Award No 782
OPINION AND AWARD
In the Matter of Arbitration Between
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 31-S-5
Appeal No. 1393
Arbitrator: Herbert Fishgold
April 20 1988
Appearances:
For the Company:
R.V. Cayia, Supervisor, Operations, Union Relations
M. Sorenson, Manager, No. 7 Blast Furnace Department
D. Rosenow, Section Manager, No. 7 Blast Furnace Department
K. Kahl, Supervisor, No. 7 Blast Furnace Department
K. R. McKenna, Senior Representative, Union Relations
R. Vela, Section Manager, Union Relations
For the Union:
Bill Trella, Staff Representative
Gavino Galvan, Chairman, Grievance Committee
Don Lutes, Secretary, Grievance Committee
Edwin Bircher, Griever
Andrew Quasney, Grievant
Pedro Garcia, Witness
Londale Micou, Assistant Griever
Statement of the Grievance: The aggrieved, Andrew Quasney, Check No. 5519, contends action taken by the Company, when on February 13, 1987 his suspension culminated in discharge is unjust and unwarranted in light of the circumstances involved.
Relief sought: The aggrieved requests that he be reinstated and paid all monies lost.
Contract provisions cited: The Union cites the Company with alleged violations of Article 3, Section 1 and Article 8, Section 1 of the Collective Bargaining Agreement.
Statement of the Award: The grievance is denied.
CHRONOLOGY
Grievance No. 31-S-5
Grievance filed: February 17, 1987
Step 3 hearing: February 24, 1987
Step 3 minutes: June 30, 1987
Step 4 appeal: July 7, 1987
Step 4 hearing(s): January 29 and March 3, 1988
Step 4 minutes: March 28, 1988
Appeal to Arbitration: March 24, 1988
Arbitration hearing: March 31, 1988
Award issued: April 20, 1988
FACTS
The grievant, A. Quasney, was employed by the Company on April 23, 1974. At the time of his discharge, the grievant was established in the Repairman occupation in the No. 7 Blast Furnace. During the last five years of the grievant's employment, he received the following disciplines:
Date Infraction Action
6/25/82 Insubordination incident water thrown on co-worker Discipline - 3 days Record review/Final warning
5/16/83 Not following work/safety procedures Discipline - 3 days
6/16/83 Insubordination Suspension
6/30/83 Return to work on final chance basis
7/11/83 Record review/Final chance return to work - Agreement explained

8/18/83 Five days absent without leave AWOL letter sent
11/10/83 Left workplace without permission Discipline - balance of turn and reprimand
12/5/83 Left workplace without permission Discipline - 1 day
12/10/84 Use of profane, abusive language Discipline - 2 days
2/22/85 Use of profane, abusive language VODG warning
4/17/86 Five days absent without leave AWOL letter sent
8/27/86 127-A violation-threw debris at co-worker Discipline - 3 days
10/2/86 Record review/Final warning
1/30/87 Horseplay/insubordination Suspension

On January 30, 1987, the grievant, A. Quasney, was assigned to work the second turn, 8am - 4pm, as an Auxiliary Repairman. At the start of the turn, Labor Leader, Curtis Robinson, assigned the grievant and L. Williams, to clean out the debris from the No. 4 System Trough at the No. 7 Blast Furnace. The day before, the grievant had also worked on the No. 4 system and had contributed to the setting of three of the necessary four forms within the trough.

According to the record, molten iron flows through troughs, which must be periodically cleaned and rebuilt. This flow of iron leads to erosion of the trough as well as a buildup of slag and iron along the sides of the trough. Typically, the sides of the trough are shaved to remove the buildup of slag and iron. A gradall is then utilized to remove large portions of the debris. In addition, employees must enter the trough and shovel out debris which the gradall cannot remove. The high temperatures in the trough make it difficult to work in or around the trough when cleaning out debris. One method of cooling the trough for the setting of the forms is to spray water into the trough area. After the debris is removed from the trough, forms are placed in the trough to rebuild it for future use. Castable material, similar to concrete, is then poured to form a brand new trough.

At the start of the turn, grievant, believing the trough to be too hot, decided to spray water into the trough area in which he was directed to work by Robinson. He proceeded to hook up the water hose on the north side of the trough and began to spray water into the area where the fourth form was to be placed. At all relevant times, grievant was facing south, but standing on the north bank of the trough.

Approximately 20 minutes into the turn, Robinson approached the trough from the south and stood approximately nine feet away directly across the trough from the grievant. From this position, Robinson allegedly told the grievant on two occasions to stop watering the trough and to turn the water off. According to Robinson, immediately after the second instruction, he was hit about the face and chest with water from the hose Quasney was using.

Robinson then approached J. Williams, another employee working in the vicinity, and told Williams that the grievant had sprayed him with water. Immediately after speaking to Williams, Robinson left the work-site and went to the office of Keith Kahl, Refractories Supervisor, to report the incident.

Shortly thereafter, a department investigation was conducted to determine the facts and circumstances surrounding the above incident. The investigation was conducted by Kahl and Dale Rosenow, Section Manager, and entailed speaking with Robinson, the grievant, and seven bargaining unit employees who were working in the general vicinity at the time of the incident. Each of the bargaining unit employees were interviewed to determine what they knew regarding the incident reported by Robinson, and the site of the incident was also visited.

As a result of the investigation of the January 30 incident and in light of the grievant's previous record, the grievant was notified on February 2, 1987 that he was suspended for five days after which he would be subject to discharge for violations of Inland General Rules for Safety and Personal Conduct 127-f and o (horseplay and insubordination), respectively and his overall unsatisfactory work record.

Under the provision of Article 8, Section 1 of the Collective Bargaining Agreement, a suspension hearing was held on February 6 to review the grievant's record and the January 30 spraying incident. At this hearing, the Company determined that there were no circumstances which warranted modification of the department manager's decision, and on February 11, the grievant was notified that his suspension would conclude in discharge.

The issue in this case is whether there was just cause to terminate the grievant on February 11, 1987, for the culminating incident of January 30, involving the violation of Rules 127(f) and (o) (horseplay and insubordination) of the General Rules for Safety and Personal Conduct, allegedly deliberately spraying his Labor Leader, C. Robinson with a water hose.

DISCUSSION

The Company claims that the grievant intentionally sprayed Robinson. It bases this conclusion on its evaluation of the interviews of the employees in the immediate vicinity of the incident on January 30, and an observation of the work-site that morning. In particular, the Company relied upon the statements given by Robinson, the grievant, and the other seven employees immediately following the incident.

According to Robinson, from a distance of approximately nine feet directly across the trough, on the south side, from Quasney, he twice yelled to the grievant to "cut the water off." After the second time, Robinson noted that the grievant looked up, making eye contact, and then raised the hose and squirted Robinson in the face and chest area. Thereupon, according to Robinson, the grievant threw down the hose and proceeded toward some of his co-workers.

Robinson then approached J. Williams, another employee working in the vicinity, and told Williams that the grievant had sprayed him with water. At the subsequent department investigation, Williams stated that he heard Robinson yell and saw that he was wet and had water dripping off his face. Robinson then went to the office of his supervisor, Kahl, to report the incident. Kahl observed that Robinson's shirt was visibly wet, and then informed Section Manager Rosenow of the incident, whereupon it was determined to conduct an investigation immediately.

Nine employees, including Robinson and the grievant, were interviewed regarding the incident. Each employee was brought to Rosenow's office one at a time. After obtaining their oral statements, Rosenow reviewed the accuracy of his notes with each employee, and subsequently had his notes typed. Robinson was the only one to affix his signature to this typed version.

At his interview, the grievant was asked for his explanation, and Rosenow's notes reflect that Quasney stated that he did not spray Robinson, and then stated that there was a hole in the hose that caused Robinson to get wet by the water. R. Miles, another employee interviewed, told Rosenow that the grievant told him to turn off the water, and when Miles did so, he noticed that water was leaking and shooting straight up and a little toward the north wall of the Casthouse, in the opposite direction and away from where Quasney was standing. This fact was substantiated by a site visit by Rosenow following these interviews.

The Union, on its part, claims that the Company did not discharge for cause since the grievant did not intentionally spray the Labor Leader, Robinson. In support of its position, the Union argues that, although Robinson may have gotten wet, Quasney neither heard nor saw Robinson; that he was completely unaware that he had sprayed Robinson at the time it occurred; that it was purely accidental; and, finally, that no one actually saw the grievant deliberately spray water in the direction of Robinson.

The incident presents a clear issue of credibility. There were no eyewitnesses to the spraying incident other than the two participants. Thus, the resolution as to what occurred during the spraying incident turns solely on the credibility of the witnesses. In resolving the conflicting testimony, the Arbitrator must "sift and evaluate the testimony to the best of his ability, and reach the best conclusion he can as to the actual fact situation." Texas Electric Steel Casting Co., 28 LA 757, 758 (1957). Elkouri and Elkouri set forth the general approach taken by arbitrators:

. . . the duty of the arbitrator is simply to determine the truth respecting material matters in controversy, as he believes it to be, based upon a full and fair consideration of the entire evidence and after he has accorded each witness and each piece of documentary evidence, the weight, if any, to which he honestly believes it to be entitled." (How Arbitration Works, 4th ed., 1985 at 319-320).

In this regard, Arbitrator R. W. Fleming observed, in General Cable Co., 28 LA 97, 99 (1957):

Arbitrators are not equipped with any special divining rod which enables them to know who is telling the truth and who is not where a conflict in testimony develops. They can only do what the courts have done in similar circumstances for centuries. A judgment must finally be made, and here is a possibility that that judgment when made is wrong.

Finally, as Elkouri and Elkouri further noted:

Special considerations are involved in weighing testimony in discharge and discipline cases. Thus Umpire Harry Shulman recognized that an accused employee has an incentive for denying the charge against him, in that he stands immediately to gain or lose in the case, and that normally there is no reason to suppose that a plant protection man, for example, would unjustifiably pick one employee out of hundreds and accuse him of an offense, although in particular case the plant protection man may be mistaken or in some cases even malicious. Umpire Shulman declared that, if there is no evidence of ill-will toward the accused on the part of the accuser and if there are no circumstances upon which to base a conclusion that the accuser is mistaken, the conclusion that the charge is true can hardly be deemed improper. (Id. at 322, footnote omitted).

It is with these principles in hand that the Arbitrator proceeds to review the record. At the outset, it must be noted that this case is largely based on hearsay evidence, much of which is contained in statements attributed to the bargaining unit employees interviewed immediately after the incident, particularly the statements of Working Leader Robinson. As this Arbitrator has previously noted in Bethlehem Decision No. 273, the best evidence would have been their testimony, and that under normal circumstances the statements would be accorded little weight, if admitted at all. However, here, as in the Bethlehem case, there is a policy against calling as witnesses representatives of the other side. Specifically, Article 7, Section 1, provides, e.g., that "[t]he Company agrees that it shall not subpoena or call as a witness in arbitration proceedings any employee from the bargaining unit." In this regard, the Company was not in a position to call Robinson or any of the other bargaining unit employees, but did agree to make Robinson available for the Union to call as a witness.

As the record shows that, although Robinson did testify at Step 4, not only did the Union decline to call Robinson, but it only called one of the other employees, P. Garcia, in an attempt to rebut the Company's evidence. Although the Union contended that calling Robinson might subject him to some disciplinary action pursuant to the Steelworker Constitution, the Arbitrator is unable to find anything in the record presented to have prevented the Union from calling Robinson or any of the other employees. Under these circumstances, the Arbitrator must admit the Company's representations as to what these employees saw and heard, and give them full weight in deliberating the evidence in the instant proceeding.

When the grievant's testimony is viewed against the record, the Arbitrator is unable to find his explanation of the January 30, 1987 incident to be credible. In particular, there are serious inconsistencies in the grievant's version of the incident from the time of the investigation of the incident up to the time of the arbitration hearing. At the time of the investigation, although he said he did not hear Robinson, grievant made no mention of not seeing Robinson across the trough; of not knowing Robinson got wet; or of the possibility that he sprayed Robinson inadvertently. His sole explanation was that the split in the hose caused Robinson to get wet. At the suspension hearing and grievance hearings, grievant suggested that he may have inadvertently squirted Robinson, but it was purely a coincidence that it occurred at the same time Robinson allegedly instructed him to turn off the water.

Robinson's three versions of the incident--his statement on January 30, 1987, at the Step 4 meeting, and in a March 25, 1988 statement, although containing some variations, are substantially consistent, and are corroborated in significant respects by the statements of the other employees present in the immediate vicinity. For example, P. Garcia acknowledged that he heard Robinson verbally instruct the grievant to stop cooling the trough with water. He further acknowledged that he was standing at a greater distance from Robinson than grievant was. Moreover, R. Juarez told Rosenow that Robinson told him he was going to tell the grievant to turn off the water, and J. Williams, who was standing about 20 feet away and not looking in Robinson's direction, heard Robinson yell when he was hit with the water. Furthermore, Miles heard the grievant tell him to turn off the water.

All of this contradicts the Union's contention that due to the background noise in the Casthouse operations, the grievant was unable to hear Robinson's directive, the position grievant took in the 3rd Step Minutes. Yet, in the 4th Step Minutes, for the first time, and again at the arbitration, grievant maintained that he had been wearing ear plugs on January 30, which also prevented him from hearing Robinson. The Arbitrator finds it difficult to believe that at neither the investigation, the supervision hearing nor the 3rd Step meeting the grievant would have failed to have included such an important piece of information.

Moreover, the record also does not support grievant's contention that he did not see Robinson because of the steam conditions in the trough area, relying on Garcia's statement that while he (Garcia) heard Robinson, he could not see anything because of the steam. As the record indicates, the trough in question had not been used during active operations for approximately six days and had cooled sufficiently to place three forms the prior day. While it is possible the steam at the end of the trough area where Garcia was working was thicker, Robinson said he saw the grievant clearly and was only nine feet directly across from him. Juarez also stated that he saw Robinson on the south side of the trough directly across from the grievant. In addition, Robinson claimed that the grievant looked up at him at the second time he instructed grievant to shut off the water, that their eyes made contact, and that the grievant raised the hose and sprayed him.

Grievant's own versions of what occurred are internally inconsistent. At the time of the investigation, grievant's explanation for Robinson's getting wet was because of a split in the hose. On the other hand, at his suspension and grievance hearings, he stated that he may have inadvertently squirted Robinson when he coincidentally happened to turn to tell Miles to turn off the water. In the first instance, there was no way

that the hold in the hose could have gotten Robinson wet since it was on the north side of the trough and squirted in the opposite direction from the grievant. Indeed, grievant subsequently recognized this, and it was then that he proffered the possibility of the inadvertent spraying.

While, on the surface, such an explanation may appear plausible, in light of the various inconsistencies and omissions at various stages of the proceedings, the Arbitrator is unable to credit this explanation. In particular, since grievant was spraying water into the trough, which is below ground level, the hose would have been aimed and focused in a downward fashion. Moreover, at the arbitration, grievant denied that he said anything about how Robinson could have gotten wet, never mentioned the split in the hose, and did not even speak to Robinson. The Arbitrator is unable to find any basis for Kahl or Rosenow to have lied about their investigation, and indeed, their testimony is entirely consistent with Miles' statement.

Finally, the Company's version of the January 30 incident is entirely consistent with grievant's past record, particularly his long-standing pattern of misconduct toward Robinson. In June 1982, grievant was disciplined three days and given a Record Review/Final Warning for throwing water in Robinson's face, after Robinson had instructed him to return to work. More recently, in August 1986, grievant was disciplined for violation of Rule 127-a (attempting bodily harm to another employee) when he purposefully shoveled debris on Robinson, an event witnessed by two other bargaining unit employees. Grievant failed to file a grievance challenging either of these disciplines.

Thus, despite the Union's appeal that grievant, knowing of his past record and with 13 years' seniority, would not intentionally spray a fellow employee, the Arbitrator must conclude, on the record presented, the grievant in fact intentionally sprayed Robinson with water on January 30, 1987.

The only remaining question is whether discharge was then warranted. At the time of the incident on January 30, 1987, the grievant was working on a "final chance" basis, and knew, therefore, that any infraction or violation of a Company rule could result in his termination. Arbitrators have uniformly recognized the significance of a "final chance" basis as a consideration for an employee's continued employment and as a part of a Company's attempts at progressive and constructive discipline. As Arbitrator Ralph Seward stated in Inland Award 717 (1983):

"Last chance" understandings, such as the one here involved, can be a highly important and valuable means of salvaging potentially good employees who are on the brink of discharge because of repeated instances of absenteeism or other similar lapses from responsible conduct. They can, in other words, be the capstone of progressive discipline - a means of making habits and attitudes that might otherwise lead inevitably to discharge. If they are to serve this end, however, such 'last chance' understandings must be respected and given effect. To do otherwise would be to deprive them of significance or usefulness. . . .

Herein, both the grievant and the Union acknowledged that under these circumstances, if grievant indeed intentionally sprayed Robinson with water, discharge was warranted. Accordingly, the Company was justified in terminating the grievant for this latest incident of misconduct. His prior disciplinary record clearly supports the Company's decision to deem this incident as a breach of the "final chance" condition for continued employment.

AWARD

The grievance is denied.

/s/ Herbert Fishgold

Herbert Fishgold

Washington, D.C.

April 20, 1988