. Boyden -- Assistant Superintendent, Stores & Trucking

Rene Vela -- Assistant Superintendent, Labor Relations

William Brehmer -- General Foreman, Stores & Trucking

Vincent Soto -- Senior Representative, Labor Relations

Union

Tom Barrett -- Staff Representative

Joe Gyurko -- Chairman, Grievance Committee

Don Lutes -- Secretary

Jack Thill -- Griever

Donna Cooley -- Grievant

BACKGROUND

This grievance from the Main Storeroom of the Stores and Trucking Department claims violation of Articles 3, Section 1, and (as amended at Step 3), 13, Section 2, of the August 1, 1980 Agreement in a supervisor's writing out and placing in the General Foreman's "working file" a memorial of his oral warning to one of the grievants for alleged poor work performance by her, without giving her a copy.

Perhaps because of the misunderstandings that can arise from oral communications, the Company uses a form called "VODG," an acronym for "Verbal Orders Don't Go." The form is a 5-1/2" by 8-1/2" memo pad used for a variety of communication purposes.

One function which the VODG form serves in some departments, including the Main Storeroom of Stores and Trucking, is to record in writing, as a memory-jogger, a supervisor's oral instruction or reinstruction of an employee about a particular job duty, or an oral warning for a minor incident of alleged poor work performance by an employee.

This grievance arose apparently when employee Kangrga, one of the seven grievants, was told by Stores and Trucking General Foreman Brehmer to locate a particular purchase order. She was unable to do so, and it then was located by another employee. Brehmer told Kangrga that he was going to put a VODG about this event in her file and said also that it was not the first one to be there.

That allegedly surprised Kangrga. She was aware that several VODGs could result in a formal reprimand letter. Sometime in the past Kangrga had asked and had been allowed to see her personnel file, and there were no VODGs in it then. Kangrga allegedly became concerned that Supervision may have placed VODGs in her personnel file, would use them against her for disciplinary purposes, and then would remove them before she was allowed to see it. The Union alleged that, had Kangrga known that VODGs were in her file, she might have challenged them.

In any event, it seems that no copy of that VODG was given to Kangrga, and this grievance followed, claiming the right to such a copy and that denial of it amounted to Management's denying grievant the right to Union representation, should she choose to challenge it in the grievance proceedings. It asked that Management be directed to give grievant a copy of the VODG and that those for which no such copy had been given be removed from grievant's records.

The Union argued that VODGs are a form of discipline and that employees must be given copies of them, be allowed to challenge them, and to have Union representation while doing so, relying upon Inland Award 602 in support of those claims.

General Foreman Brehmer said that Kangrga was mistaken about the way in which VODGs are used by him and his department. He explained that he has what he called an informal "working file" kept in his office, which is separate and apart from the employee's "departmental personnel record," which is kept in the Department Superintendent's office in the custody of the Personnel Clerk. When an employee performs poorly, a foreman or the general foreman will discuss the event with the employee then document the poor performance and the fact of the discussion in a VODG and put it in the General Foreman's "working file" for future reference. This is said to serve only as a reminder to the foreman of the oral discussion with the employee. The Company says that only when a number of VODGs on the same type of poor employee performance would accumulate in the informal "working file," would there be a formal reprimand. Such a formal, written reprimand would become part of the employee's "departmental personnel record," a copy would be given to the employee and the formal reprimand would be subject to challenge in the grievance proceedings, with Union representation.

The Company claims that a VODG, of itself, does not affect an employee's record in any way and that Main Storeroom VODGs never are put in an employee's "departmental personnel record." The Company says that is why grievant saw no copies of VODGs in her "departmental personnel record" when she went through it in the past. The Company stresses that the VODG represents nothing more than a foreman's note to himself, reminding him of the oral discussion with the employee and of the subject of it. Management characterizes that as a fair, reasonable, and practical system, long used by the Main Storeroom without challenge by anyone.

The Company insists it must reserve the right to use these VODG memoranda of poor work performance, because supervisors cannot be expected to recall every discussion of poor work ever had with any employee. It says the alternative would be to issue a written reprimand for each occasion of poor employee performance, even less serious ones, which in its view would be detrimental to employee interests.

Since it says that the Main Storeroom's contested use of VODGs does not permanently affect grievant nor, of themselves, result in discipline, it claims that it is not necessary under the Agreement to give employees copies of them.

Management urges that the Union's reliance on Inland Award 602 is misplaced, since the facts there allegedly were different from these, in that the VODGs there issued by a different department were put in the employee's "departmental personnel record." The Company insists that is the critical difference between Inland decision 602 and this case, since this VODG was not put in Kangrga's "departmental personnel

record." Management says that makes the present problem similar to that sanctioned in the past by Inland Award 185.

Possibly pertinent provisions of the Agreement read as follows:

"ARTICLE 3

"Plant Management

3.1 "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, to hire, recall, transfer, promote, demote, suspend for cause, discipline and discharge employees for cause, to lay off employees because of lack of work or for other legitimate reasons, to introduce new and improved methods or facilities, and to change existing methods or facilities, and to manage the properties in the traditional manner are vested exclusively in the Company, provided, however, that in the exercise of such functions the Company shall not discriminate against employees because of membership in or legitimate activity on behalf of the Union."

"ARTICLE 13

"Seniority

13.7 "Section 2. Personnel Records. Records as to each employee's service with the Company shall be maintained in the department in which he is employed, and such records shall include matter relative to an employee's work performance and length of service. Each employee shall at all times have access to his departmental personnel record and in case of those employees whose departmental record indicates unsatisfactory workmanship, the superintendent of the department or his assistant will call the employee in and acquaint him with the reasons for unsatisfactory rating.

13.8 "The superintendents of departments will, when necessary, continue the program of acquainting the employee with written notices of discipline or warning to stop practices infringing on regulations or improper workmanship. These letters are recorded on the personnel cards. In all cases where one (1) year elapses after a violation requiring written notice, such violation will not influence the employee's record.

13.9 "These records of the employee's individual performance have much influence on the 'Ability to perform the work' clause in Section 1 of this Article, but in no case will the Company contend inability to perform the work when the procedure as outlined in this Section has not been strictly complied with. Should any dispute arise over the accuracy of the personnel record, it shall be disposed of through the normal grievance procedure."

"ARTICLE 14

"Safety and Health

14.9 "Section 7. Written records of disciplinary action against the employee involved for the violation of a safety rule but not involving a penalty of time off will not be used by the Company in any arbitration proceeding where such action occurred one (1) or more years prior to the date of the event which is the subject of such arbitration."

The Company insists that the phrase "departmental personnel record" in the second sentence of Section 2 of Article 13 is the only official personnel record for each employee. It is kept in the Department Superintendent's office, with a duplicate file kept in the Personnel Department. The Company stresses that the official "personnel cards" of Paragraph 13.8 contain the employee's picture, and all official commendations for superior performance, as well as negative comments of a formal nature about "reprimands, safety warnings, discipline, and other items."

Management notes that in some departments VODGs are used in a different way to record official, written reprimands. In those departments, VODGs are the vehicles for official, written disciplinary actions, and employees are given copies of them and do challenge them, and in given cases, the challenges have been successful. Company Exhibit 6 shows eight examples of VODGs that were put in employees' official personnel files between 1972 and 1981 in various departments and that were challenged in the grievance proceedings. The Company says that once the statement becomes written in the employee's official record, serious disciplinary action, such as suspension and discharge are taken on the basis of that official record. That was not done here.

Assistant Labor Relations Supervisor Vela, who has been in this Department for ten years, explained the varying uses to which a VODG can be put in a progressive-discipline system. For example, if an employee should be late, a foreman might give him only an oral warning that he should not repeat such tardiness, and no record might be made of that oral warning. Of course, no copy can be given to the employee, and apparently, aside from general complaints of "harrassment" over an extended period of time, oral warnings have not been challenged in the grievance proceedings. If that employee soon were late again, the foreman

this time might decide to make a VODG memo of his second warning and put it in the general foreman's "working file" but not in the employee's official "departmental personnel record."

If this employee soon were late again, the foreman might decide then to move to the next step of progressive discipline and issue a formal reprimand to the employee. He would fill in the appropriate notations on a formal Reprimand Form; it would be put in the employee's official "departmental personnel record;" a copy would be given to him; and he could challenge it in the grievance proceedings. Vela says the use of a VODG is intermediate between purely oral warnings and the formal Reprimand Form. The next step after the Reprimand Form for that employee's tardiness would be time off, imposed by a formal Disciplinary Statement placed in the employee's "department personnel record," with a copy to the employee and opportunity to challenge it. Some departments do not use VODGs but move immediately from purely oral warnings to the official Reprimand Form.

Management notes also that some supervisors, after orally warning an employee about something, may, in order to be able to recall it accurately later, write out a memorial of the event and the oral warning on a rough scratch pad they carry and keep in their pocket, and with no copy put in any file. The Company urges there is no provision of the Agreement requiring that the employee be given a copy of such a note written by a foreman as a memory-jogger in his own scratch pad. The Union does not disagree with that. The Company says employees occasionally make and keep their own notes of oral statements by foreman.

The Company agrees that a VODG statement and a foreman's rough, scratch-pad note, not entered in the employee's official record, can affect an employee's status within the progressive-discipline-system, but only because it would enable the foreman to remember accurately details which he otherwise might forget, among many other incidents, if he had not written them down, but it insists the VODG, not entered in the "departmental personnel record," does not increase the substantive significance of the "oral warning."

The Union notes that, whatever it may be called, the VODG card is Company property, the same as the formal Reprimand Form and Disciplinary Statement, and that it is written and not "oral." The Union stresses also that employees are "personnel," and that VODG statements are used to support later discipline and, in some cases, to deny promotions. The Company contends, however, that not every record is a "departmental personnel record," and that it does not attain that status until it gets into an official file. It notes also that foremen also put employee commendations on VODGs but that, unless they were put in the employee's official personnel record, the employee would not get a copy of it.

The Union agrees that a foreman's scratch pad is one thing but insists that a "working file" is official Company property and that a VODG written in a "working file" is Company action against the employee. The Union introduced a grievance (24-P-67) challenging use of VODGs, copies of which were not given to the employee, which later apparently were used in part at least to support denial of that grievant's claim to move up from her Helper to a Stores Attendant job.

The Company agrees that that grievance was similar to this one, in that the VODG there was not put in the official personnel file and a copy was not given to that grievant. Management agrees also that the event underlining those VODGs was relied upon by the Company to support its denial of her move-up claim, but the Company insists the VODG itself was not used in that case. It merely refreshed the memory of the supervisor who testified about it. Management stresses that these uncopied VODG statements, not in the official personnel record, cannot be used to substitute for the foreman's testimony on the event and that it is the latter and not the VODG statement that is evidence of the event.

The Company agrees a foreman could write out the VODG statement of what he saw and put it in a "working file" without ever saying anything to the employee, but it says that is very unlikely. It says the employee could challenge the VODG once he became aware of it, whenever that might be. That is said to be another difference between the official personnel file and a "working file," in that entries in the latter, a copy of which was not given to the employee, may be challenged at any time, once the employee learns of them, but that an entry in the official personnel record, must be challenged within thirty days or they become final.

The Union suggests the parties should be focusing on the reality of grievance administration. It says, for example, that when an employee is given an official written warning and a copy of it is given to him, he brings it to the Union representative at whatever level, who then learns that the Company says the foreman also has several VODG memoranda in the "working file" about other, related events in the past. The Union wonders how it ever could settle that grievance, when the grievant is telling it that the VODG events never happened or that he just cannot remember them. These cases allegedly will clog the grievance proceedings, since the Union says it simply must continue to process such grievances.

The Company fears a great increase in paper work if copies of VODG statements have to be given to employees even if the original had not been put in the official personnel record. It says also that would overformalize an informal system and would hasten the arrival of employee time-off in the progressive-discipline plan. The Company says such a change would be a major one, with plant-wide application and necessarily would increase the number of grievances processed. The Union is not sure that would follow but says it is irrelevant, since it is the employee's right that must count.

The Union explains that it is speaking here only of VODG statements that might be thought of as disciplinary, and it predicts the paper work would not be at all complex, since it would require only use of carbon paper.

Storeroom General Foreman Brehmer said that all VODGs are turned in to him and go through his review. He pulls the employee's official file and evaluates it in light of the current VODG to decide whether formal disciplinary action should be imposed or whether the VODG simply should be put in the employee's "working file." That had been the system followed for all of his twenty-five years in the department (eleven in the bargaining unit), and he says he was told it was followed also for ten or fifteen years before that. The Company cites Inland Award 363 for the proposition that a general notion of estoppel should prevent one party from attempting to change a recognized practice not inconsistent with the Agreement that has been known and allowed to continue without challenge for a long period of years.

The Company introduced exhibits of VODG statements (some good and some bad) that did not go into the official personnel file and of formal warnings and other disciplines that were put in the official personnel record.

Management notes that VODGs often cover more than just the statement of warning and may include also a copy of the stores ticket or bill of lading involved. They, too, would have to be given to the employee, if the Union's system should be followed.

General Foreman Brehmer says that he thinks it neither practicable nor fair to rely solely upon the foreman's recollection in these situations and, therefore, that it was fairer to have the written memo of the VODG. The Union agrees, wholeheartedly, and thus urges that the fairest system would put a copy in the employee's hands, too. Brehmer said he did not disagree with that.

Stores and Trucking Assistant Superintendent Boyden said there is no evidence of well-founded fears that VODGs erroneously or surreptitiously would get into an employee's official personnel file, since that is kept in a different place, that is, in an area adjacent to the Department Superintendent's office, so that it is not practical that the department would sneak a VODG into the official record and then, if the employee should ask to see it, quickly ferret it out.

Grievance Committee Secretary Lutes was the area griever and the grievant in Inland Award 602. He said that after that decision he and Quality Control Superintendent Matson went over the Award. The witness said VODGs were causing lots of problems, since the foreman had a file of memoranda and the employee had no copies. They, therefore, agreed that Supervision would clear all Quality Control files, including informal "working files" of VODGs of which copies had not been given to the employee, and from then on copies of all VODGs would be given to employees. Lutes claimed without back-up statistics, that as a result of those agreed changes in the system, the Quality Control Department went from nine straight years of having the highest number of grievances in the plant to the lowest. Lutes agrees that the VODG in Inland Award 602 had been put in both the informal, "working file" and in the official "departmental personnel record." He said the Stores and Trucking Department presently had the highest volume of grievances filed. The Company agrees there is a right to challenge writings put in an employee's official file but says there is none to challenge an oral warning. Since the Union agrees the employee need not be given a copy of an entry made by a foreman in his rough scratch pad, Management can see no basis for the claim here, insisting that the VODG here is the same as the foreman's scratch pad, since the VODG can affect the employee's record no more than can an oral warning. The VODG would not enter into evidence in any later proceeding. It simply would help the foreman to recall the event. If the employee were to deny the event or oral warning or both at a later time, the foreman would have to support it by his testimony, and the Company says the VODG would not be significant evidence. The Company suggests the employees should make and keep their own notes of these affairs.

Management insists that Inland Award 185 has decided this precise point, so that it no longer is an open question. It notes that the VODGs in Inland Award 602 were put in the employees' official personnel file and, therefore, that Award did not intend to overrule Award 185, where they were not.

The Union replies that the only way for the grievance proceedings to work properly is for employees to have copies of the VODG statements so that they, too, can remember the event and the discussion and have

Union representation when they challenge it. It is said to be entirely unrealistic to claim that the employee could remember the event and discussion of a VODG statement months or years after the event, without a copy of it. The system challenged here allows the foreman to refresh his recollection but not the employee. That is said to be unfair.

The Company urges it is not just a play on words to say that the official record differs from the informal, "working file," since the only testimony on the point is that the only record that the parties' practice in this area always has treated as the "departmental personnel record" under Article 13, Section 2, is the record kept in the Department Superintendent's office and is not the informal, "working file," in which this VODG was put. The Company notes also that it is just not accurate to say that the grievance proceedings cannot function unless the employee be given a copy of such VODGs, since it has been working well for over thirty-five years, without Stores and Trucking employees getting copies.

FINDINGS

It should be understood at the beginning that this grievance does not challenge Management's right orally to warn employees of alleged poor performance, to discuss it with them, or to write down on a VODG or any other piece of paper a memorandum of the matter. Similarly, there is no challenge to a foreman's writing a note of that for his memory in his private scratch pad and not giving a copy to the employee.

The claim is, however, that once the VODG or, presumably, any notation of an oral warning by any other name, is placed in an employee's file, either the official personnel record or the General Foreman's informal, "working file," it has thus been given by Management the contractual status of a "departmental personnel record," under Article 13, Section 2 and, therefore, a copy of that paper must be given to the employee, who then must be accorded a right to challenge it in the grievance proceedings and to have Union representation while doing so.

Article 13, Section 2 speaks nine or ten times of personnel records, records, such records, department personnel records, department record, written notices, letters, personnel cards, these records, and personnel record. Presumably the written record of disciplinary action of Article 14, Section 7, and personnel records of previous disciplinary action in Article 8, Section 2, would fit somewhere in the Article 13, Section 2 records, notices, and letters. Those three sources were the only ones referred to by the parties as contractual provisions relating to records.

In this argument, the Company assumes that the General Foreman's informal "working file" is not covered by any of the above phrases relating to records, and the Union argument assumes that the "working file" is covered by one or more of the phrases in Article 13, Section 2.

If this were a new problem, it might be that a General Foreman's "working file," without distortion of the language, perhaps could fall within one or more of the many references to records, notices, and letters in Article 13, Section 2. This is not to say, however, that that language is so all-embracing that it necessarily must cover a "working file." It is not.

This seems especially true in light of the uncontradicted testimony in this record that in the Main Storeroom, at least, this use of VODGs placed in the "working file," and used only as a prod to often faulty memory, has gone on for over twenty-five years. Thus, this arrangement has been used too openly and for too long a period in this area and in some others, as well, to allow a decision this late in the day that the Agreement always required that the employee be given a copy of VODGs placed in the "working file" and not in the record that these parties always have considered as the "departmental personnel record."

The Union might be right in predicting that continued use of this system will clog the grievance proceedings, because the foreman will have a note to support his claim of an incident of poor work performance and the employee who might deny that any such thing occurred will not and, therefore, the Union representative may have no choice but to continue to process the grievance. But, if that be true now, it was true in the past, as well, and yet the parties have followed these arrangements in this area for a long period of years and in the face of several related arbitration awards. In view of all that, it would not be responsible construction of less than compelling Agreement language to hold that copies of VODGs not placed in the "departmental personnel record" must be given to the employee.

The VODGs used here are employed solely as spurs to memory and never are placed in what the parties in this and other areas for years have considered as the "departmental personnel record" but were put in an informal "working file." The Union agrees that a foreman may make a note for his future reference in his scratch pad kept in his pocket but insists that is his private property and that it differs from an entry on Company-owned paper, with a Company-created title, and kept in a Company file or drawer. The difficulty with that is, however, that these problems of fair, reasonable, and equitable administration of the grievance proceedings are too intensely practical to be decided by rules relevant only to the law of personal property

and having nothing to do with sensible functioning of the grievance proceedings. The Union showed that, following the decision in Inland Award 602, the representatives of the parties responsible for the Quality Control Department met and agreed upon several changed ways to deal with these and related problems and that the volume of grievances dropped dramatically in that area. That demonstrates the best way for the parties to deal with their problems but there they agreed to do things which they were not compelled to do without agreement.

Perhaps it should be stressed also that the VODG, as explained by the Company here, is of itself not evidence of anything and would prove nothing. It serves only to refresh the foreman's memory, who then will have to testify about these events. It would be fairer for the employee to have the same memory refresher, but that is not to say that, without one, the system is so unfair as to warrant a decision requiring that he be given a copy. Perhaps, as some employees already appear to do, all should be careful to make their own notes of any such incident to use as a spur to their memory.

The Union relies heavily upon Inland Award 602, but there the VODGs were placed in the official department personnel record and were treated by all concerned as formal, written reprimands and disciplinary actions. None of that is true here and, therefore, Award 602 does not govern this situation. References were made here and there to the employee's right to have Union representation, but presence or absence of a copy of a VODG that has not been put in the departmental personnel record does not afford or deprive an employee of Union representation, assuming the case to be one in which he would be entitled to it.

Accordingly, since no violation of the Agreement arose here, the grievance must be denied.

AWARD

The grievance is denied.

/s/ Clare B. McDermott

Clare B. McDermott

Arbitrator