

Award No. 787

OPINION AND AWARD

In the Matter of Arbitration Between:

Inland Steel Company,
Company,

and

United Steelworkers of America,
Local Union 1010,
Union.

Grievance No. 19-S-19

Appeal No. 1398

Arbitrator: Herbert Fishgold

August 23, 1988

Appearances:

For the Company

Doug Shideler, Supv., Field Fabricators, IRMC

Joe Saddler, Supt., Structural, IRMC

Robert Armstrong, G.M., IRMC

John Decker, Section Manager, Medical

Jim Dobson, Project Representative, Union Relations

For the Union

Jim Schultz - 24375

Larry Young - 3305

Phil Avalos - 9206

Larry McMahon - 29867

Donald Bolden - Grievant

Statement of the Grievance:

* The aggrieved, Donald Bolden, Check No. 7222, contends the action taken by the Company, when on December 9, 1987, his suspension culminated in discharge, is unjust and unwarranted in light of the circumstances involved.

Presenting the Matter on Behalf of the Company:

R. Vela, Section Manager, Union Relations

Presenting the Matter on Behalf of the Union:

William Trella, Int'l Representative

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:

1. Just cause did not exist for the termination of Donald Bolden for employment.

2. Donald Bolden shall be restored with the Company, with seniority rights, but without any back pay for the period between the date of his termination from employment and the effective date of his restoration thereto.

3. The intervening period shall be considered to constitute a period of disciplinary suspension from employment.

CHRONOLOGY

Grievance No. 19-S-19

Grievance filed: 12/15/87

Step 3 hearing: 1/20/88

Step 3 minutes: 3/11/88

Step 4 appeal: 3/14/88

Step 4 hearing(s): 6/21/88, 6/27/88

Step 4 minutes: 7/11/88

Appeal to Arbitration: 7/12/88

Arbitration hearing: 7/28/88

Award issued: 8/23/88

Facts:

D. Bolden (hereinafter "Grievant"), Check No. 7222, was hired by the Inland Steel Company (hereafter "Company"), on September 29, 1967 and was assigned as a General Laborer to the No. 4 BOF Department. At the time of the incident which gave rise to this grievance, he was a Field Fabricator in the Field Services Department. On Monday, November 30, 1987, the Grievant was accused by a co-worker, H. Sanchez, Check No. 2817, of physically assaulting Sanchez in the No. 4 BOF Field Fabricators mobile (trailer) lunchroom/office.

An investigation into the incident was held on November 30 and December 1, 1987. The investigation was attended by several members of management as well as P. King, Grievance Committeeman for Area 19, J. Shultz, Assistant Grievance Committeeman for Area 19, the Grievant and H. Sanchez. Also testifying at this investigation were Field Services bargaining unit personnel who had been in or around the lunchroom at the time of the incident. None of these witnesses could offer any eyewitness information with respect to the altercation between the Grievant and Sanchez. However, all indicated that they heard noises in the lunchroom at the time of the incident.

Sanchez in his testimony at the December 1, 1987 investigation, claimed he had been physically attacked by the Grievant. The Grievant, on the other hand, maintained that he had only pushed Sanchez to the floor from his position on the end of the picnic bench in the lunchroom. Based on the testimonies and evidence presented at this investigation, the Grievant was suspended on December 1, 1987, preliminary to discharge for violation of Rule 127-a of the Company's General Rules for Safety and Personal Conduct, which states: "127. The following offenses are among those which may be cause for discipline, up to and including suspension preliminary to discharge:

"a. Fighting with or attempting bodily injury to another employee or non-employee on company property."

Following a suspension hearing held at his request pursuant to the provisions of Article 8, Section 1 of the Collective Bargaining Agreement, the Grievant was informed that his suspension would culminate in discharge on December 9, 1987. The instant grievance contests this discharge, and cites the Company with alleged violations of Article 3, Section 1 and Article 8, Section 1 of the August 1, 1986 Collective Bargaining Agreement.

Issue:

The issue in this case is whether there was just cause to discharge the Grievant for assaulting a fellow employee.

Discussion:

The Company claims that there was just cause to terminate the Grievant under Article 3, Section 1 and Article 8, Section 1 of the Collective Bargaining Agreement. According to the Company, Sanchez' written statement and the testimony of witnesses clearly demonstrate that the Grievant physically assaulted Sanchez with intent to bodily harm him. In addition, according to the Company, the examination of Sanchez by the Company's Medical Department revealed that Sanchez had been seriously assaulted. n the other hand, the Union argues that discharge is not warranted because Sanchez provoked the assault. Furthermore, the Union claims that, based on the testimony of witnesses, the assault could not have been as serious as is claimed by Sanchez.

The incident presents a clear issue of credibility as apparently there were no eyewitnesses to the facts which precipitated the incident other than the two participants. Thus, the resolution as to what occurred during the 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 there is a possibility that that judgment when made is wrong.

Finally, as Elkouri and Elkouri further noted:

Special circumstances 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).

At the outset, it must be noted that on December 23, Sanchez gave an extensive and detailed chronology of what happened on November 30. Sanchez' statement states, in relevant part, as follows:

Upon entering the trailer, I observed that it was full of people. There were a number of people in the lunchroom area as well as the office area. I then put my lunch in the refrigerator located along the west wall of the trailer. As I looked around the lunchroom area, I looked for a place to sit down. There are three tables that run the full length of the lunchroom. The first table was filled with people, the middle table had people sitting at only one end and the third and northern-most table was occupied by only two people, Larry Young and Frank Kwiecien.

As I approached the second and third tables, I noticed that there was a Steelmaker and a white styrofoam cup positioned on the north end of the middle or second table. I continued to think to myself, where is the best place to sit down? I was not familiar with or did not know a number of the people in the lunchroom. So, I looked for an open spot on the second or third table where I could sit and not intrude on anyone. The florescent light, hanging above the third or northern-most table had burned out and, since I wanted to read the Steelmaker that I had seen lying on the middle table, I sat down on the northwest corner of the middle table. At this time, I believe Phil Avalos and Tony Harris were sitting at the same table, some distance from me on my right.

When I first sat down at the end of the bench I reached to my right for the Steelmaker and heard someone say in effect, 'I'm not staying here, I'm getting out or I'm leaving.' I also heard someone say immediately following this, 'Me too.' I am not sure who said it, but I assumed it came from my left where Larry Young and Frank Kwiecien had been sitting at the third table. I did notice that when these words were spoken Larry Young got up and moved from the table first and then, later, I observed Frank leave the table.

From the position I took at the table, I could not see if there was any coffee in the styrofoam cup that was located to my right near the Steelmaker. I picked up the Steelmaker and began to read when I heard someone say, 'Larry, Larry, Larry.' As I recall, my name was spoken approximately two or three times. Immediately, D. Bolden approached me from my right and said, 'What do you think you are doing, you're in my seat.' I replied that I was sitting down. He said, 'Not in my spot.'

I then returned toward him and said, 'Don't give me a hard time, it's too early in the morning.' He said again, 'You're sitting in my spot, and that's my coffee right there,' pointing to the styrofoam cup to my right. I then reached for the cup, looked at it and noticed there was only a small amount of coffee in it. It was almost empty. I moved the cup in several directions indicating to Bolden that there were empty seats next to me, across the table from me and even on the third table since it was now empty. At that time, he was on my right side standing over me and said, 'Well, I'll tell you what, I don't want to and if you don't move I'm going to do something about it.' At that point there were still people in the trailer. I'm not sure who was still here, however.

I then leaned back with my hands still on the table in order to look Bolden in the face. I asked, 'What are you going to do about it?' I asked not in an aggressive tone but simply in an effort to question him in regards to what he meant. He then grabbed me in a headlock and in a twisting motion lifted me up off my seat while maintaining his hold on my head and neck. The next thing I knew, I was on my back on the floor with Bolden on top of me trying to pin my arms to the floor with his knees. He also had one hand on my neck and the other on my face trying to press my head hard into the floor. It was approximately at this point that he yelled at me, 'You fucking punk.'

I quickly realized that this was an actual attack and I came to my senses enough to break his hold on my arms so I could attempt to control him and get him off of me. I remember someone making a remark similar to, 'Boy, that guy is strong.' I'm not sure who said it, however.

I was then able to release my arms from his hold, grab his hands, release them from my neck and face and push his hands up towards his chest. He looked at me as if he was a madman and I wanted to get him off of me so I could escape. At that point he stood up and looked over me while I remained on the floor. He then

kicked at me, attempting to strike me in the side on more than two occasions. I attempted to avoid his kicking action and held my forearm outward in order to break the force of the kicks. Luckily, I was also dressed for cold weather and cushioned well or the kicks to my side could have done more damage than they did.

After he stopped kicking me, I got up off the floor where he stood looking at me. There was still people in the trailer, I can't see well without my glasses. So, I was unable to identify these people. (My glasses were knocked off during the fight). I then looked at him and extended my arms at my side and asked, 'Don, what's the matter, what's the problem. He was standing approximately two to three feet from me and charged at me. He knocked me backwards and I struck the wall and a portion of the protective screen for an exhaust fan on the north lunchroom wall. I didn't fall down. Amazingly, I bounced off the wall and remained standing. At this point, he began swinging at me, striking me with his fists. I tried to protect my face and head with my left arm and at the same time turned sideways away from him. He landed approximately four or five blows on the back of my neck and shoulder area.

Believing that he was not going to stop his attack, I then attempted to bear-hug him in order to control him and stop his attack. It was then that someone stepped in and stopped the fight. Again, I'm not sure who it was since my eyesight is poor and, without my glasses, I can't easily recognize people unless I know ahead of time who they are. I would also say that the excitement of the moment also made it difficult to recognize who remained in the trailer.

After we were pulled apart, I began looking for my glasses and tried to gather my composure. D. Bolden was then standing at the northwest exit door of the trailer looking out. While I continued searching for my glasses, I kept an eye on him because I wasn't sure what he might do next. He then said to me, "What happened, did you fall down or fall off the bench?" I replied, "You know what happened." He said, "No, I don't. I don't know what you are talking about." At that time I informed him that I was going to call Lloyd Starrick (Field Services Structural Section Planner). Bolden asked me, "Why are you going to do [sic] that? He won't do anything about it."

While this statement goes into far greater detail than Sanchez' oral statements on November 24, 30 and December 1, it is internally consistent with his assertions. Moreover, at the hearing, when called as a witness by the Arbitrator, his testimony was consistent with all of his previous statements.

The Grievant's version of the incident, however, was inconsistent. On November 30, when questioned by Joe Saddler, Section Manager, Grievant initially maintained that nothing happened, and denied doing anything to Sanchez. When asked about the scratches on Sanchez, Bolden remarked that maybe his wife or girlfriend did it to him earlier in the day. Upon further questioning, Bolden admitted that "I kinda tripped him over and he fell off the bench. I shoved him over and he fell off the bench." On December 1, Bolden repeated the same story, and added "I was afraid Sanchez was going to attack me, so I held him down." However, at the arbitration hearing, when pursued during cross-examination, Bolden testified that he knelt next to Sanchez and shoved him off the bench, and that Sanchez landed on the floor between the benches. Bolden went on to testify that when Sanchez got up, he thought Sanchez was coming towards him, so he grabbed Sanchez by the head or neck and shoved him against the rear wall.

Thus, Grievant admits to two separate instances during the altercation in which he physically assaulted Sanchez, although his admissions stop short of the assault as described by Sanchez.

As noted earlier, although other employees were present at the time of the altercation none apparently "saw" anything untoward occur. Several employees who were called during the December 1 investigation said they heard noises or thuds or felt the trailer shaking, but did not see anything. They did, however, acknowledge that Sanchez looked red-faced, upset and scuffled up. Indeed, even the Union representatives on November 30 and December 1 acknowledged that Sanchez showed them scratches on his cheek and neck.

Moreover, Company witnesses who saw Sanchez on November 24 attest to seeing scratches on his neck, face and chest. Dr. Hooker, who examined Sanchez in the clinic right after the altercation, noticed swelling and discoloration on the right side of his head, a red mark on the right side of his head, a red mark on his right shoulder and left side of his neck, redness on the back of his shoulder blades, a fresh abrasion to the left wrist, and tenderness in the neck.

Thus, it is clear that Bolden assaulted Sanchez in a manner sufficient to inflict the injuries referred to. This finding is clear despite the incredulous testimony of Phil Avalos, who although sitting next to Sanchez throughout the time in question, testified that he did not see Bolden do anything, and did not see Bolden bump Sanchez off the end of the bench.

That action of Bolden constituted a violation of General Rule 127a and would justify the imposition of disciplinary measures against Bolden consistent with the degree of the committed offense. Company Rule 127a clearly provides that an employee may be disciplined for fighting and that discipline can include discharge. The question in the instant case, however, is whether this particular incident merits discharge or whether some lesser form of discipline should be imposed.

The Company claims that discharge is warranted in this case because the Grievant had previously been disciplined for fighting and because the assault in this case was extremely serious. However, for the following reasons, the Company's decision to discharge the Grievant was not warranted.

First, even the Company witnesses acknowledged that not all incidents of fighting involving bargaining unit employees results in discharge rather than suspension.

Second, although the Grievant had been previously disciplined for fighting, that discipline occurred several years ago and should not be the basis for discharging the Grievant for this most recent and unsubstantiated incident. Finally, it is clear that the Grievant was not totally at fault for this fight. Sanchez could just as easily have moved his seat, then move Bolden's cup. Sanchez even admitted that he "challenged" the Grievant when he said, "[w]hat are you going to do about it?" Moreover, when Sanchez initially got up off the floor, he again called out to Bolden, resulting in the second assault. Therefore, while fighting is clearly unjustifiable and violates Company rules, this particular incident was not entirely unprovoked and Sanchez is not entirely blameless.

It is a well recognized arbitral principle that discharge is the most serious form of discipline and such a penalty should not be imposed where there is a reasonable doubt about whether the offense occurred. As outlined above, although the Arbitrator does not downplay the serious nature of this assault, it appears that this assault was not entirely unprovoked. Accordingly, in light of the above, there was not just cause to discharge the Grievant for this particular incident.

However, it is also clear that an altercation did occur and that the force used by the Grievant was unreasonable and violated a Company rule about which he was fully aware. Based on the record, it is clear that some form of discipline should be imposed. However, the Arbitrator believes Bolden should be provided one final opportunity to demonstrate that he can live with the rules laid down for employees' conduct. See, e.g., Award 724 (Luskin, 1982). Therefore, in light of the fighting and the fact that Sanchez was more than "pushed" during the altercation, it is reasonable that the Grievant should be restored to employment, with seniority rights, but without any back pay for the period between the date of his termination from employment and the effective date of his restoration thereto.

For the reasons hereinabove set forth, the award will be as follows:

AWARD

1. Just cause did not exist for the termination of D. Bolden from employment.
2. D. Bolden shall be restored to employment with the Company, with seniority rights, but without any back pay for the period between the date of his termination from employment and the effective date of his restoration thereto.
3. The intervening period shall be considered to constitute a period of disciplinary suspension from employment.

/s/ Herbert Fishgold

Herbert Fishgold

Arbitrator

Washington, D.C.

August 23, 1988