

Arbitration Award No. 764
IN THE MATTER OF ARBITRATION BETWEEN
INLAND STEEL COMPANY

Indiana Harbor Works
and

UNITED STEELWORKERS OF AMERICA

Local Union No. 1010

Grievance No. 24-R-104

Arbitrator: Clare B. McDermott

Opinion and Award

March 20, 1986

Subject: Discharge--Sleeping On Job--Last-Chance Reinstatement.

Statement of the Grievance: "The aggrieved, Michael Mihailidis, Payroll No. 7785, contends the action taken by the Company, when on May 17, 1985, his suspension culminated in discharge, is unjust and unwarranted in light of the circumstances.

"Relief Sought - The aggrieved requests that he be reinstated and paid all monies lost.

"Violation is Claimed of Article 3, Section 1, and Article 8, Section 1."

Agreement Provisions Involved: Article 3 of the March 1, 1983 Agreement.

Statement of the Award: The grievance is denied.

Chronology

Grievance Filed: 5-20-85

Step 3 Hearings: 6- 4-85, 6-14-85

Step 3 Minutes: 11-19-85

Step 4 Appeal: 12-9-85

Step 4 Hearings: 12-6-85, 1-16-86

Step 4 Minutes: 2-20-86

Appeal to Arbitration: 1-29-86

Arbitration Hearing: 2-24-86

Appearances

Company

Robert B. Castle, Arbitration Coordinator, Labor Relations Department

John Beuhler, Turn Supervisor, Mobil Equipment Services Department

James Rowe, Turn Supervisor, Mobil Equipment Service Department

James Abolt, Representative, Labor Relations Department

Katie Woods, Secretary, Labor Relations Department

Union

Bill Trella, Staff Representative

Bobby Joe Thompkins, Acting Chairman Grievance Committee

Don Lutes, Secretary Grievance Committee

Mike Mihailidis, Grievant

Jack Thill, Griever

Jim Thill, Steward

Bill Winstead, Witness

Andy Taylor, Witness

BACKGROUND

This grievance from the Mobile Equipment Services Department of Indiana Harbor Works claims that grievant's discharge for alleged sleeping on the job, failing to conform to the earlier "last chance" reinstatement agreement, and for his overall unsatisfactory work record, was without cause, in violation of Articles 3 and 8 of the March 1, 1983 Agreement.

Grievant began with the Company in 1974 and was working as a Mechanic on day turn of May 2, 1985.

Grievant's assignment was to drive service truck No. 915 to service other vehicles by starting them and by answering repair calls in the field. At the beginning of the turn grievant thus had to go to the end-dump lot and start some of the twelve to twenty fifty-ton dump trucks by air compression or by battery jump.

Mobile Equipment Services First Line Supervisor Beuhler, was taking another employee and some equipment in his truck to a parking lot. He saw grievant's 915 truck from a distance of 200 to 300 yards at about 7:20 or 7:25 a.m. He called grievant on the radio several times but got no answer. He became curious

about that. He dropped off the employee and the equipment and returned to the end-dump lot and by then it was perhaps 7:45 a.m., and he saw grievant's truck sitting in the same place. Beuhler parked his truck and walked over to grievant's. Grievant was sitting in the passenger side. Beuhler opened the door, cranked the window down, reached across grievant and turned up the volume on the radio, and asked grievant if he felt all right and if he had had enough sleep. Beuhler says he did that because he had not been able to raise grievant earlier by radio and because grievant seemed slow and drowsy in his reactions and not as alert as he ordinarily would be. Beuhler could hear that grievant's truck radio was working. Grievant said he had had sufficient sleep and felt well. Beuhler told grievant to stay alert, gave him an assignment of starting a tandem-axle truck, and left. At the hearing this was called the first encounter between these two that day. Beuhler says he was in the garage office, and at approximately 9:22 a.m. he called grievant by radio to tell him that two trucks had to be started. He could not raise grievant on the radio. Beuhler went to his truck to begin driving around looking for grievant. He found him at what is called Heckett Row. Beuhler drove up beside grievant's truck and from the north. Grievant's truck was facing north, so that their drivers' side windows were beside each other. Beuhler says he thus was within two and one-half feet of grievant, who was in the driver's seat of his truck, and that both windows were down. Grievant was slouched down in his seat, with his left arm on the door, and his head down in the palm of his hand, in a sleep-like position. Beuhler called grievant's name out loud in what he says was a normal tone, and grievant did not respond. Beuhler called grievant's name again at a louder level, and again there was no answer by grievant. The engines of both trucks were running. Beuhler got out of his truck. Grievant had not moved. Beuhler stood one and one-half feet from grievant and called his name again, and still grievant did not respond. He had not moved and still was sitting in the same slouched position, with his head down. After Beuhler called grievant the third time, with no response, he reached in and grabbed grievant's jacket at the left shoulder and shook it and called his name again. Grievant still did not respond or move. Beuhler shook grievant again and called his name, and grievant finally responded by turning slowly toward Beuhler in what he says was a disoriented way and said, "What?" Beuhler concluded that grievant had been asleep, and he told him to park the truck and come to the office because he wanted to charge him. Beuhler went to his truck and then to the office. This was called the second encounter.

Beuhler told his superior, Assistant General Foreman Kelly, that grievant had been asleep and that he expected grievant to arrive in the office soon.

Beuhler and Kelly waited about ten minutes, but grievant did not arrive. Beuhler was looking out a window facing east and saw grievant driving south in his truck (915) on the road to the scrap baler. Beuhler got in his truck and went off, searching for grievant. He found him in his truck near 7 door of the garage.

Grievant's truck was stopped facing northwest, behind a manhauler bus, which was stopped at a gasoline island. Beuhler pulled up to the left side and slightly behind grievant's truck. Beuhler got out and went to grievant's truck. Grievant was in a position on the driver's side, virtually identical to the position he had been in on the second encounter at Heckett Row ten or fifteen minutes earlier. That is, grievant was slouched down with his head in his hand. Beuhler called grievant's name several times but got no answer. He grabbed grievant's jacket at the shoulder and tugged and shook it till grievant responded. Beuhler told grievant he was charging him with sleeping and being in an unfit condition to work, and that he should park the truck and come to the office. Grievant protested mildly. This was called the third encounter.

At the office grievant was charged with sleeping and being in an unfit condition to work. Plant Protection was called. Beuhler and Assistant General Foreman Kelly discussed sending grievant to the Clinic to be checked for fitness to work. Beuhler left and had no more part in these events.

Grievant was taken to the Clinic, and the Company says he failed an apparently oral patient-assessment examination but passed a breathalyzer and a urine drug test.

The next day, grievant was suspended preliminary to discharge for sleeping on the job, failing to conform to the earlier "last chance" reinstatement agreement, and his overall unsatisfactory work record. The suspension was converted to discharge on May 17, 1985, and this grievance followed.

Beuhler testified at the hearing that, although he could not see grievant's eyes on either of the second or third encounters, because grievant's head was down, there was no doubt in his mind that grievant was asleep on the two latter incidents, and the reasons for that belief are said to be the fact that Beuhler had to call out grievant's name several times and to shake him vigorously both times in order to get him to raise his head and respond.

During his last five years of work, grievant's absenteeism record was as follows:

"1980 - (since 5-3-80) 107 turns (105 extended absence, 1 sick, 1 tardy)

"1981 - 8 turns (5 sick, 1 other, 2 tardy)

"1982 - 52 turns (40 extended absence, 4 sick, 1 personal, 2 tardy, 5 early quit)

"1983 - 88 turns (73 extended absence, 7 sick, 1 failure to report off, 1 transportation difficulty, 2 other, 1 tardy, 3 early quit)

"1984 - 70 turns (60 extended absence, 1 sick, 1 transportation difficulty, 2 other, 5 tardy, 1 early quit)

"1985 - (until 5-3-85) 6 turns (3 sick, 3 tardy)"

Over the same five-year period grievant had the following disciplinary record:

"Date	Infraction	Action
"3-10-81	Failure to work as scheduled	Reprimand
"1-6-82	Failure to wear safety shoes	Discipline - 1 turn
"5-10-82	Failure to work as scheduled	Reprimand
"9-2-82	Failure to work as scheduled	Attendance Review with Assistant General Foreman
"9-2-82	Unsafe work performance	Discipline - 2 turns
"11-2-82	Sleeping	Discipline - balance of the turn plus one additional turn
"6-26-84	Unsafe work performance	Safety Warning letter
"12-5-85	Overall work record	Record Review
"4-22-85	Failure to work as scheduled, sleeping and unsatisfactory overall work record	Suspension preliminary to discharge (continued in employment on last chance basis 4/26/85)
"4-29-85	Overall work record	Record Review"

Grievant's immediately prior disciplinary problem saw him suspended preliminary to discharge on April 22, 1985, for sleeping and for excessive absenteeism. Four days later the Company agreed to continue grievant in employment but on a last-chance basis, as recorded in a letter of April 26, 1985, reading as follows in pertinent part:

". . .it has been decided to give you one final chance to prove you can be a responsible employee based upon the following conditions:

"1. You will meet with your department manager or his designated representative upon return to work for the purpose of reviewing your record.

"2. All time lost by you as a result of your suspension up to the date you are placed on the work schedule, shall constitute disciplinary time off.

"3. You are to contact your department for your work schedule for the week of April 28, 1985 upon receipt of this letter.

"This decision is made with the understanding that any repetition of the conduct which led to this suspension or violation of other Company rules or regulations will constitute cause for your suspension preliminary to discharge."

Those employment conditions were reviewed by Management with grievant on April 29, 1985, grievant's first day of work after his suspension. The Company stresses that it was only three days later that grievant got into the present difficulties.

Grievant says that what was called the first encounter on May 2 arose as follows. He says he received no radio calls from Foreman Beuhler. He was starting a truck at the end-dump lot at about 7:30 a.m., when he saw Beuhler drive past. Grievant then was sitting on the passenger side of his truck, waiting for the compressor to build up sufficient pressure to start the truck. Beuhler returned at about 8:00 a.m., when grievant just had finished starting an end-dump truck by compression. Grievant then was sitting in the driver's side of his truck, since he had had to move the truck in order to allow an end-dump truck to leave. The window was up, and grievant was waiting for the next truck. Beuhler drove up from in front of grievant. He came to grievant's truck, opened the door and, without any explanation, said there would be no damn sleeping, reached across, turned up the volume on the truck radio, and asked grievant if he had had enough sleep. Grievant said he had had sufficient sleep. Beuhler left.

Grievant says he was alert then, having eaten breakfast at a diner before coming to work that morning.

Grievant says he finished his starting tasks at the end-dump lot at about 8:30 a.m. As he left, a tandem Driver flagged him, and he started that truck, which activity took twenty or twenty-five minutes. Grievant does not recall who that driver was or what he looked like.

Grievant drove around and saw a V-bottom truck that had to be started. It then was close to 9:00 a.m. This chore took some time, since the truck would not start by a jump-start. Grievant discovered a terminal was

bad and had to change it. Grievant is not sure who that driver was or what he looked like. All that took about thirty minutes, and grievant took a coffee break. Thus, it then was approximately 9:25 or 9:30 a.m. Grievant drove around and heard that a truck at Heckett Row had to be started. Grievant went there, started it, and left.

Grievant thus claims that all the while Beuhler says he encountered him at Heckett Row (encounter #2) he was not there but was starting the V-bottom truck on baler road. Accordingly, while he agrees he was at Heckett Row at some time that morning, he says it was not at the time Beuhler said it was and, in any event, he insists that Beuhler did not "encounter" him at Heckett Row, so that he contends there was no encounter #2, and that Beuhler's account of that is an outright lie.

Grievant then went to the site of 7 door at the garage, and he says he was stuck there behind a bus. Truck Driver Dale said his truck needed a start. Grievant was sitting in the driver's seat, with his elbow on the windowsill and his head in his hand when Beuhler came up, put both hands around his left biceps, and said, "You son of a bitch, mother fucker, what the fuck is wrong with you?" Grievant put up his hands and said he did not want to argue with Beuhler. Beuhler became more angry and said, "Park the fucking truck and get your fucking ass in the Office."

At the Office, Kelly said he was sending grievant home and suspending him for sleeping. Grievant said nothing.

Grievant states that at the Clinic he was given a breathalyzer test and gave a urine sample. He was taken to another part of the Clinic, where a Nurse had him walk a heel-toe-heel-toe pattern, and he passed it, as he did the breathalyzer and urine tests. As the Nurse was taking his blood pressure, she was joking with someone else there, and she asked grievant who the President was, and he thought she was joking and replied that it was Abraham Lincoln. The Nurse asked what country they were in, and grievant still thought it was a joke, and he said it was Mexico, and the Nurse laughed. Grievant then was taken to the gate. Grievant says that he stopped behind the manhauler bus at 7 door, and Truck Driver Dale said his truck had to be started but that he was in no hurry. Thus, grievant rested a few minutes while he waited behind the manhauler bus. Grievant says Beuhler did not just "jostle" him but that he grabbed his biceps with both hands. Grievant said nothing at that encounter.

Grievant said that at the first encounter, Foreman Beuhler approached him and told him, suddenly and without reason, not to sleep. He said there was no provocation also for Beuhler's grabbing him at the third encounter. He said he did not object to that at the time but that he became extremely indignant about it by the time of the Step 3 Meetings. He says that, since he had been guilty of no misconduct, he was puzzled by Beuhler's directive to report to the Office, but he did so without saying anything.

Grievant charged that Foreman Beuhler fabricated phony accusations against him in order to protect himself.

Beuhler denies using profanity against grievant, but he admits he did say at the third encounter, "God dammit park the fucking truck and get in the office." He says those words were spoken out of frustration and displeasure at the situation and not out of ill will toward grievant.

The Union stressed the alleged events and statements at the Clinic. The Company disputed some of those alleged happenings there but, in any event, it says that grievant passed the breathalyzer and urine tests, and that nothing that went on at the Clinic played any part in this suspension and discharge.

Grievant denies he was sleeping or inattentive to his duties. He says, indeed, that Beuhler did not accuse him of sleeping at the third encounter and, since he claims there never was any second encounter, he says he was not accused of sleeping until he got into the Office with Assistant General Foreman Kelly.

Grievant says also that at the third encounter Foreman Beuhler put his hands on him in an abusive manner, even though grievant had done nothing to provoke that.

The Union stresses that it does honor "last chance" agreements, but it notes that when the basic facts are in dispute as to whether or not the current event took place, it must challenge the Company's action, since it is the Company, of course, that has the burden of proving its charges.

The Union notes the testimony of Beuhler and several of its witnesses, to the effect, with over 200 Truck Drivers and Supervisors on the same radio frequency, that radio traffic sometimes, especially at the start of the turn in the morning, is very heavy, so there was nothing unusual about Beuhler's not being able to get in touch with grievant by radio.

The Union points out that Beuhler said he never saw grievant with his eyes closed, since his head was down. It then wonders how he could charge grievant with being asleep.

Driver Taylor testified that he saw grievant pull up at 7 door (third encounter) at about 9:30 a.m. He was there because his truck would not start. He did not speak to grievant. Taylor says he saw Foreman Beuhler

pull up about two minutes after grievant had stopped there. Taylor's truck was stopped 100 to 150 feet from grievant's. Taylor was too far away from grievant and Beuhler to hear what was said by them. He could see Beuhler's hand reaching into grievant's truck several times, but, he could not see if Beuhler were shaking grievant. Taylor was looking from a distance behind both trucks and parallel to the direction in which they were pulled in and parked. Taylor could not see whether or not grievant was asleep, but he thinks he could not have been because he had been stopped there only about two minutes before Beuhler came along, and he says grievant could not have fallen asleep in that short time.

Grievance Committeeman Thill said he originated grievant's April 26, 1985 last-chance reinstatement agreement. He often does that when an employee has been suspended and discharged and has been several weeks without work and income and is facing months more of that. He makes an arrangement with the Company Labor Relations Representative that cuts the employee's losses and gets him back to work. He said grievant was not aware that he had made such an agreement in this situation.

Taylor corroborated the Union argument that radio contact sometimes is interfered with by other Truck Drivers' tendency to play games by depressing the microphone button when they hear a call, which prevents the caller and the callee from hearing anything.

The Company says the only issue is whether or not grievant was asleep. It argues on that issue that there is no basis for finding that Beuhler or grievant were mistaken in their diametrically opposite versions of what took place. It insists the only rational explanation is that one is telling the truth and the other is not. Management argues in relation to encounter #1 that grievant said he had done nothing to cause Beuhler to say there would be no damn sleeping, and yet grievant took no offense, although he insists he was not sleeping. The Company suggests that is odd.

The Company finds it odd also that grievant could not name or even describe the tandem Driver or the V-bottom Driver, despite his alleged servicing the latter truck for up to one-half hour. It says those Drivers might have helped save grievant's job, and yet he did not call them. It thus suggests they were fabricated. Management says it is preposterous to believe that grievant, who says he gave Beuhler no reason to shake him on any of these encounters, would take no offense then and not even say anything. The Company says, if grievant's account be accurate, Foreman Beuhler was acting absurdly, and yet grievant made no objection to Beuhler. The Company notes the Union's statement to the effect that it was difficult to understand grievant's reaction to Beuhler's charges.

The Company notes the testimony of both grievant and Beuhler, to the effect that there had been no animosity by one against the other in their past relationships, and it stresses that there was no basis for thinking that Beuhler would have had any reason to seek to fabricate a story about grievant that would jeopardize his job.

The Union asks, if grievant intended to sleep, why he would park in the clear, open space, near the Supervisor's office, at door 7 at the garage. It argues that is not the behavior of an employee just returned to work on a last-chance basis.

The Union says there are several hundred Truck Drivers and that grievant is a Mechanic and not a Driver and, therefore, does not know each Driver by sight. Thus, it says nothing unusual lies in grievant's inability to name or describe the tandem-axle or the V-bottom Drivers.

The Union says, moreover, if grievant had been told by Beuhler to go to the office, that he would not have driven around for ten more minutes and not have gone to the office as directed.

The Union says Beuhler should have gone to the nearby office and gotten another supervisor to come and observe grievant and corroborate Beuhler's account.

FINDINGS

It is clear, in light of grievant's very fresh last-chance reinstatement of April 26, 1985, and in view of his poor absenteeism and disciplinary record, that, if he was asleep on either or both of encounters 2 and 3, that the penalty of discharge would be beyond legitimate challenge here.

That grievant either was asleep or in some state very similar to it is shown by the preponderance of the evidence. That is not because of his recent last-chance reinstatement agreement or because he was an employee and Beuhler a Foreman. It is so because, to a dispassionate stranger objectively interested in determining which of two sharply conflicting accounts appears the more reasonable, Beuhler's carries a convincing ring if truth and grievant's does not.

At the beginning, it is clear from all evidence from both parties that these two men have worked together for eight or ten months and have had no problems prior to this. Grievant agreed he had had no difficulties with Beuhler before this. Accordingly, Beuhler's saying consistently that grievant was sitting in a slouched position with his head down in his hand and was totally unaware of his surroundings and that he twice had

great difficulty getting grievant's attention by calling out to him by name a number of times from two and one-half and one and one-half feet away and even by shaking him vigorously several times on each of two occasions is persuasive that grievant was so close to a state of unconsciousness that it would be bootless to debate whether he was actually sleeping or was in some other slumberous psychological state of temporary suspension of consciousness. In order to arrive at a strong belief in good faith that grievant was in a sleep-like condition, it was not necessary that Beuhler be able to see grievant's eyes.

Secondly, grievant insists he was not sleeping and yet he did not object when Beuhler and Kelly so charged him. That is so odd and such a departure from the normally expected behavior of an injured and innocent employee, that it shakes grievant's account.

He would meet that by insisting that Beuhler did not say he was sleeping or even in a sleep-like condition on encounter #3. That would evade the conclusion that his not objecting was contrary to his position here. But, grievant agrees Beuhler said there would be no sleeping at encounter #1, so it is clear that sleeping had been mentioned. Moreover, Beuhler's behavior, admitted by grievant, in telling grievant to go to the office, makes no sense unless stated on a charge of being in a sleep-like condition. Finally, it is equally odd, if he had not been sleeping, that he did not say so in the office when Kelly told him he was being sent home for sleeping.

The Union argues that grievant, just reinstated under a last-chance agreement and thus aware of how careful he should be, would not have driven around for ten minutes or so after being told to go to the office and would not have parked in full view in a travelled area to go to sleep. There is something to that, but Beuhler's positive and detailed testimony of the slouched position in which he twice found grievant, the sleep-like state he was in, and the great difficulty he had in arousing grievant to even minimal attention to his surroundings, simply is too strong to be overcome by the oddity suggested by the Union. Furthermore, the Union argument is based on assumptions about the way in which a careful employee likely would behave. The trouble with that is, however, that there was very little in grievant's absenteeism and disciplinary record to support a belief that he was behaving as a reasonably careful employee.

The Union alleges inconsistencies in Beuhler's version, but analysis shows that most of the suggested statements were not inconsistent at all. They were given in response to different questions. Beuhler denied using profanity against grievant but admitted that, out of frustration, he had used obscenity against the general situation. There was no meaningful proof that Beuhler shook grievant with excessive force.

Grievant did not claim that he did, at the time. It simply took vigorous jostling to bring grievant to attention to his surroundings. Beuhler had discussed with Kelly whether grievant should be sent to the Clinic, but Beuhler then left and had nothing more to do with these events. Thus, it was not surprising that he said later that he was not aware whether grievant actually had gone to the Clinic. They were different concepts.

Union evidence of the extent of possible radio interference may be accepted at face value here. Nothing in this analysis relies on grievant's not replying to Beuhler's attempts to contact him by radio. Beuhler's inability to do so was significant only in explaining why Beuhler approached grievant directly.

Nothing said here is based in any way on anything said or done at the Clinic. Similarly, nothing decided here is based on the absence of Step 3 Minutes at grievant's unemployment-compensation hearing.

Consequently, it must be found by a preponderance of the evidence considered as a whole that grievant was asleep or so nearly asleep that he violated the rule against sleeping in the plant. Accordingly, in light of his very recent last-chance reinstatement agreement and his poor attendance and disciplinary records, his discharge was for cause, and the grievance will be denied.

AWARD

The grievance is denied.

/s/ Clare B. McDermott

Clare B. McDermott

Arbitrator