

Arbitration Award No. 747
IN THE MATTER OF ARBITRATION
Between
INLAND STEEL COMPANY
Indiana Harbor Works
and
UNITED STEELWORKERS OF AMERICA
Local Union No. 1010
Grievance No. 2-R-54
Arbitrator: Clare B. McDermott
Opinion and Award
May 10, 1985

Subject: Discharge--Claim for Safety Relief Not Made in Good Faith--Insubordination.

Statement of the Grievance: "The grievant, Gilbert L. Serrano, Check No. 5979, Safety Committeeman for Area #3, alleges that he was discharged in retaliation for raising Health and Safety issues, that in light of all the circumstances, his discharge is unjust, unwarranted, and unlawful.

"Grievant requests that he be made whole, the letters be removed from his personnel file, and that he be reinstated with all contractual benefits agreed by and between the Inland Steel Company and the United Steelworkers of America.

"Violation is Claimed of Article 3, Section 1, Article 4 Sections 1, 2, 4, Article 8, Section 1, Article 13, Section 2, Article 14, Sections 1 & 6 of the Collective Bargaining Agreement."

Agreement Provisions Involved: Article 3, Article 4, Sections 2 and 4, Article 14, Section 6 of the March 1, 1983 Agreement.

Statement of the Award: The grievance is sustained in part and to the extent stated in the last paragraph of the accompanying Opinion.

CHRONOLOGY

Filed: 10-26-83

Step 3 Hearings: 11-8-83, 11-22-83, 12-6-83

Step 3 Minutes: 2-9-84

Step 4 Appeal: 2-17-84

Step 4 Hearing: 2-23-84

Step 4 Minutes: 5-9-84

Appeal to Arbitration: 5-10-84

Heard: 5-21-84, 5-22-84, 5-23-84, 6-18-84, 6-19-84, 6-20-84

Transcript Received: 9-15-84

Appearances

Company

R. B. Castle -- Arbitration Coordinator, Labor Relations

L. A. Busch -- Asst. Superintendent, No. 2 Coke Plant

W. J. Ambry -- Asst. Superintendent, No. 2 Coke Plant

R. Vela -- Asst. Superintendent, Labor Relations

J. A. Nielsen -- Senior Representative, Labor Relations

R. K. Scholes -- Senior Representative, Labor Relations

J. King -- Asst. General Foreman, No. 2 Coke Plant

H. Thompson -- Foreman, No. 2 Coke Plant

J. M. Hanak -- Coordinator, Safety and Protection Services

H. S. Junker -- Supervising Safety Eng. Safety & Protection Services

J. P. Bokash - Safety Engineer, Safety & Protection Services

D. W. Sharp -- Captain, Safety & Protection Services

L. Yurko -- Lieutenant, Safety & Protection Services

D. DeLeeuw -- Sergeant, Safety & Protection Services

A. Irvine -- General Foreman, No. 2 Coke Plant

Union

Thomas L. Barrett -- Staff Representative (all days)

Joe Gyurko -- Chairman Grievance Committee (all days)

Bill Gailes -- Vice Chairman Grievance Committee (all days)

Don Lutes -- Secretary Grievance Committee (all days)

Hank Mosley -- Griever (all days)

Mike Payne -- Witness (6-18, 6-19, and 6-20)

Tom Mills -- Witness (6-18, 6-19, and 6-20)

Angel Girau -- Witness (5-23)

E. Barrientez -- Witness (5-22)

O. Lumpkin -- Witness (5-22)

R. Glen -- Witness (5-22)

Gilbert Serrano -- Grievant (all days)

BACKGROUND

This grievance from No. 2 Coke Plant of Indiana Harbor Works, claims that grievant's discharge for alleged insubordination and overall work record was without cause, in violation of Article 3, Article 4, Sections 1, 2, and 4, Article 8, Section 1, Article 13, Section 2, and Article 14, Sections 1 and 6 of the March 1, 1983 Agreement.

This extremely long and very complicated record will require the recitation of hundreds of facts, statements, contentions, allegations, suspicions, and countersuspicions in order realistically to set out the issues that must be resolved.

Grievant began with the Company in 1965 and in October of 1983 was working as Payloader Operator at the emergency coke wharf in No. 2 Coke Plant. Grievant had spent most of his time at No. 3 Coke Plant but, when it was shut down, he was assigned at No. 2 Plant.

The emergency wharf at No. 2 Coke Plant is a concrete pad used for dumping of coke on the ground and is operated only when the regular coke wharf and conveyor system cannot be used. The quench car (hot car) travels along tracks beside the emergency wharf, catches hot coke as pushed and, after quenching, deposits it on the ground at the emergency wharf. A Payloader Operator on the wharf scoops up the coke from the east wall dumping site to his right, pushes it against a north wall in front of him and into the bucket, and loads it into rail cars to his left. The emergency wharf is used only intermittently, when the regular wharf cannot be utilized and, therefore, the Payloader Operator is not always occupied. The emergency wharf has a concrete pad 10' or 12' wide, slanted at a 4 to 6° angle toward the east wall, and is separated from the hot-car track by a steel-plated, vertical concrete wall 12" wide, 50" high on the hot-car side and 45" high on the wharf side. The wall thus falls off 5" in its 12" width, slanting away from the hot-car side. A pool of water up to perhaps 2' deep is kept on the ground at and near the low side of the pad at the east wall to further cool hot coke. It is about 45' from the east wall to the rail cars that are to be loaded.

On Monday, October 3, 1984, grievant was assigned to operate the payloader at the emergency wharf. He was an experienced payloader Operator. He was given a reorientation to No. 2 Coke Plant Department and, says Foreman Thompson, to the Payloader Operator job at the emergency wharf. Grievant's supervisor that day, Foreman Thompson, says he oriented grievant on the department's rules, and the hazards, safety rules, and work clothes to be worn, and that he went over the procedure to be followed by the Payloader Operator on the emergency wharf. Thompson says grievant was familiar with all that even before he had told him of it, from his working the Payloader Operator before. Thompson says the orientation took about forty-five minutes.

Thompson says grievant, along with other employees just arriving at Plant 2, then went to see a film for about one-half hour. After that, grievant was assigned to the Payloader Operator job at the emergency wharf at about 10:30 a.m. He operated the payloader for whatever time it was required that day. During that turn Foreman Thompson says he saw grievant operating without wearing safety glasses, and he warned him that he must wear them while operating the equipment. Grievant checked the payloader that morning and turned in and signed the "Mobile Equipment Operating Daily Inspection Report" for that day, with no indication of defective or unsafe features of the equipment.

Grievant operated the payloader without incident for whatever time it was required on Tuesday, October 4. He again turned in and signed the Inspection Report for the equipment, with no indication of any defect or unsafe condition.

Grievant was assigned to operate the payloader again on Wednesday, October 5. Foreman Thompson says he came to the emergency wharf at about 8:30 a.m. and noticed grievant was operating the payloader without having his hard hat or safety glasses on. Thompson says he got grievant's attention and asked him to wear his safety glasses and hard hat. Grievant put on his hard hat but not the safety glasses. Thompson repeated his order to wear safety glasses while operating the payloader, and he says grievant seemed to get very angry, stating that he would not wear his safety glasses because of steam in the area. Grievant jumped

off the equipment, saying he would not wear safety glasses, that he wanted safety relief from the job, and that he wanted to see Coke and Coal Handling General Foreman Irvine, Thompson's superior. Thompson said Irvine was at a staff meeting and unavailable. Grievant walked forty or fifty feet away to Assistant General Foreman King. Thompson followed and, when he caught up to the two, grievant was telling King that he wanted safety relief from the job because of the steam. King asked grievant what difference wearing safety glasses would make, indicating that, if there were too much steam to see with the glasses on, there would be too much steam with them off. Grievant replied the situation was unsafe and he wanted safety relief. Thompson told King his version of what had happened. Thompson told grievant to go to the Labor Office and wait for him since he had to line up another employee to cover the Payloader Operator job in order not to shut down operation of the battery.

If the hot car dumps coke at the emergency wharf twice, without its being pushed away by the payloader, it cannot dump anymore there, and no more ovens can be pushed.

When grievant was told to go to the Labor Office, he asked to have a Union representative with a contract. Thompson says he thought they could sit down at the office and, when things settled down, discuss the situation and resolve it.

Thompson arranged for employee Glen to operate the payloader.

Thompson was using the telephone to call for a Union representative, and he says grievant stood in the doorway and kept yelling, "Mr. Ambry, Mr. Irvine, and Mr. King, you are out to get me." King asked grievant to sit in the hall, be quiet, and let them conduct their business of getting him a Union representative. Grievant kept hollering and interrupting. King told Thompson to shut the door, and grievant yelled at King, "I'm filing a grievance against you for slamming the door in my face." Thompson inched the door closed and said "Please get off--move back," and closed the door, with grievant standing outside and yelling.

Thompson says grievant was very belligerent in the office, yelling that Ambry, Irvine, and King were out to get him. Thompson says he and King were doing nothing but trying to talk to and reason with grievant and to discuss with him why he had a problem with wearing safety glasses this day.

After Safety Committeeman Payne arrived, grievant said the payloader was almost hit by the hot car, while he was operating at the east wall. Thompson says grievant was told he should not have been at the east wall with the hot car not in the quench station. Thompson insists grievant did not say he almost had been hit by the hot car while they were still out at the equipment.

When Payne arrived, he and grievant talked for a moment and then came into the office. Thompson told Payne that grievant said the job was unsafe because he had to wear safety glasses. Thompson said in his opinion the job was safe, with glasses, that the steam was minimal, that grievant had performed it on the two previous days with no complaint, and that Thompson could not understand what the problem was on the third day. Payne allegedly turned to grievant and asked, "Gil, what's the problem? What's going on? I don't see any problem." At that, grievant began saying the window on the payloader was broken, hot coke was being dumped, there was no centralized fire-extinguisher on the equipment, that the hot car was not locked out, and insisting on safety relief.

Thompson says neither King nor he said or otherwise indicated that grievant's request for safety relief would be granted and instructed grievant to return to the job, suggesting that he work it under protest if he wished, and that the situation would be looked into. Grievant asked if he would be docked for the time in the office, and King said he would not. King finally directed grievant to go back on the job, and grievant refused, saying his mind was made up and he wanted safety relief. King told Thompson to call Plant Protection and have grievant removed from the plant for insubordination. Grievant then was five or six feet from King. Grievant asked if his pass would be pulled, and King said it would not be and that he should return the next scheduled day.

Thompson called Plant Protection and asked to have grievant taken out of the plant for failure to wear safety equipment and for insubordination. Thompson said grievant heard all that.

Grievant then requested that a Step 1 oral complaint grievance form be filled out. King said he had no such forms in that office, and grievant said, "You're denying me my rights." King replied he simply had no forms there and would have to go and get one, and he left the office.

King returned with a form, and grievant dictated to Payne what to write on it, and Payne did so. Payne signed it, and Thompson wrote "Denied," and dated and signed it.

Grievant dictated and Payne wrote that the hot car was not locked out and that it came within two inches of grievant's payloader on every pass. Thompson said that was not true and that it would be within feet of the payloader.

When the Plant Protection officer arrived, Thompson asked that grievant be escorted out of the plant for failure to wear safety equipment and for insubordination. Thompson said grievant was in a position to hear that. Grievant did not say he had not been insubordinate. Grievant asked that King, Thompson, Payne, and he go to the emergency wharf and observe the operation. The foremen agreed, and they did so. Thompson says Payne signed the oral complaint grievance form, saying that he acknowledged the unsafe condition, before seeing the operation that day. The four watched the operation being performed by Glen in the ordinary way and without delays. Thompson says the steam was not excessive. He says steam conditions and that of the payloader on October 5 were no different from what they had been on October 3 and 4. Grievant then was escorted out of the plant at about 10:30 a.m.

Thompson first met grievant on Monday, October 3, and had had no prior disciplinary or nondisciplinary experience with him. Thompson says that when he and King sent grievant home on October 5, they knew nothing of grievant's past disciplinary record, since he just had come over from Plant 3.

Thompson says he saw grievant's claim for safety relief as insincere because his actions changed so abruptly, with his anger and belligerence arising only after Thompson had mentioned safety glasses, as if grievant was trying to cover up the issue of the glasses.

Thompson explained that the established safety procedure for operation of the emergency wharf is that the payloader is to be pushing coke away from the area immediately adjacent to the east wall and near the hot-car track only when the Operator knows that the hot car is in the quench station. While the hot car is out of the quench station, the Payloader Operator can push coke against and take it off the north wall and load it into rail cars to the west but is not supposed to be pushing at the east wall. The normal quenching cycle takes ninety seconds and is set by a supervisor. The Hot Car Operator simply pushes a button, and the ninety-second quench occurs. When using the emergency wharf, coke ordinarily is double quenched, for a cycle of over 180 seconds, since there is an interval between quenches. When the hot car has finished quenching, he is to sound a horn to tell the Payloader Operator that he is going to move out of the quench station, so that the Payloader Operator will know to get away from the east wall. Thompson says he watched grievant operate the payloader enough on October 3 and 4 to know that he understood the procedure requiring that he stay away from the east wall when the hot car might be there.

No. 2 Coke Plant Coal and Coke Handling Assistant General Foreman King confirmed much of Thompson's account. He said he was at the south end of the coal field, about fifty feet from the emergency wharf, at approximately 8:30 a.m. on October 5, when he saw grievant and Thompson approaching.

Grievant said he wanted relief from the job, that he was having problems with steam and could not see. Thompson arrived and told King he had found grievant operating the payloader without having his safety glasses and hard hat on, had told grievant to put them on, and that grievant had put on his hat but not the safety glasses. Thompson says he again told grievant to put the safety glasses on, and grievant became angry and said he could not see with the glasses on and got off the equipment. Grievant mentioned only steam and said nothing then about nearly being hit by the hot car. King asked, if the steam was so bad, what difference would it make whether grievant wore the safety glasses or not. Grievant did not answer that but claimed safety relief.

King said that conditions at the emergency wharf were ideal that morning, with no excessive steam.

Thompson told King that grievant had worked the job on the two previous days, and King said he could see no difference on Wednesday from conditions on Monday and Tuesday.

King told grievant to go to the office, feeling sure that they would be able to resolve the matter there. Grievant said he wanted a Union representative.

In the office King and Thompson were attempting to call a Union representative, and grievant stood in the doorway and in a loud, angry voice accused King of doing a good job of setting him up and trying to get him fired. King told grievant to sit down for a minute while they tried to get a Union representative.

Grievant continued to be extremely boisterous. King told Thompson to close the door. Grievant said he would file a grievance against King if he closed the door on him. Thompson closed the door as grievant stepped back one or two steps, just enough to allow the door to inch closed.

Payne arrived and grievant and he talked for a few minutes and then entered the office. Thompson told Payne what had happened and that grievant had worked the job the two days before, and Payne said to grievant, "What's the problem? Why can't you work the job now?" Grievant began expanding on the steam and safety glasses. He said there was no automatic leveling device on the payloader, that the fuel tank was on the bottom and could explode from the hot coke.

King did not think grievant had a bona fide safety problem, especially since grievant said he had left the payloader once while allegedly trying to call Thompson, and then had returned and worked on it and since

he had worked the job the two previous days without any suggestion of safety concerns. King said he had seen other employees claim safety relief and while they might be excited they were not angry and defiant. King said grievant could go back and work the job under protest. Grievant refused, claiming a right to safety relief. Grievant asked if he would be docked for the time in the office, and King said he would not be. Grievant requested safety relief.

King says grievant's demeanor was extremely defiant and that he was unwilling to listen to what King was saying. King then said he could see nothing unsafe on the job and directed grievant to go back to work. Grievant said he wanted relief. King said grievant was subjecting himself to a charge of insubordination. King told Thompson to call Plant Protection and have grievant escorted from the plant for insubordination. Thompson did so and told Plant Protection it was for refusal to wear safety equipment and for insubordination.

Grievant said he wanted to fill out an oral complaint grievance form. King said he had none, and grievant said "What are you trying to do? Deny me my rights?" King said he just had no form. He got one, and grievant told Payne what to fill in. King's intention in filling out the form was to keep the situation which already had gone beyond his wildest dreams, from going any farther.

The Plant Protection officer came and read off the charges as safety attire and insubordination, and King and Thompson said that was correct. King said he would not pull grievant's pass and that he should return the next day. Grievant requested that they view the operation, and they did and watched Glen operate the same payloader with his safety equipment on and no excessive steam. Glen had no problems. King did not pull grievant's pass because he thought an investigation likely would be held the next day, and grievant would have to attend it.

Plant Protection Sergeant DeLeeuw explained that when Management people call Plant Protection to have an employee escorted out of the plant, the Desk Sergeant receives the call and then calls an officer to carry out the request. DeLeeuw got a call and went to the Labor Office and asked for King, who told DeLeeuw that he wanted grievant taken out because of a safety violation and insubordination. DeLeeuw made out a report of the event on that day, and the Desk Sergeant's log also referred to this incident. The latter shows that Plant Protection received a call at 9:26 a.m. from complainant Foreman Thompson for a "10-17 (escort man out)" at No. 2 Coke Labor for safety violation and insubordination and that Sergeant DeLeeuw responded and did so at 10:23 a.m. DeLeeuw said King told him the reason for escorting grievant out and that he did not tell King that.

At about 2:30 or 3:00 p.m. that day King learned he was to meet in Assistant Superintendent Busch's office, preparatory to an imminent-danger investigation of emergency-wharf safety conditions by the Indiana Occupational Safety and Health Administration. It was learned later that grievant had called the United States Occupational Safety and Health Administration, which apparently had declined jurisdiction, but had said it would contact the state agency.

Indiana OSHA made its investigation that afternoon, in conditions that King said were identical to those grievant had experienced in the morning. Safety Engineer Bokash, who accompanied the inspection and took pictures of conditions then, said the OSHA representative said to Union Safety Committeeman Herod that he saw no basis for the allegation of imminent danger and could not see anything wrong. The investigation took about twenty or thirty minutes. Indiana OSHA later (October 26) reported in writing that no cause was found to issue a safety order.

Apparently there was to be an investigative meeting sometime in the morning of the next day, October 6, but sometime in the afternoon of the 5th, it was postponed to the afternoon of October 6. Eight Company representatives attended that meeting, including Labor Relations representative Scholes and a stenographer who apparently took notes. Sergeant DeLeeuw was outside the office.

Grievant and Grievance Committeeman Mosely appeared and, seeing the Company group, said they felt outnumbered and asked to have additional, full-time Union representation. The Union people called the Hall to ask about this, and the Company people called Labor Relations. The latter were told there was no Union right to have an equal number of representatives at this investigative meeting or to have a full-time, Step 3 representative there.

Grievant said the Company was stacking the deck against him. Acting Department Superintendent Busch said there was no Union right to have any additional Union representative present and that the meeting would proceed. Grievant asked if he would be paid for his time, and Busch said he would not be. Grievant asked if he could leave, and Busch said he could not hold him prisoner. Grievant said he was leaving, and he did. As grievant was going out the door, Busch told Assistant Superintendent Ambry to go and get him back, that grievant must be made to understand the ramifications of his walking out of the investigation.

Ambry went after grievant and hollered to him, but grievant kept walking away down the road. The Plant Protection officer then escorted grievant out of the plant. King says at the October 6 meeting grievant continued to be angry and defiant.

Sergeant DeLeeuw was outside the office on October 6, and he said that grievant came out and that Ambry called several times for him to come back to the office because Busch wanted to talk to him. Grievant said Busch said he could leave and he was leaving. Grievant threw his hand out and left. DeLeeuw said he is sure grievant heard Ambry. DeLeeuw then followed grievant, who was outside the building, about thirty feet from the office entrance, and escorted him out of the plant. Sergeant DeLeeuw was armed with a handgun on October 5 and also on October 6. On the latter date at the meeting, he took out and unloaded his weapon, apparently at Grievance Committeeman Gyurko's request.

Assistant Superintendent Busch, who was Acting Superintendent on October 5, in the absence of Superintendent Arsenault, attended the Indiana OSHA inspection, and he said conditions at the emergency wharf on that day were average for that time of year and that the conditions were about the same as they were when the parties, grievant, and the Arbitrator examined the site on May 21, 1984.

Busch says that after the Indiana OSHA inspection he and his people met at about 4:00 p.m. that day and discussed the situation with grievant. As of then, a meeting was to be held on the matter at 7:00 a.m. the next day. Busch then said the Company could not be ready by then. Grievant had been told to come at his regular, 7:00 a.m. starting time. Busch had Thompson call grievant and put the meeting back to 1:30 p.m. Busch says at the meeting there was a harangue about Company representatives outnumbering Union representatives, and grievant called it a kangaroo court. Grievance Committeeman Mosely said he would go ahead under protest, and Busch says grievant agreed. Busch read what had happened the day before and asked grievant to state his version, and grievant refused to say anything. Grievant said he was being held prisoner, and Busch said he could not hold grievant against his will. Grievant asked if he could leave, and Busch said he could, but that his pass would be pulled. Grievant left, and Busch hollered for grievant to return, but he did not. Busch told Ambry to get grievant back in the office so he could tell him that he could be cited for insubordination. Ambry went out but came back without grievant, saying grievant would not return. Apparently Sergeant DeLeeuw caught up to grievant, pulled his gate pass, and escorted him out. Busch says that grievant's demeanor on October 6 was agitating, confusing, and disruptive.

No. 2 Coke Plant Assistant Superintendent Ambry testified that he went after grievant on October 6 as he left the meeting and got to the porch of the building. Grievant was pacing back and forth near the foot of the stairs and Ambry once or twice asked grievant to come back into the office because Busch had some matters to discuss with him. Grievant was very excited, had his hands over his ears, and was saying, "I am not listening and I am going. I am leaving." Grievant started away, and Ambry told him to hold it, to stop, and directed him to return to the office. Grievant had his hands over his ears. Ambry is certain grievant heard his direction to return to the office because, when Ambry said that, grievant made a "refusal" motion with his hand and said he (Busch) ". . . said that I could leave."

Ambry told Sergeant DeLeeuw to escort grievant out. He did not have him bring grievant back because, he thought, based on grievant's history and his behavior at that meeting, no useful purpose would be served even if he were to return. Ambry returned and told Busch he thought grievant had been insubordinate again. Management people consulted and decided to try again to have an investigative meeting. Local Union officers were informed of the problem and, within a short time, the Union called back and said it had spoken to grievant and convinced him to attend such a meeting and state his account of what had happened. The meeting was held on October 10, with the same Management representatives, plus Department Superintendent Arsenault, and the same Union representatives. The Union did not have any additional or full-time representatives. At this meeting there was full disclosure of testimony by each party.

After the October 10 meeting, Plant 2 Management had a chance to review grievant's personnel file. Much of it referred to events at Plant 3 where grievant had worked for a period. Plant 2 Supervision had not been aware of grievant's record until on or after October 6. After the October 10 meeting, the joint Management decision was that because of grievant's behavior on October 5 and 6 and in light of his overall record, he be suspended preliminary to discharge. Busch says the major factor in that decision was grievant's record and what Supervision saw as grievant's tendency to engage in diversionary argument when an incident would occur. Busch thought the October 5 and 6 incidents were serious offenses, standing alone.

Accordingly, on October 11, 1983, grievant was suspended preliminary to discharge, by letter reading in pertinent part as follows:

"You are hereby notified that you are suspended for five (5) working days effective October 11, 1983, and at the end of that period you are subject to discharge.

You are being suspended for violation of No. 2 Coke Plant Department Rule 11 and Rule 127-o (insubordination) of the GENERAL RULES for SAFETY and PERSONAL CONDUCT on the 7-3 turn of October 5, 1983, for refusing to give testimony in an investigation and insubordination in refusing to return to the investigation as instructed on October 6, 1983, and for your overall unsatisfactory work record." An 8.1, suspension-period hearing was held on October 18, and on October 24 the suspension was converted to discharge, and this grievance followed.

At the suspension-period hearing, grievant said the steam made the job unsafe on October 5 and that he should have been issued a respirator and green, flame-retardant clothing. That hearing took about two hours and fifteen minutes.

There were three Step 3 meetings, covering nearly three full days. At the first, the Company's Labor Relations representative heard the Union witnesses and thought they were picturing conditions much worse than he had seen. The parties then agreed to go with grievant and visit the emergency wharf. Accordingly, on November 10 the parties' representatives and grievant went to the emergency wharf. Perhaps some were helped by this visit, but the Company began from error, and the situation proceeded from there to a burlesque of sensible, adult behavior. The right or wrong of most of this event is not open in this arbitration proceeding, but each party argues selective phases of it as confirming its belief that the Company was discriminating against grievant because of his national origin and Union activities or that grievant was given to petulant insistence on his selfish "rights," regardless of the consequences for the larger good of the parties or, indeed, of grievant's own long-range good. Thus, only the details necessary to understanding those claims will be set out.

Grievant had a camera with him and asked Labor Relations Assistant Superintendent Vella, apparently in charge of the Company group, if he could take pictures. Vella said he could. He says he momentarily had forgotten about the Company's long-standing and strictly enforced rule against picture-taking on its premises by anyone but its own agents.

At any event, grievant took various pictures for perhaps five minutes or so. Busch apparently reminded Vella about the Company rule. Vella went to the Grievance Committee Chairman and the Grievance Committeeman and said he had made a mistake in allowing grievant to take pictures and would have to have him stop doing so and ask him to give him (Vella) the film. Grievance Committee Chairman Gyurko said he was surprised by Vella's letting grievant take pictures. Vella apparently asked the Union representatives for their help in getting grievant to give him the film. They said Vella had given permission and would have to get out of it on his own.

Vella told grievant he had made a mistake in allowing him to take pictures and that he would have to stop. Grievant said he would. Vella then asked grievant to give him the film. He said the Company would compensate grievant for the film, return to him any personal photographs on it and the negatives, and have a Company photographer come immediately and take pictures of any condition on the wharf that grievant wanted. Grievant refused, saying that he had been given permission to take pictures, that the camera and film were his personal property, and that the photographs he had taken would prove his innocence of the charge of insubordination by demonstrating that his account of steam conditions was accurate.

Vella's efforts to persuade grievant to surrender the film and grievant's refusal continued for some time. Vella directed grievant to give him the film. Vella says he asked the Union representatives to help him persuade grievant, and he claims they did, and that the Chairman said grievant would have to give up the film. The Chairman says he does not recall doing so but agrees that he could have. Vella told grievant he would not be allowed to leave the plant without giving up the film. Grievant refused to do so.

Vella said that grievant had been very courteous and well behaved up to the time when he told him to surrender the film. He says grievant then became upset and hyper. Vella said grievant was making a serious situation worse, and grievant asked what more Vella could do to him, since he already had been fired. Vella again directed grievant to give up the film. Grievant refused.

Vella prevailed upon the Union officers to try again. He says they did not succeed. Grievant said to the Chairman that he wanted to leave and that he was not feeling well. Vella said he could not. Grievant said he was leaving. Vella said he could not leave without Plant Protection escort.

Plant Protection was called. Grievant said he was leaving. Vella asked the Chairman to accompany him and grievant to the locker room, since he thought they were "losing it" there. The three went to the locker room. Vella told the Chairman grievant was not leaving the plant with the film. The Chairman asked if the Company would take it from him physically, and Vella said he hoped it would not come to that but, if the need arose, they would. Grievant said if they tried to take the film from him, he would defend himself. The Chairman said he had better not.

At the locker room, the Chairman suggested that employee Lopez be called. He apparently was a very close friend of grievant's and the thought was that maybe he could convince grievant to give up the film or at least calm him down. Vella went to call Lopez. He saw Plant Protection Sergeant Snow arrive in a car with Assistant Superintendent Busch.

Busch asked grievant to give up the film, offering to pay for it then and there. Grievant refused. Sergeant Snow tried to persuade him, without success. Vella said grievant seemed to be very nervous and irrational. Vella called Lopez, and he said he would come over. Vella then called Plant Protection to get assistance for Sergeant Snow, fearing that grievant would attempt to walk out without an escort.

Vella went back outside and saw Sergeant Snow's four-door squad car stopped just off the roadway, with Sergeant Snow in the driver's seat, Grievance Committee Chairman Gyurko in the front, passenger seat, and grievant in the back seat. Vella approached the back door, and began again trying to persuade grievant to surrender the film. Grievant refused.

Another Plant Protection squad car drove up and stopped just in front of Snow's car. Captain Sharp and Lt. Yurko got out and eventually went to Snow's car. They identified themselves and asked grievant to get out of the car. He did not.

Vella says Captain Sharp reached into the car in front of grievant and grievant flailed his arms for two or three seconds and said to Chairman Gyurko "Joe, you see what they're doing. If you don't do anything to stop this I'm going to sue you." Gyurko allegedly swung around and said "You can't threaten me in that way." Vella said to grievant that this was not a problem between him and Gyurko but was between him and the Company. Gyurko got out of the car, and Vella went to the back of the car and became an observer, in order to allow Plant Protection to conduct its business.

Grievant locked both back doors. Captain Sharp from one side and Lt. Yurko from the other reached through the front windows and lifted the lock buttons. Grievant slid to the center of the back seat, facing more toward Sharp.

Sharp leaned forward and Vella says he saw grievant kicking his feet and striking Sharp on the upper knee and thigh area. At this, Yurko reached into the car from his side, behind grievant, and pulled grievant down so that he lay supine across the back seat with his head actually extending out of the car, beyond the seat. Yurko thus restrained grievant for perhaps ten or fifteen seconds. Sharp emerged and said he had the camera.

The Company group could not open the camera. It was raining all this while, and Sharp said he did not want to spoil the film if he ever could get the camera open. Thus, he ran into an office. Grievant got out of the car. Sharp returned and said the film was not in the camera. The back seat was searched and no film was found. Grievant took off his jacket. Sharp searched it and found no film. Grievant gestured as if to pull off his shirt and asked if they wanted to strip him butt-naked. Sharp said that would not be necessary. Yurko said to Gyurko that he had seen what happened, that he had to restrain grievant. Gyurko said Yurko should not have gotten physical. That exchange became heated, and they were nose to nose, with Gyurko saying that Yurko should be knocked down a peg or two. Vella separated those two.

Captain Sharp said he was standing at the back bumper of the car and that grievant was looking straight ahead and not at him and was saying, "Don't touch me. Don't touch me." Sharp said he had not done so. Grievant began saying he wanted to see his doctor. Sharp said he could go to the Company physician at the Clinic. Grievant said he wanted to see his own doctor. Grievant then said that, if they took him to the gate, he would give them the film there. Sharp feared if that were done that grievant, then on city property would refuse to surrender the film and would leave.

Sharp saw an open, brief-case type container lying on the seat to grievant's left. Sharp was on the right side of the car and Yurko on the left. Sharp leaned into the car, intending to reach across grievant and get the case. Grievant leaned back to his left and kicked Sharp two or three times in his lower right leg.

At that, Lt. Yurko opened the back door on the driver's side and reached in, put his arm around grievant's upper body, and pulled him backwards and down on the seat, so that grievant was lying partially out of the car. Sharp was holding grievant's feet to keep grievant from kicking him. Sharp then saw a camera. He let go of grievant's feet, grabbed the camera, and backed out of the car. He said this specific phase of the incident took fifteen seconds. Sharp says he did not strike grievant and that grievant initiated the physical contact.

There was no film in the camera.

Sharp showed Vella where grievant had kicked him, and Sharp then went to the Company Clinic for observation. X-rays were taken there and were negative.

Sergeant Snow then left, apparently intending to drive Grievance Committee Chairman Gyurko and grievant to the parking lot. Grievant said he wanted to go to the Company Clinic. The three went there, and Sharp arrived later, while grievant was being examined. Two East Chicago police officers walked in and asked who had called them. Grievant said he had. He had called his wife and asked her to call the East Chicago police so that he could file assault and battery charges against Sharp and Yurko.

Sharp told the police that grievant was not a Company employee; was being examined; and, if he had a complaint, he could go to the police department and file it. The police officers said that was fine and left. Lt. Yurko said that he approached the car, opened the door, and asked grievant to get out. Yurko had a can of Mace in his hand, down at his side. Grievant said, "He's got Mace. Don't touch me. You can't touch me." Gyurko said, "You can't touch him. Don't touch him." Yurko put the Mace in his pocket.

Yurko saw grievant kicking at Sharp, and he reached in and grabbed grievant by his hair, pulled his head back and down to the seat, and grievant began back-peddling toward Yurko and almost went out of the car. Holding grievant's hair, Yurko grabbed him around his shoulder so that grievant's right side was held against Yurko's chest and Yurko's left arm was around grievant's left arm. He held grievant, who kept squirming, and Yurko told him to hold still. Grievant kept squirming, and Yurko said, "Goddamn it. Hold still." Grievant stopped squirming, and Yurko let go. He says that phase took about ten seconds.

Yurko then said to Gyurko that he was a witness and that he (Yurko) did not strike grievant. Gyurko began shaking his finger at Yurko, calling him a smart-ass punk. Gyurko said, "You want a piece of my ass? Come on." Nothing more came of that.

That was the Company's account of all these events.

Grievant's differs and on nearly every aspect stands in sharp contrast to the Company version.

He has operated heavy mobile equipment since his return from the Army in 1969. He was elected as Assistant Griever in 1979 at No. 3 Coke Plant and Blast Furnace and as Safety Committeeman in 1982. He was transferred from No. 3 Coke Plant to No. 2 on October 3, 1983. Foreman Thompson gave him the department orientation and lined him up as Payloader Operator on the emergency wharf. Grievant says Thompson did not give him a Position Safety Orientation. He says Thompson told him he had to wear safety equipment when he walked in any area but said nothing about wearing safety glasses or hard hat while in the payloader cab. All that took from forty-five to sixty minutes, beginning about 8:30 a.m.

After a coffee break and time spent straightening his things in the change house, grievant relieved Glen as Payloader Operator on the emergency wharf for his lunch break at 12:00 or 12:30 p.m. and worked until approximately 1:00 or 1:30 p.m., for a total of a little over one-half hour. That short operating time came about because the battery went out at the same time, and Glen had caught up. Grievant said Monday was a nice, sunny day and that steam and other operating conditions that day were normal, just like they were on May 21, 1984, when the parties and the Arbitrator viewed the site, just prior to the first arbitration session. Grievant says on this day that he had a five-minute rest between dumps by the hot car. When Glen came back, the emergency wharf no longer was needed and did not operate any more that turn. Grievant says he does not recall Thompson telling him that he must wear safety glasses while operating the payloader that day.

The next day, Tuesday, October 4, grievant again was assigned as Payloader Operator and attended a safety orientation on regulated areas and earplugs, conducted by Safety Engineer Bokash. Grievant inspected the payloader. He worked the equipment for about an hour, and, although Tuesday was a little cooler, steam and other conditions were the same as they had been on Monday and as they were on May 21, 1984.

Grievant says he would push and load coke while the hot car was gone to the batteries to catch a load, and then he would wait. He thought that was very safe. When grievant went back after lunch, the operation no longer was dumping on the emergency wharf.

Grievant thus estimates he actually operated the payloader at the emergency wharf for about one and one-half hours on Monday and about the same time on Tuesday, for a total of about three hours for those two days.

Grievant was assigned to the Payloader Operator job on Wednesday. He says Thompson told him he was an experienced Operator, had been there a long time, and that he did not tell him anything about the emergency wharf. He agrees he had worked it about two hours in perhaps 1982, while relieving Glen then. Grievant inspected payloader No. 801 and nothing then struck him as unsafe about it. He saw its broken window but did not then connect the hot coke and the fuel tank's being on the bottom of the machine with lack of safety. He saw that a fire extinguisher was missing but would not refuse to operate equipment for that reason, alone, but later, when in the office King kept asking him what else was unsafe, he naturally mentioned the absent fire extinguisher.

Grievant had said he only relieved Glen on the equipment Monday and Tuesday and that the Relief Operator does not fill out the turn inspection report but that the regular Operator does. Grievant said also he operated different equipment on Monday and Tuesday. Company Exhibits 30 and 31 then showed that grievant had made out and signed the inspection reports for Monday and Tuesday and that he had operated the same equipment (801) on Monday as he did on Wednesday.

When he went to the wharf, he says there was a pile of coke at the north wall, with steam coming out of it, and a very large pile at the east wall, suggesting that the midnight turn had not finished clearing the wharf. As he pushed toward the north wall, he detected a hole in the coke pile on the wharf about two feet deep with boiling water and steam. He says Wednesday was cloudy and rainy and very, very windy. The wind was blowing in every direction but mostly to the west.

Grievant back-bladed, in order to fill the hole. Each time he did, steam would come up. He went to the east wall, parallel to it, and the steam enveloped him and the area. He took his safety glasses off because they had fogged up from the steam, and then he would put them on again. They fogged up again, so he took them off again and this time left them off. The cab filled with steam, and he was in a white blanket and could not see. He wiped everything off with paper and all of a sudden and without his having heard a warning horn, he saw the hot car about three or four feet in front of him. He grabbed the directional lever, threw the equipment into reverse, stepped on the gas, and backed out. It then was about 8:10, 8:12, or 8:15 a.m. He says, if anyone had been behind him, he would have killed them. He backed all the way to the transfer track and came within about two inches of the pusher ram that was stored just beside the quench station. He then pulled the machine about to where the first rail car is at the north wall.

Grievant got off the equipment and said to himself that the job was unsafe. He went to the sampler shop and called Foreman Thompson but got no answer. He called again, with the same result. He went downstairs, and no one was there. He went to the Safety Engineer's office, but the door was locked. He telephoned again, but there was no answer. All this took five or six minutes.

He decided to go back on the equipment. As he got on, another load, red hot, was dumped, and the steam engulfed him again. He took his glasses and hard hat off. He waited in the steam for perhaps thirty, forty, or sixty seconds. As soon as it cleared, he backed up, and Foreman Thompson was standing near the north end of the southernmost of the three rail cars. Grievant was upset and yelled at Thompson, "Hey, this job is unsafe. That hot car almost struck me by the east wall and I'd like to be reassigned and ask for safety relief from the job." Thompson asked what was going on. Grievant said the hot car almost hit him, and Thompson said, "Well, that's the way the operation is."

Grievant said the job was unsafe and he would like to be re-assigned or have safety relief from the job.

Thompson said "Hey, put your hard hat and safety glasses on." Grievant said,

"I'm asking safety relief . . . and you're telling me to put my hard hat and safety glasses on? . . . I don't believe you . . . you know, that machine almost struck me."

Thompson told grievant to put his hard hat and safety glasses on, and he did. He got off the equipment and told Thompson to look at the boiling water, that he could smell the rubber tires burning, and that the fuel tank was on the bottom of the payloader.

Grievant said he wanted to see General Foreman Irvine, and Thompson said he could not, since Irvine was busy. Thompson said grievant could see Assistant General Foreman King. Grievant and Thompson walked around the rail cars, and King was standing right there.

Grievant said to King that he wanted safety relief from the job because the hot car almost struck him, that the job was unsafe, and he was scared and upset. King said that Thompson should give grievant safety relief and get Glen to operate the equipment and that grievant should go to the Labor Office where they could talk.

Grievant said it seemed that a grievance would have to be filed and requested that Safety Committeeman Payne be there. King said he would be there.

Grievant says King and Thompson locked themselves in the office. He was in the hall, and they had locked the door to the office. Grievant knocked, and Thompson opened the door. Grievant said he would like to get his contract and safety book, so he could word everything properly. Thompson said Payne would have it, and grievant asked what if he did not. King said to shut the door. Grievant said,

"King, how can you tell this man to shut the door while I am standing right in the way here . . . here? You can ask me to leave. You can ask me to sit down but you just don't do that, tell the man to shut the door in my face like that. It is going to hit me."

Thompson said "Go on, Gilbert, just go on. We'll talk to you in a minute." Grievant moved out, and Thompson closed the door.

In about ten minutes Payne came and grievant explained what had happened. King then explained part of what had happened. Payne said he felt it was unsafe, that he had worked in the area as a Mechanic, and he thought grievant had a legitimate excuse.

King said he did not think so, and Thompson said the job was safe. King said that if grievant would go back on the job, they would forget all this and he would be paid.

Grievant said it was unsafe, and he would not go back and get hurt. King asked if grievant was refusing to do the job, and grievant said he was not but was asking for safety relief. Payne asked if a safety man could be provided at the wharf, and King said he did not have anyone. Grievant said if they would give him a safety man, he would work the job. King said he had no one. Payne said Glen had finished. King said Glen would be given another job. Payne said there was no other work for Glen.

King began asking what was unsafe. Grievant said the hoe car almost hit him and had made him move blindly. Grievant said he was nervous, as if his blood was going 240. King asked what else was unsafe. Grievant said there was a window out of the payloader and there was boiling water. Payne was writing things down. Grievant said this should be done in a first step oral grievance form. King said he did not have one, and he went to get one. Grievant mentioned bad steam; the hot car's not being locked out; its coming within two inches of the payloader on every pass; if the payloader were at the east wall, the hot car would hit absence of a window on the right of the payloader; the left window was cracked; absence of an automatic float leveler on the payloader, to make the bucket automatically adapt to the slanted, concrete surface of the wharf; two or three feet of boiling water, all the way up to the railroad tracks; absence of a safety man; inadequacy of the fire extinguisher; absence of warning lights; inability to hear the siren because grievant had earplugs on.

Grievant said King had granted him safety relief, and then King went to get the form and they filled it out, and only then did King tell Thompson to call Plant Protection, and Thompson did so, saying he had a man that had to be escorted out for not wearing his hard hat and safety glasses. Sergeant DeLeeuw came, and King or Thompson said grievant was being sent home for not wearing safety glasses and a hard hat. Payne said that grievant had asked for safety relief. DeLeeuw said, "Insubordination, too?" King said, "Yes, and insubordination, too." Thus, grievant claims that the Guard was the one who added insubordination, which then was adopted by Supervision.

The first step oral complaint grievance form was filled out and signed. Grievant was told to return to the plant the next day.

Grievant asked that they go and see the emergency wharf, and they did so. Grievant says that while there, Payne wrote on the oral complaint form, "Safety man acknowledges unsafe condition."

Grievant called the United States Occupational Safety and Health Administration, but it declined to exercise jurisdiction and said it would forward the complaint to the Indiana OSHA. After three o'clock that afternoon grievant learned that Thompson had called grievant's home and told him not to go to work the next day. He learned the next morning that he was to go in for a hearing at 1:30 p.m. on October 6, and that a Plant Guard would escort him into the hearing. Grievant then called Inland Vice President Katsahinas and spoke to his secretary, saying that he was not a criminal, was not charged with violent behavior, was a Union representative, and that he did not understand why he had to be escorted into the plant. The secretary said she would look into the situation and take care of it.

Grievant and Grievance Committeeman Mosely came to the meeting on October 6 and saw eight Company representatives there, including Labor Relations representative Scholes. Grievant asked the purpose of the meeting and was told it was to decide whether or not he would be disciplined. Mosely said the Company had a Labor Relations representative and, therefore, he thought the Union should have a Step 3 representative, too, that is, Grievance Committee Chairman Gyurko, and grievant asked for a Safety Committeeman as well. Busch said they were not needed at this stage. Mosely asked for a recess, so that he could call the Hall for advice. Mosely did so, and grievant called District Director Parton, but neither could reach anyone who could help. Mosely told grievant they would go back and attend the meeting under protest.

They returned and told the Company people they were going ahead under protest.

Busch said grievant had been charged for not wearing safety glasses and a hard hat. Grievant said he had asked for safety relief but could not prove that without the presence and testimony of Safety Committeeman Payne, whom the Company would not allow at the meeting. The Company did not deny that grievant had asked for safety relief.

Busch asked grievant to tell his story, and grievant asked if he was being paid for this time, and Busch said he was not. Grievant asked if he could leave, and Busch said "Yes," and grievant left.

As he was going down the stairs outside the building, Ambry came out and said they had changed their minds and grievant could come back in and they would like to have him back in the meeting. Grievant asked if he could have the Safety Committeeman there, and Ambry said he could not. Grievant asked whether Busch had said he could leave, and Ambry said he had, and grievant said he was leaving. Grievant asked Sergeant DeLeeuw if he would give him a ride, and Ambry told DeLeeuw not to do so. Grievant began walking, and Ambry then said DeLeeuw would drive him out, and he did so.

An investigative meeting finally got under way on October 10. Grievant said Local Union President Andrews and Grievance Committee Chairman Gyurko told him to go to the meeting and state his side of the story. He did so, and the meeting proceeded apparently without untoward incident.

At the pre-discharge hearing grievant agrees he said he had been given authority by the Company to operate the payloader and he felt that included discretion on his part to decide whether or not to wear safety glasses or a hard hat in the cab.

Grievant said the Step 3 Meeting on November 8 lasted eight hours, but that less than ten minutes of that meeting were produced by the Company.

At the November 10 visit to the emergency wharf, grievant asked for permission to take pictures of conditions. Vella spoke with Busch and then said it was up to Grievance Committee Chairman Gyurko. Gyurko said it was not up to him but was up to the Company people, since it was their plant. Vella again spoke to Busch and then said grievant could take all the pictures he wanted.

Grievant took about ten pictures and measured several distances. Grievant says November 10 was a rainy day but not so windy as was October 5.

Perhaps twenty or thirty minutes went by, and Vella came and told grievant he had made a mistake and grievant could not take any more pictures. Grievant said that was fine, since he had what he wanted. Vella said he would have to give him the film. Grievant said it was his. Vella said he would reimburse grievant for the film. Grievant said he came to get evidence for his grievance; he had it; he had been given permission to take pictures; the film was his property; he would keep it and show it in fighting for his job. Busch came and asked for the film. Grievant refused. Busch began yelling and directed grievant to give up the film. Grievant asked whether Busch remembered that he had fired grievant. Busch said grievant would not leave the plant with the film.

Grievant said that made him feel the way he has just before he had been in bar fights. He told Gyurko that Vella and Busch were threatening him and that he was finished and was ready to leave. Grievant said he was upset and would like to go to the Clinic. They said he could not. That went on for another twenty minutes. They began to leave, and grievant asked Gyurko to accompany him because he did not trust the Company people and they had got him all upset.

Grievant went to the change house, showered, and emptied his locker. Busch told Sergeant Snow to bring grievant to his office, and grievant said to Gyurko that he wanted to go out the gate. Grievant, Gyurko, and Sergeant Snow got into the squad car, to take grievant to Busch's office. Grievant tried to persuade him to take grievant to the gate. Snow said he had to follow his orders. Just then another Plant Protection squad car pulled up right in front of where Sergeant Snow's car was parked. Grievant says the other car must have been going fifty miles an hour and that its brakes squeaked, and two men jumped out and rushed to the car he was in and demanded the film, one with a can of Mace.

Captain Sharp reached in the front window and unlocked and opened the right rear door. Lt. Yurko grabbed grievant by the neck and pulled his head down, so that his head and the middle of his shoulders were sticking out over the edge of the seat, and Yurko's hand hit grievant's face and broke the sunglasses he was wearing. Yurko banged grievant against the door. Yurko had grievant in a head lock and said, "Hey, I told you to stand still. I'll break your fucking neck." Grievant was hollering. Grievant's legs went up, and Sharp grabbed him from the other side. Sharp searched grievant while he was held down on the seat by Yurko. Sharp said grievant did not have the film on him. They let him go. Grievant got out. He says he had had the film in his right jacket pocket and that the only reason Sharp did not feel it when he searched him was that, when he was forced back, the jacket pocket went underneath him, and Sharp must have missed it. He says his jacket was torn by Sharp.

Grievant says he then tossed the camera to Sharp, and that he had put the film in his army boot. He says it was a miracle that Sharp did not feel the film when he grabbed grievant's legs.

Grievant said the pictures he took showed almost the spitting image of steam conditions as shown by Company Exhibits 29-A and -B and of conditions existing on October 5. He says the pictures he took on November 10 would prove his innocence. They were not introduced at the arbitration hearing. Grievant's lawyer has them, he said.

Sharp could not open the camera. Yurko walked toward grievant, who told him to hold it and asked whether Yurko was coming at him again. Gyurko said not to touch grievant any more. Grievant took off his jacket and threw it to Sharp, who searched it. Gyurko said to Yurko, "You want a part of me? Take a part of me." Gyurko pointed his finger at Yurko. Vella separated them. Grievant said he had hid the film on the way to the locker room.

On the way out in Sergeant Snow's squad car, Snow asked grievant if he was hurt, and grievant said he had some bruises and that he wanted to go to his doctor. Gyurko suggested he should go to the Company Clinic, and grievant apparently agreed. He called his wife, told her what happened, and asked her to call the East Chicago Police Department. The Company doctor took x-rays, gave grievant a patellar reflex test, had him raise his arms, and asked if he could see the doctor's fingers. Grievant said he was in pain and that his neck was hurting. He says the doctor saw his neck was swollen but gave him no medication.

Grievant later went to the East Chicago Police Station and made out a report. He says the Company made a counter-charge against him the following day.

A day or two later, grievant had a Union representative take pictures of what he says were bruises on his body from what he calls the officers' attacking him. These pictures were introduced in this record.

Grievant says that while operating the fork lift at the plant in 1971, hauling tar buggies which were heated with steam, a truck of an outside firm drove through the steam cloud and hit his fork lift. It turned over, and grievant was hurt. He says that accident made him leery of poor visibility in heavy steam.

The Company answered that it was surprised by this claim, which it says was not brought up in the grievance proceedings. Grievant says it was.

Grievant says that Sergeant DeLeeuw came armed to the Step 3 meeting, and Gyurko said he should not be armed at such a meeting. DeLeeuw emptied his pistol and grievant was scared.

Union witness Barrientez had operated the payloader at the emergency wharf for about two years from approximately 1979 to 1981. He said there was no set procedure while he worked that site, requiring that the Payloader Operator not be at the east wall unless the hot car was in the quench station. He agrees he does not know what the procedure has been at the emergency wharf since he left that assignment. He said also that while on that equipment at the emergency wharf he would remove his safety glasses when they would fog up from the steam. He would take them off and wipe them clear with a paper towel. He would not always put them on again immediately, since they just would steam up again. He never got a safety warning for not having his safety glasses on. He did not always wear his hard hat in the cab, especially not in very hot weather. The witness said he could not always hear the hot-car horn as it signaled it was approaching from the north, especially if vapor had gotten into the horn. The regular hot car can and sometimes does dump as it moves along and without stopping. The one-spot car stops in order to dump. He said there was steam, no matter whether the weather were hot or cold. He has been pushing at the east wall while the car was not in the quench station. When he became engulfed in steam, he would wait until it would dissipate before he would move, and that would take approximately twenty seconds. In those situations he would not be at the east wall. The hot car never dumped a load on him or his equipment; he never asked for safety relief; and his payloader never tipped over.

Union witness Lumpkin has worked the Payloader Operator at the emergency wharf on and off ever since those operations began at the wharf, which he thought was about 1970 or 1971. He worked it at least up until May of 1983. When he last worked it, he would be at the east wall no matter where the hot car was, and he imagines foremen have seen him doing that and have not cited him for a safety violation. He says weather conditions are not a major factor in how much steam would arise from the operation. Hot coke hitting the water creates a lot of steam in the summertime, but he agrees quite a lot more steam arises in colder weather. He has removed his safety glasses when they became fogged and, when steam would subside, he would put them on again. He has operated the payloader without wearing a hard hat. He knows of no one who does not wear safety glasses when operating the payloader. The Payloader Operator cannot always hear the hot-car horn. He never was advised of a Job Safety Analysis for this assignment. The witness agreed that the steam conditions pictured in Company Exhibits 29-A and -B, taken on November 10, 1983, showed a bad steam day. He said Company Exhibits 21-A through -F did not show too much steam. They were pictures of steam conditions during the Indiana OSHA visit in the afternoon of November 5, the day of the initial incident here. This witness operated at the emergency wharf before construction of the east wall in 1979 or so, and he said the Payloader Operator just had to use his best judgment as to when to go into the east wall to push freshly dumped coke, but he would like the hot car to be in the quench station when he was at the east wall. If steam got really bad, he would just sit and wait until it dissipated. That would be relatively quickly if it were a nice, windy day. His payloader never was

hit by the hot car, but he worried about it all the time. He did nothing about that worry and told no one about it, allegedly for fear that, if he were to do so, he would be sent home. He knew of no one who was sent home for such a reason. The witness said he had heard of an employee (Cardona) whose equipment had been hit by the hot car perhaps three or four years before the hearing. He thinks the east wall was in place then. He said Cardona told no one in Management of the incident.

Union Witness Glen had operated at the emergency wharf from its inception. There was no Job Safety Analysis. He works the assignment currently and there now is a Job Safety Analysis for it. It became effective right after grievant's incident on October 5, and it requires that the Payloader Operator not go to the east wall unless the hot car is in the quench station. Before that, he says he would be at the east wall no matter where the hot car was. He had to remove his safety glasses while on this assignment because they steamed up, and then he would put them back on. They then would steam up again. He says he was close to being hit by the hot car and knows of a couple of employees who were hit, Cardona and Cribbs. He said both events occurred a good little bit ago, but he also said later that Cribbs's accident occurred after grievant's event in October of 1983. Cribbs told him of this, saying that the payloader was struck on the rear wheel but that there was no damage to it. Apparently there was no damage in either alleged event. He said the hot car had come close (within six inches) but never had hit him. The witness said bad steam conditions might take three or four minutes to go away. He worried about being hit by the hot car but never told anyone about the worry, because he might be sent home if he did so. He knows of no one who ever was sent home for that reason. He just had a feeling that way.

Glen took over the machine when grievant left it on the morning of October 5. He says it was a bad steam day. He worked the balance of the turn and finished at about 2:45 p.m. He operated payloader 801 for about one hour then until it was taken to the shop for washing. It had a broken right window, and that had existed for about a week before that. The steam was bad on other days, too, but he said nothing about it. The steam conditions for the balance of the turn were about as they had been in the morning. He had seen steam conditions a lot worse, and operated in them. He never heard of a payloader's tipping over. The horn on the hot car can barely be heard. His payloader never has been hit by the hot car, and he says that was up to the good Lord. He says he would not work a job that he thought was dangerous and might hurt him, but he never asked to be taken off this one. He never told anyone in the Union about his concern on this job. A Safety Man sometimes was used before the wall was built but not since that time.

Union witness Girau operated the payloader at the emergency wharf perhaps eight or nine times, beginning sometime in 1983, before this incident. There was no procedure requiring the payloader to be away from the east wall when the hot car was not in the quench station, and Foreman Martin did not tell him that he should not be at the east wall unless the hot car was in the quench station when he assigned him to the task. A couple of times foremen have seen him at the east wall when the hot car was passing the emergency wharf, and they did not write him up for a safety violation for that reason. He has removed his safety glasses when they became steamed up. He would clean them and put them on again. Sometimes the steam would be so bad he would leave the glasses off, in order to get the work done, since he could not see with them on. Foremen saw him operating without having safety glasses on. He said the steam sometimes would be worse in the summer. He could smell the rubber tires of the payloader burning. Foreman Martin assigned him to the station and did not tell him any specific directions. He thought the hot car might hit him. Sometimes he backed up just in time, but he did not tell anyone of this. He said steam was worse in cold weather. He told no one that the job was unsafe because they would send him home. He never heard a toot from the hot car. Supervisor Irvine once told him to put his safety glasses on, and he did so, but he would take them off again, meaning that he could not see with them on. The witness has operated the payloader with the top of the window open or off. He never asked for relief from this job.

Grievance Committeeman Mosely said that at the October 6 meeting grievant asked if he was being paid and whether he could leave, and Busch said he could, and he left. Busch called grievant back and then told Ambry to call grievant back because he wanted to explain to him what could happen.

Mosely agrees that at the suspension-period hearing grievant said he thought it was safe in the cab without safety glasses and hard hat.

Mosely said that on November 10 Yurko grabbed grievant around the neck and was choking him, since grievant had changed colors.

Safety Committeeman Payne was at the session with grievant, King, and Thompson in the Labor Office on the morning of October 5. He filled out the oral complaint grievance form then and before they went out to the wharf he wrote, "Safety man acknowledges unsafe condition." Payne said he had worked around the

wharf as a Mechanic and, therefore, knew what its conditions were and, with grievant's explanation of the situation in the office, he did not have to see the site that morning in order to know it was unsafe.

Payne says King and Thompson suggested grievant work the job under protest. Grievant refused because he said that would not make his point. The Plant Guard arrived and King did not know what offense to cite grievant for, saying that he would not perform the job under current conditions, and the Guard said that was insubordination. Payne said grievant was not insubordinate. He was seeking safety relief. He says King and Thompson then changed the offense from insubordination to sending grievant out because he sought safety relief and there was no other job available. Payne says when he left that meeting he was not aware of any insubordination charge.

Payne said use of the emergency wharf calls for double-quenching, but if the operation were falling behind, that procedure would not be followed. He said he had been aware of safety problems in the operation at the emergency wharf for about a year and one-half, and they arose from flaming coke and inability to see through the cloud of steam. Those elements create danger of explosions and tire blow-outs that could effect steering; boiling water could scald the Operator's feet if he should have to get off the payloader in the water; and risk of the payloader's being hit by the hot car at the east wall, since the bucket or the right corner of the cab allegedly swing out over the hot-car path when the payloader pivots. Payne said Operators stop when engulfed in steam and that it takes five to ten minutes for the steam to dissipate. He says he has seen foremen scold Payloader Operators who were waiting for steam to clear because they were not pushing coke off the east wall. Payne is not aware of there being an explosion, of tires' blowing out and causing the equipment to veer, or of a man's scalding his feet. He thought the east wall was built more to keep coke off the hot-car tracks, which might derail the hot car, than it was for the safety of the Payloader Operator. He thinks the hot car overhangs the wall by a few inches, so that it still could hit the payloader, even with the wall in place, but he agreed the wall did make it safer. Payne has heard of several instances of the payloader's being hit by the hot car but does not know the names of the Operators involved.

Payne never has reported any of these unsafe conditions to anyone. He said if he were to report every "little incident," he would constantly be in the foreman's office. He insisted he has discussed the emergency wharf two or three times with Busch, Arsenault, and King, and he (Payne) thought the east wall was not high enough; that there was too much water; and that there should be a Safety Man. Nothing was done, but he filed no grievance, being under the impression that a Safety Committeeman cannot file a grievance. He agreed he may have dreamed up that limitation.

Payne said he came into the October 5 session and, after speaking to grievant out in the hall, asked grievant how Wednesday differed from Monday and Tuesday. Grievant answered that the steam was the same but that the payloader had no windows (glass out) or fire extinguisher, his safety glasses were fogged, and that he had operated a different machine on Monday and Tuesday. Payne thinks if grievant had been given a different machine to operate on Wednesday, October 5, the problem might have been solved. He asked King that grievant be given the machine he had operated on Monday and Tuesday, but King refused.

Payne says Thompson stated no reason for escorting grievant out when he called Plant Protection on the telephone and, if the latter had not needed a reason for his records, the word insubordination would not have come up.

Payne says the representative from Indiana OSHA after the observation that afternoon was over, asked him if he saw any unsafe conditions, and he said he did not at that time, but conditions then were nothing like those in the morning. The representative of the State agency said he had to make his determination on the basis of what he saw. The same machine (801) was there then as when grievant operated in the morning. Payne says he has seen Payloader Operator's running the equipment without safety equipment. He never heard of a procedure, before grievant's incident, requiring the Payloader Operator to stay away from the east wall unless the hot car was in the quench station. He has heard of it since.

Grievance Committeeman Chairman Gyurko went over in detail each of grievant's past disciplinary events within the relevant five-year period. As presented by the Company at Step 4 and in its pre-hearing brief, that record is as follows:

"Date	Infraction	Action
11-25-78	Out of work area, leaving plant improperly	* Discipline - 5 turns
9-3-79	Out of work area	* Discipline - balance of turn plus 5 turns
9-7-79	Overall unsatisfactory record	* Record review
8-13-80	Out of work area, insubordination (Discharge)	Suspension

3-10-81		+ Gr. No. 3-P-1 - conditional reinstatement - 60 days' discipline
3-10-81	Overall record unsatisfactory	@ Record review
6-10-81	Insubordination (3-day Suspension)	+ Reprimand
1-13-82	Out of work area	* Discipline balance of turn
4-1-82	Insubordination	@ Discipline - balance of turn plus 3 turns
7-9-82	Improper report off	+ Reprimand
7-28-82	Out of work area, insubordination	@ Discipline - balance of turn plus 5 turns
12-28-82	JSA violation	Suspension
1-18-83		* Returned to work schedule - 10 days discipline
2-14-83	Failure to wear safety glasses	@ Warning
3-9-83	Insubordination and failure to give testimony	& Discipline - balance of turn plus 4 turns
6-9-83	Out of work area	@ Discipline - 1 turn
6-9-83	Tardiness	@ Discipline - 1 turn"

Gyurko's explanation established, with one exception on which the parties remain at odds, that some of those disciplinary events stand as final imposition of discipline against grievant, some still are being contested in the incompleting grievance proceedings, and others were removed in the grievance proceedings and arbitration. The relevant record includes fifteen incidents in the five years preceding October 5, 1983, and the upshot of all the grievance and arbitration activity is that the five events indicated by asterisk in the above table stand because not grieved or not removed in the grievance and arbitration proceedings; three marked by "+" sign, which include one in which grievant's discharge was modified in arbitration to a sixty-day suspension without pay and one in which a three-day suspension was reduced in arbitration to a reprimand; six shown by a "@" which still are in the grievance proceedings and not yet resolved; and one (four-plus turn suspension), noted by ampersand, which the parties dispute, with the Union saying a grievance was filed and now is in Step 3 and the Company saying no proper grievance was filed.

Gyurko then stated his view of events at the November 10 site visit. Vella gave grievant permission to take pictures, and he did so for about fifteen or twenty minutes. Vella then said he had made a mistake and asked Gyurko to get the film from grievant. Gyurko said Vella had given permission, and he (Gyurko) would not tell grievant the Company wanted the film. Vella so notified grievant and demanded the film, and grievant refused, saying he had been given permission to take pictures, and that the film was his property. The Company people told grievant he could not leave the plant unless he gave up the film.

Grievant was getting excited, and Gyurko thought his blood pressure was getting built up. Grievant said, "See how they treat me. They always do this to me." Grievant then was pretty well worked up and said he wanted to leave. Gyurko, Sergeant Snow, and grievant went to the locker room. Grievant then was really upset and said he wanted to see a doctor. Gyurko suggested to Mosely that Lopez be called to help calm grievant down. Gyurko was fearful he might have a heart attack.

Gyurko, Snow, and grievant got back in the squad car, and Gyurko told Snow grievant was all worked up and wanted to see a doctor and that he should be taken to the clock house. Another squad car pulled up in front of theirs and two officers got out.

Sharp and Yurko came up, and Sharp identified himself and asked for the film. Grievant refused. Gyurko said grievant wanted to see a doctor, and Company representatives said he could not leave. Gyurko said they should not lay a hand on grievant, who had locked the rear doors. Grievant said "You aren't going to use that Mace on me." Sharp reached through the front window and unlocked the rear door. Grievant said that Gyurko was not going to let them beat him (grievant) up, and Gyurko kept hollering that they could not lay a hand on grievant. Sharp opened the back door, and Gyurko jumped out of the car. Sharp started into the back seat and Gyurko tried to grab Sharp from behind. Nobody else was doing anything about this.

Yurko got grievant from the other side. In trying to get Sharp off grievant, Gyurko touched Sharp's pistol and feared if he kept pawing at him it might go off, so he backed off, still screaming. They wrestled on the seat a few seconds, and it was over. Sharp came out with the camera, and Yurko released grievant.

Yurko told Gyurko he was his witness, and Gyurko asked, "Witness to what? That you beat the man up?" Gyurko said Yurko was Gyurko's witness. Yurko was belligerent, and Gyurko backed away. Gyurko called Yurko a few things and said that if Yurko wanted him, he could have him. The "gallery" then got involved, and things quieted.

Gyurko said he wanted grievant out of there and to a doctor. Snow said grievant was not an employee and, therefore, could not go to the Company Clinic. Gyurko said the event occurred on Company property and it would be better to take him to the Clinic. They did so.

Gyurko reported all this to Local Union President Andrews, and later they met with Industrial Relations Assistant General Manager Wingenroth, who apologized for the Guards and said those things should not have happened.

Gyurko said he could not recall requesting grievant to give up the film to the Company. He said grievant asked him if he were just going to sit there and let the Guards beat him up. He said it was possible that grievant said to Gyurko that he would bring charges against him (Gyurko). Gyurko later asked grievant what he did with the film, but grievant refused to answer.

The Company notes that the Step 3 Minutes say that grievant rejected the pleas of his Union representatives to comply with the Company policy and release the film, and that the Union's corrections to those Minutes do not challenge that statement.

After grievant's regular, direct examination on the events of October 5 and 6 and November 10, over about 90 pages of transcript, he returned and testified for over 350 additional pages of direct and cross-examination and introduced over 225 of his Exhibits, nearly all of that intended to support his claims that his troubles on October 5 and 6 and November 10, 1983, as well as all his earlier difficulties, were caused wholly by Management's discrimination against him because of his Union activities and his national origin. The second claim is not a charge that the Company discriminated against grievant because of his general Hispanic background. It is finer than that and is that Management discriminated against him because he is from Puerto Rico and treated him differently because of that than it would have treated a person of Cuban, Mexican, Central, or South American Hispanic background. Several of the matters referred to allegedly in support of the above two charges had not been grieved or had been made the subject of grievances that had been processed and were final and closed against grievant. Several of the events had been grieved and were resolved in grievant's favor.

The parties made a joint measurement of some distances. They found and stipulated that putting the hot car at the east wall where it passes and dumps and placing the payloader right against and parallel to the east wall, the outer lip of the hot car overhangs perhaps 1" in some places and 0" in others over the outside (payloader side) of the wall. The payloader tires are 56" high and 18" wide. The payloader handrail is, after the tires, the nearest part to the hot car, and it is 22" to 24" from anything on the hot car. Thus, with the payloader parallel to the east wall, only the tires could be touched by the hot car and ordinarily only by one inch. If the payloader were pivoted as far as it would go, however, handrail clearance would be reduced to 12" or 13" from the hot car. When the hot car gates are open, as they must be to dump, they overhang the east wall by 18" but they are higher than, and thus would clear, the tires. The hot car's speed was estimated by Busch as about three or four miles per hour. The payloader bucket, of course, could be put out over the hot-car track.

Supervisor Martin had been at the emergency wharf from June of 1978 until September of 1983, and he said that during those times Payloader Operators were required to and did wear safety glasses and hard hats while operating the equipment. Martin issued safety warnings to employees who failed to do so. He assigned grievant to this station four to six times, and grievant did not raise any safety complaints to him about the operation then. He conducted safety meetings with employees, and no one ever raised any safety concerns about wharf operations. Grievant did raise other safety issues to Martin, including one about the absence of rail skates when cleaning pusher pads. Martin thought grievant's point was valid, and a Job Safety Analysis was established to incorporate this idea. About two weeks later grievant violated that very procedure and was suspended. Grievant brought up two other safety points, not related to the Payloader Operator, and the Company adopted them, too, and on one such occasion he was granted safety relief. Martin said he observed Payloader Operators at the wharf about twenty-five times and never saw one at the east wall while the hot car was coming back toward the quench station. He said there was no Job Safety Analysis on that point during his tenure at the wharf, but he had oriented employees to operate so that they would not be at the east wall unless the hot car were in the quench station. If he had seen anyone violate that orientation, he would have reinstructed or disciplined them. Martin said he has so oriented grievant who had no questions then. Martin said he has also oriented employees Glen, Lumpkin, Girau, and Chapman.

Supervisor Thompson was recalled and said he could recollect that on the morning of October 5 the east wall was not backed up with coke, as it would have been with two pushes dumped there and not taken away by the payloader. He said there was no delay of any kind that morning in pushing ovens or quenching coke.

Thompson said when he took over from Martin in September of 1983, he found a handwritten unsigned piece of paper in a desk about emergency-wharf, payloaders-operating practices, and he used it to instruct Operators on that procedure, including grievant. Thompson said the Payloader Operator dictates the pace of the emergency-wharf dumping operation. He said grievant, not Glen, was the primary Operator on Monday and Tuesday, October 3 and 4, 1983, and that grievant operated from about 10:45 a.m. to 3:00 p.m. on Monday and from 7:00 a.m. to 3:00 p.m. on Tuesday.

The Union contends that the oral complaint form made out by Payne on October 5 and signed by him and Thompson then, was not filled out by the Company until much later, on or after October 26, after the written Indiana OSHA decision came in.

The Company notes that the form, apparently in Payne's writing, says the time of the discussion was 9:30 a.m.

The Union asks why, if Thompson thought grievant was insubordinate and was not sincere in his request for safety relief, he let grievant and Payne fill out the oral complaint grievance form. Thompson said he did not know whether or not that form had to be filled out in those conditions but, with grievant angry, he did not want to make matters worse, so he decided it would be better to let him fill it out.

Assistant Superintendent Busch was recalled and denied that Safety Committeeman Payne had mentioned to him any unsafe conditions on the emergency wharf before this event on October 5, 1983. He agreed Payne did so on and after that. He said Payne had come to him before that about safety problems at other areas.

Relevant parts of Article 14, Section 6, read as follows:

"Section 6. Disputes. An employee or group of employees who believe that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question shall discuss the complaint with his or their foreman. Following such discussion, the oral disposition form provided for in Step 1 of Section 3 of Article 6 shall be immediately prepared, signed, and distributed as therein provided. If the complaint remains unsettled, the employee or group of employees shall have the right to: (a) file a grievance in Step 3 of the grievance procedure for preferred handling in such procedure and arbitration or (b) relief from the jobs or jobs, without loss to their right to return to such job or jobs; and, at the Company's discretion, assignment to such other employment as may be available in the plant; provided, however, that no employee, other than communicating the facts relating to the safety of the job, shall take any steps to prevent another employee from working on the job. Should either the Management or the arbitrator conclude that an unsafe condition within the meaning of this Section existed and should the employee not have been assigned to other available equal or higher-rated work, he shall be paid for the earnings he otherwise would have received."

The Company argues that grievant was, indeed, insubordinate on October 5. Thompson saw him operating the payloaders without safety glasses and hard hat and told him to put them on, as he had done on Monday, two days before. Grievant put on the hat but not the glasses because, he said, of the steam. Thompson directed him again to put the safety glasses on, and Thompson says grievant's demeanor then changed abruptly. He got off the equipment and said he could not run it safely with glasses on and asked for safety relief from the job. Grievant then asked King for safety relief. The Company notes that grievant had worked this job on Monday and Tuesday without protest, and it said that Safety Committeeman Payne, too, could not understand what the trouble could be on Wednesday. From all that, King and Thompson believed that grievant's claim for safety relief was not sincere.

The Company notes that Indiana OSHA inspected the site in the afternoon of that day, and found no imminent danger, and the Union Safety representatives present apparently did not disagree.

Management does not dispute grievant's right to request safety relief if he believes he is ". . . being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation . . . ," but it insists he could legitimately exercise that right only if he actually and in good faith so believed. If he did not so believe, then it says his refusal to perform the job as ordered constituted insubordination. It cites Inland and other decisions on the point.

The Company notes there always is steam at the emergency wharf in varying degrees, depending, it says, primarily on weather conditions. At the time in question, it said the temperature was mild, in excess of 50°, and the sky was clear. It claims, as its witnesses said, that there was relatively little steam then, seldom rising above the height of the payloaders tires. It introduced photographs of the steam conditions in the afternoon of that day, taken during the Indiana OSHA inspection period. They show little or no steam, but they show also little or no coke on the wharf.

The Company says when it is cold and rainy, steam conditions are worse. It claims the weather report recapitulation for Monday, Tuesday, and Wednesday, was as follows:

"Date	Day	Morning temperatures	Wind condition
10-3-83	Monday	70	So. to S/W - 15 m.p.h.
10-4-83	Tuesday	59	N/W - 5-10 m.p.h.
10-5-83	Wednesday	52	N/W - 10 m.p.h."

The Company stresses also that grievant made the required pre-operating safety check of the payloader on Wednesday morning and noted nothing unsafe about it then.

Management notes that Foreman Thompson said he was in his office from the beginning of the turn until about 8:30 that morning and that he got no telephone calls such as grievant said he tried to make during the ten or twelve minutes he was away from the equipment, to tell Thompson the job was unsafe. It says also that on such a serious matter as safety, grievant had other ways to reach Thompson, including asking the Hot Car Operator to call Thompson on the walkie-talkie he had.

Moreover, the Company argues that, if grievant really thought the job was so unsafe, it is unlikely he would have gone back and worked it after his claimed telephone calls for Thompson.

It is stressed also that King and Thompson said that while in the office grievant asked if he would be paid for the time he had been off the job while arguing about it. That is said to show he was concerned with pay and not with safety.

The Company says grievant's feigned claim of unsafe conditions actually was meant to mask and confuse his approaching difficulty about not wearing safety glasses and hard hat when first seen by Thompson.

Next, the Company charges that grievant again was insubordinate in leaving the investigative meeting on October 6.

The Company points to several instances of discipline against grievant during the relevant, five-year period, which now are final and closed, including those for being out of his assigned work area, for insubordination, and some which involved a claim by grievant of unsafe conditions, which claim was found in arbitration to be unsupported and not made in good faith. It says those incidents show a pattern of behavior by grievant that is consistent with his conduct here. It alleges that when about to be charged with violation of this or that rule of employee conduct, grievant is given to putting up a cloud of counter-charges and a claim of unsafe conditions, meant only to obfuscate rational discussion and resolution of the matter.

The Company stresses grievant's admission at the arbitration hearing that he held it to be within his discretion to wear or not to wear safety equipment while operating the payloader.

The Company relies also on the sad events of the plant visit of November 10 as allegedly showing grievant's defiant attitude toward Management's authority and a post-discharge act of insubordination. It says such post-discharge evidence is relevant, if only on the issue of the appropriateness of the penalty imposed.

The Company notes that no Hot Car Operators were brought to testify for the Union on the issue of alleged lack of coordination between hot-car movements and those of the Payloader Operator. It says that should bear against grievant on that point, as it allegedly shows that the situation is not so chaotic between the two pieces of equipment as the picture presented by the Payloader Operator witnesses would have it.

Management stresses that, while out at the site, grievant mentioned only steam as making it unsafe to wear safety glasses. But, once in the office, he became a man in search of a reason to support his claim and began listing many other items relating to condition of the payloader. Apparently at Payne's questioning, grievant then said he had operated different equipment on Monday and Tuesday.

On nearly all phases of these arguments, the Company stresses grievant's behavior even on nonessential aspects of the problem, which it sees as nervous, irrational, uncontrollable, provocative, defiant, and uncooperative. It cites grievant's behavior on November 10 as confirming all that. It says grievant also has a clear tendency to take matters into his own hands. It notes that Foremen King and Thompson had little or no prior experience with grievant and, therefore, that they had no reason to fabricate their versions of what happened simply to get grievant into trouble.

The Union highlights analysis of this problem with the warning that this is a discharge case, in which Management necessarily must pull the laboring oar. The Union notes that Company Exhibit 22, the Safety Orientation sheet allegedly given to grievant, says nothing about any procedure at the emergency wharf that would prohibit the payloader from being at the east wall, unless the hot car were in the quench station. The Union scoffs at Thompson's testimony that he explained such rules to grievant on the basis of a handwritten note he had found in a file cabinet. No such paper was submitted. All Union witnesses say there was no

such rule before this event, but that it was established afterwards. The Union says that if that sensible procedure had been in effect at this time, this problem never would have developed.

It is argued also that Company Exhibits 29-A and -B, picturing conditions on November 10, 1983, show that steam conditions can be severe at any given time.

The Union argues that grievant consistently sought safety relief, and it says that is not insubordination. It notes that grievant's pass was not pulled, that he was told to return the next day, and that he was allowed to have the oral complaint grievance form filled out, all said to show that King and Thompson were not then thinking of insubordination.

Next came word of the impending Indiana OSHA inspection that afternoon. The Union charges that changed Management's attitude toward grievant and caused it to retaliate against him by deciding to discharge him.

The Union sees the number and high-level status of Management representatives at the October 6 meeting as legitimately creating concern on the part of Grievance Committeeman Mosely and grievant. Right or wrong on the contractual propriety of any of that, they naturally felt outnumbered and outgunned and grievant saw that as unusual preparation for his meeting which allegedly would not have been planned and carried out for any other employee.

The Union says it is unusual on Management's part in conducting a realistic investigation of the October 5 event and grievant's claim that his payloader nearly was hit by the hot car, that no Company representatives ever went to the Hot Car Operator to ask him if that claim were accurate. It argues it was Management's duty to do so and not the Union's. It stresses that walkie-talkie radios were not given to the Payloader Operator, so that he could communicate directly with the Hot Car Operator.

The Union cites the conduct of the Plant Protection officers on November 10 as showing the claimed irresponsibility of Management toward grievant.

The Union cites Inland decisions for the proposition that the belief of an employee that conditions are unsafe within 14-6 is not to be countermanded or judged by what someone else may think or by what the ordinary reasonable employee might think.

Management notes there has been only one minor accident involving the payloader at the emergency wharf since that equipment began in this operation, apparently in 1974.

Substantial aid in helping the Arbitrator to visualize the geography and potential safety problems of the emergency wharf and of the nature of the hot-car and payloader operations was gained at a visit to the site with the parties' representatives and grievant before these hearings began.

FINDINGS

In order to isolate the hinge issues, it will help to dispose first of several that are not critical, and that will require proceeding in reverse chronological order.

The events of November 10 are not directly in issue here. Grievant already had been discharged, and the Company added no new charges against him arising from them. Although it did allege his behavior then was an act of post-discharge insubordination, and he seeks no relief here about any of that. The Company and grievant, however, see those events as confirming previously held opinions about the petulance of one and the irresponsibility of the other. The Company urges they demonstrate grievant's rigid refusal to cooperate, and grievant says they show how vicious Management is in dealing with him.

But, although grievant may have been rigid then, that was not necessarily a fault in those circumstances. Management had given grievant permission to take pictures, and he did so with his own camera and film. They did not cease being his personal property just because the Company then realized its mistake, changed its expressed mind, and told grievant to stop photographing. He did so, but the film still was his. At least, the Arbitrator was given no analysis of the Indiana law of personal property, or of Federal law, if that somehow should be applicable, that would suggest the contrary. Accordingly, rigid though it may have been of grievant to refuse to give up the film, nothing in this record would support the conclusion that there was any breach of external law or of the law of the Agreement in his doing so. It is not necessary to decide here that Management, having been the prime mover in creating the impasse, should not have continued its perhaps overly technical insistence upon its no-photographing rule and should have allowed grievant to keep the film and to depart without use of physical force, and no such decision is made here. It is sufficient to say that, whatever the merits of that situation might be in some other forum, nothing in the Company's actions that day justify its argument here that grievant was solely in the wrong then or even that he somehow was more wrong than it was.

It is surprising, however, in light of grievant's repeated insistence that the pictures he took that day would prove his innocence, that he did not exhibit them at the arbitration hearing.

There were specific statements made that day, however, that could shed light on the credibility of witnesses as to other, more central issues, and they will be employed when relevant hereafter.

The situation of the aborted October 6 investigative meeting is different from that of November 10. The Company has charged grievant with insubordination that day by his refusing to testify at that hearing and for refusing to return to it as instructed.

This event, too, was clouded by four factors that make it difficult to find in it the kind of flat refusal of, or failure to heed, a Management direction that is required for insubordination. First, this was not a work situation out in the plant. It was at least an 8.4 meeting, and that brings into play some adversarial elements that are not present in a foreman's directing an employee to perform a task in a given way. Second, there was, indeed, a rather formidable array of Management personnel, both in status and quantity, that well could have overawed the Grievance Committeeman and grievant. Whether or not there was any strict, contractual impropriety in the status and quantity of the Management representatives who were present at that meeting, and there was none, and whether or not the Union was entitled to have more, and it was not, the concerns expressed by Grievance Committeeman Mosely and grievant were at least understandable. Third, and most importantly, grievant asked if he could leave and was told that he could. He did so. It may be that he did hear either Busch or Ambry tell him to return, but this situation, too, already had been muddled by grievant's having been told he could leave. Finally, Busch agreed that the reason he wanted grievant to come back was so that he could make it clear to him that, if he left, it would subject him to another charge of insubordination. That shows that Busch, too, was less than certain that grievant did understand or reasonably should have understood that. This is where the first factor becomes especially important. This was not a supervisor's telling grievant to use a pick and not a shovel, for example, out at the work site. This was a meeting, with a Grievance Committeeman present, to hear and decide a possible disciplinary situation. After Grievance Committeeman Mosely and grievant had been fully advised later by more experienced Local Union representatives, both attended the October 10 meeting, and everything went as it should.

Accordingly, in light of all circumstances of the October 6 event and in view of Management's burden of proof in this situation, it could not be found that a preponderance of the evidence shows grievant to have been insubordinate in his leaving, or refusing to return to, the October 6 meeting. It should be noted that this finding does not depend on any credibility determinations but relies entirely on the Company version of what occurred.

It is clear, next, that grievant's charge that Management's actions in these events were motivated by intent to discriminate against him because of his Union activities or because of his national origin totally failed of proof.

It is necessary now to face the events of October 5. It must be determined whether or not the claim of 14.7 safety relief was made in good faith. In this analysis, the Union is right in urging that it is not necessary to grievant's success that he be objectively right in his claim, or that other employees would have made the same claim, or that the ordinary, reasonable employee would make such a claim. Some or all of those factors may be relevant to the ultimate determination, but none are conclusive. It would be sufficient if grievant had a good faith belief that he was being required to work under conditions that were unsafe or unhealthy beyond the normal hazard inherent in the operation. In addition to the factors stated above, which may be relevant, additional pertinent considerations would be the actual accident and injury history of the operation and all of grievant's verbal and non-verbal behavior at or about the time of the claim.

Here, the emergency wharf has been used as a surge-bin factor in allowing pushing and quenching to go on, even though the regular wharf were down, for about thirteen years before this event and for about four years with the east wall in place, and in all that time no employee ever had requested safety relief from this job. It would be difficult to conclude that never in all that time had steam conditions been as bad as grievant said they were on the morning of October 5.

It should be clear in this regard that pictures of steam on the afternoon of that day, on November 10, on May 16, 1984, or the Arbitrator's observation of the steam on May 21, 1984, really are not directly helpful here. Every time a picture of apparently severe steam conditions was shown, Company witnesses would say they were not that bad on the morning of October 5, and every time a picture of very slight steam was shown, Union witnesses would say it was much worse on the morning of October 5. Thus, the only pictures, and there were none, that would be genuinely helpful here would be pictures of steam conditions for fifteen or thirty minutes from 8:00 to 8:30 a.m. on October 5.

Various pictures were helpful, as was the plant visit, but only to show what range of steam conditions might be expected and what effect they might have on safety of the operation. Those considerations make it

clear that steam can vary from slight and quickly dissipating, depending upon wind, so as to have almost no effect on safety or pace of the operation, through what might be called average thickness, which might obscure vision somewhat and require the Payloader Operator to hold up for some seconds now and then, to very severe steam that would extend higher above ground and would totally envelop the payloader, so that it could not be seen by one observing from outside the cloud and so that the Payloader Operator literally would be blinded within a white cloud and necessarily would have to cease operations more frequently and for longer periods of time. The latter condition also necessarily would cause fogging of safety glasses, from condensation of steam on them. All agree that when that occurs, and it does, the Operator simply must stop, remove his glasses, and wipe them clear, since he cannot see with them fogged. Indeed, within such an enveloping cloud of steam, he could not see through the steam, with or without glasses. But he would not be able to see with fogged glasses on, even after the steam had dissipated, if he would not take them off and wipe them clear. The record shows also that, other things being equal, steam is likely to be more severe in cold weather.

All that is said, not to show that steam conditions were good or bad on the morning of October 5, but only to make it clear that the steam conditions that grievant described are possible and do occur, so that he was not describing something that could not arise and had not arisen in the past. Moreover, the parties' stipulated measurements of very slight hot-car overhang if the pay-loader were parallel to the hot-car tracks and at the east wall, and even greater overhang if it were pivoted, show that the hot car could hit the payloader.

But claims of Union witnesses that the hot car had hit the payloader on several occasions in the past, but that those events never had been reported to Management because the employees were afraid if they reported them they would be sent home, as for a disciplinary offense, must be discounted seriously. It is not reasonable to conclude that employees, members of a strong and alert Local and International Union obviously capable of asserting and protecting their legitimate interests, would subject themselves to the hazardous conditions described here because they were afraid of Management. They well might be afraid, and much more so, of the alleged safety hazards than of Management's supposed disciplinary retaliation. There was no evidence that anyone ever had claimed safety relief from this job and, therefore, no one could have been disciplined for that. All Union witnesses agreed they knew of no one who ever had been sent home for claiming safety relief at the emergency wharf. The ordinary operation of Paragraph 14.7 might cause loss of work and pay if Management chose not to assign the employee to other work, but that, too, is taken care of by the pay provided in the last sentence of 14.7 should the claim of unsafe conditions ultimately prevail.

Next, there never has been an injury to a Payloader Operator at the emergency wharf. That goes a long way to undercut grievant's claim that defects and inadequacies of payloader "801" caused him to believe that the work was unsafe within 14.7. Union testimony made it clear also that the broken or missing window glass on the equipment did not have that result, for Union witnesses say they have operated it under that condition and that, even on equipment with sound windows, they sometimes operate with window or door open. Moreover, those witnesses made it clear also that even with all openings sound and closed, steam cannot be kept out. If it is severe, it would fog the windows outside, as it would fog safety glasses inside. Other factors mentioned later by grievant do not establish his good faith belief in unsafe conditions within 14.7. Grievant did not state them as causing that result when he was out at the equipment, and he was master of his claim then. That is, that the hot car was not locked out, that there was no central, automatic fire-extinguishing system, that there was no automatic float leveler on the payloader, and that the fuel tank was on the bottom, did not create such a condition. All those circumstances have existed since this equipment was put in service, and there have been no accidents or injuries arising from them, and no Operator ever has requested safety relief because of them. Moreover, grievant operated "801" in the same condition on Monday. This is not to say that any or all those conditions are ideally safe, which 14.7 does not require, but only that they do not create conditions that are unsafe beyond the normal hazard inherent in the operation and do not support grievant's claim that he had a good faith belief that they did create such conditions.

Finally, on this point, grievant agreed he would return to and operate payloader "801" if Supervision would provide a "safety man." It is clear that the proposed function of this "safety man" would be to act solely as a lookout, to warn grievant of dangers caused by steam and the hot car. He would have had no relationship to conditions of the payloader windows, position of its fuel tank, absence of an automatic float leveler, an automatic fire extinguisher, and such factors of equipment of the payloader. This shows that all grievant's later suggestions along that line were not central to his claim, not even in his own mind.

Accordingly, the legitimacy of grievant's claim turns solely on his thought, expressed out at the site that morning, that steam conditions were so severe then that, in light of the passing hot car, it was unsafe within 14.7 to operate the payloader with safety glasses on. Indeed, if steam really were that bad, it is not easy to see what safety glasses would have had to do with all this, for it would seem clear that grievant could not have seen to operate safely within the steam and free of the hot car, even without safety glasses.

All appear to agree that the present operating system, established by published Job Safety Analysis, requiring that the Payloader Operator stay away from the east wall while the hot car is not in the quench station, is a very significant improvement in safety conditions, and it was suggested that, if it clearly had been published to Operators, including grievant, at the time, this problem would not have developed. The Company says all Operators, including grievant, were so advised orally, but that is sharply disputed. It should not have been left to the possibility of assertion and denial, as can occur with oral advice. Operator's and foremen's signatures on a Job Safety Analysis, stating that requirement in writing would eliminate this kind of squabble. It is probably true that not all safety elements of any job can be expressed in a written Job Safety Analysis, but that clearly has no bearing here, for this requirement or an equivalent of it now is so stated in a published procedure, but it was published after this event.

Thus, it is possible that steam could have been so severe on the morning in question that grievant really could not see, with or without safety glasses, and it clearly is possible for the hot car to hit the payloader. Accordingly, the safety concern that grievant expressed was not sheer fantasy; it could happen. But, 14.7 does not require that there be no danger. It allows employees to claim safety relief only if they believe in good faith that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazards inherent in the operation, and the issue on this phase of the case is whether grievant had such a good faith belief on the morning of October 5 if he had operated the payloader, with or without safety glasses.

The preponderance of the evidence shows that he did not, as demonstrated by the following analysis. It is clear that Payloader Operators regularly are required to, and nearly always do, wear safety glasses and hard hats while operating the payloader at the emergency wharf. But, for purposes of this resolution, the hard hat may be ignored, because it has nothing to do with steam conditions and was not stated by grievant as a safety factor in his safety-relief claim. Moreover, he put it on when Thompson told him to.

Grievant seemed to think it important that, as he said, Thompson had not told him before operations on Monday, Tuesday, or Wednesday, that he must wear safety glasses while in the cab of the payloader. Thompson says he did so, but let it be assumed that he did not and that grievant was right on this specific point. That would have little to do with grievant's duty to wear them in the cab on Wednesday, for grievant agrees that Thompson told him to do so then. Grievant appears to assume that unless Thompson earlier had told him to do that, on Monday or Tuesday, he could not require it on Wednesday, but there is no support for that. Whatever grievant or any other employees were told before or thought before, would not excuse grievant's not obeying Thompson's order on Wednesday. Let the most extreme case be assumed, from grievant's point of view, that Management had changed its mind and on Wednesday was requiring safety glasses in the cab which had not been required before. That would give grievant no right to disregard Thompson's order. Management still had the right to require them then, and grievant had the obligation to heed the direction. Thus, all the argument about what grievant and others may have been told before is beside the point. Moreover Union witnesses made it clear that all Operators, indeed, were aware of the necessity to wear safety equipment in the cab and that all Operators did so. Furthermore, and in any event, the significance of the safety glasses has been reduced considerably since, if steam had been as bad as grievant claimed, he could not have seen through it, with or without safety glasses.

By the same discussion in the office that morning, grievant learned also no matter what he may have thought or been told before, that he was prohibited from being at the east wall while the hot car was not in the quench station. Thus, with no necessity to be at the east wall when the hot car was not in the quench station, much of grievant's safety concern evaporated, even if the steam had not. And on this point, it must be stressed that the finding here is that grievant made a bad faith claim for safety relief and was sent home for insubordination on the basis of what he knew from Thompson and King as of the end of their discussion in the office, and that had made it clear that the Payloader Operator was not supposed to be at the east wall unless the hot car were in the quench station.

But this resolution need not be put on those grounds alone. Grievant's actions and statements that morning convict him of not believing in good faith that he was being required to work in conditions which were unsafe or unhealthy beyond the normal hazards inherent in the operation. There are contradictions within

his telling and between his and that of other witnesses, including Union witnesses, which make it difficult to accept his version with any confidence.

He says he left the equipment and tried to call Thompson to tell him the operation was unsafe but could not get him. But he did not tell anybody else about that, not even the Hot Car Operator, who allegedly had nearly hit him, who was right there, and who had radio communication with Supervision. It would not have been difficult at all for grievant to have spoken to the Hot Car Operator.

It is necessary to remember that grievant says he considered this to be a very serious safety problem. Yet, what did he do after his alleged calls to Thompson? He returned and got back on the payloader and began operating it again. That is not consistent with a good faith belief that operating the equipment was unsafe beyond the normal hazard.

Moreover, when grievant later was pressed in the office, he began to throw up a thicket of allegations having nothing to do with steam, safety glasses, or the hot car. He says he should have had green, flame-retardant clothing, that the emergency wharf was a "regulated area" within regulations of the United States Occupational Safety and Health Administration, requiring that employees wear respirators there and that there be an air-conditioned retreat for employees to resort to, plus all the points already mentioned about the allegedly faulty design and condition of the payloader. None of them were related to steam or the hot car, and grievant had operated the same machine before in that very area.

When pressed about what was different and unsafe on Wednesday that had been acceptable on Monday and Tuesday, grievant said that he had not operated the same payloader those days and that he had been only the Relief Operator then. Both claims were inaccurate. Grievant had operated payloader "801" on Monday, and he had been the primary Operator and had made the pre-operation check of the equipment on Monday and Tuesday.

Moreover, grievant's and Payne's testimony conflict. Grievant said it was not until Payne got out to the site on October 5 that he wrote on the form, "Safety man acknowledges unsafe condition." Payne, to the contrary, said he wrote that on the form while still in the office and before going out to the site.

Indeed, Payne, too, clearly was led to believe by grievant's statements on October 5 that the safety problem was with the specific equipment, payloader "801," and not with the steam, since he said that grievant had said then that steam on Wednesday was the same as it had been on Monday and Tuesday. Payne thus thought that, if grievant had been furnished with a different machine then, the problem would have gone away. That at least suggests that grievant's "steam" claim was not convincing then, not even to Payne.

It is noteworthy also and quite consistent with grievant's not having his safety glasses and hard hat on, that he admitted that he thinks Management's putting him in operation of the payloader carries with it a grant of discretion to him to decide for himself whether or not safety conditions require that he wear that safety equipment while in the cab. That shows that grievant wants to decide for himself what safety equipment he will wear and when he will do so and that he, and not Management, will control things. That is not where the Agreement has placed authority to manage the plant and to direct the working forces. It places that authority in Management. Chaos would result if each individual employee were free to decide for himself what safety requirements he would heed and when he would heed them. If he has a good faith belief that he is being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation, he is entitled to relief and to be free of the risk, with the chance of other work or not, at Management's discretion. But, the mere voicing of the claim is not enough. If the evidence shows that the claim of unsafe conditions was not made in good faith, the situation becomes one of insubordination, subject to appropriate discipline, and that is this case.

Grievant claims that King actually had granted him safety relief at the beginning of this whole episode, but that is not persuasive. The entire discussion out at the site and in the office makes sense only on the basis that grievant was not granted safety relief. All that Thompson and King said, even that part with which grievant agrees, is inconsistent with their having granted him safety relief, and the same must be said of the filling out of the oral complaint grievance form.

The Union argues that grievant was not aware he was being charged with insubordination, but the evidence is against that. The testimony of Thompson, King, DeLeeuw, and the Plant Protection records show clearly enough that that was stated several times to grievant by King and Thompson. Grievant says Sergeant DeLeeuw said it first, but that is not convincing. Let it be assumed, however, that that was the case. How could it help grievant? It still would be the case that operating supervisors had adopted a suggestion of a Plant Protection Guard and then had charged grievant with it. That still would be a charge by Supervision that grievant would have to deal with and would be, in these circumstances, the same as a charge initiated by operating Supervision.

Accordingly, grievant's claim was not made in good faith and, therefore, he was insubordinate. Grievant appears to feel that all he had to do was voice a claim for safety relief and that would insulate him from a charge of insubordination. He is wrong in that. The mere mouthing of the significant words is not enough, if the preponderance of the evidence from whatever source does not show that his claim was made in good faith. Thus, contrary to grievant's apparent belief, the fact that he made such a claim is only part of the concept. It must be established also that the claim was made in good faith, and here that has not been established.

That brings us to the dispositive issue. That is, Management charged grievant with two separate acts of pre-discharge insubordination as causes for his discharge, and one act of post-discharge insubordination, said to be relevant in deciding whether or not discharge was appropriate or should be modified. Thus, two acts of insubordination were charged, and only one panned out. The October 6 charge did not survive examination. Moreover, the November 10 events showed no insubordination by grievant. Accordingly, one of the two alleged causes of the discharge failed, as did the single charge of post-discharge insubordination, which was claimed to have proved that any thought of modification of the discharge penalty should be dismissed. With the record in that state, the discharge cannot stand, since grievant was not guilty of all that was charged.

It nevertheless remains clear that some very serious and substantial disciplinary penalty must be maintained since, although not guilty of all that was charged, grievant did commit a serious insubordination offense in manufacturing and escalating to the status of a major cause a baseless claim of lack of paragraph 14.7 safety, which claim, if he had allowed it to be discussed calmly and rationally, probably would have been resolved on the morning of October 5.

Review of the relevant incidents of past discipline that stand as final against him in grievant's record shows that he sometimes has, for whatever reasons of personality or misplaced ideas of where authority lies in direction of the working forces, serious inability to abide by Article 3 and to allow Management to run the plant. There is a tendency shown in that record and in some of the Exhibits introduced by grievant in his Exhibits 1 through 82-150 that, if he has any legitimate part to play in discussing or resolving a problem, sometimes to seek to take over supreme direction of the matter from both Management and Union representatives above him in the chain of authority. His self-righteousness and over-zealousness sometimes run riot and, while that stirs up lots of controversies, it resolves very few matters.

In any event, grievant must finally understand that he cannot engage in self-help when things are not done wholly his way, that he cannot mask failure or refusal to abide by legitimate directions behind unjustified claims of unsafe conditions under paragraph 14.7, and that neither his relatively long service nor his Union representational status can protect his continued employment relationship if he should again be guilty of violating legitimate Management rules of employee behavior. Thus, without any intent to develop a general rule for disposition of such problems--no such general rule could be developed for all cases--it seems that a prolonged period of suspension without pay should be maintained, sufficiently long to impress grievant one more time of the necessity to obey and grieve, and that a period of ten months' disciplinary suspension without pay will be appropriate for that purpose.

Grievant must be made to realize that he is returning to his employment relationship more as a matter of good luck than of his good behavior and that he must reform the latter if he wishes to continue with the Company.

Accordingly, since in the peculiar circumstances of this case grievant was not guilty of all that was charged, his discharge was not for cause, and the grievance will be sustained in part, to the extent that grievant shall be returned to his employment status, but the ten-month period from October 5, 1983, through August 5, 1984, shall be a period of disciplinary suspension without pay. Grievant shall be made whole from August 6, 1984, until returned to work by receiving such earnings and other contractual benefits as he would have received except for his discharge, and offsetting such earnings and other amounts as he would not have received except for such discharge. Nothing said in this paragraph speaks to anything but returning grievant to work as a result of the partial sustaining of this grievance and does not intend to affect any other problem that may arise.

AWARD

The grievance is sustained in part and to the extent stated in the last paragraph of the accompanying Opinion.

/s/ Clare B. McDermott

Clare B. McDermott

Arbitrator

