Award No, 795
OPINION AND AWARD
In the Matter of Arbitration Between
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No, 19-S-36
Appeal No 1406
Arbitrator: Ellen J. Alexander
March 3, 1989
Appearances
For the Company
R.V. Cayia, Supervisor Operations, Union Relations
W. Moore, Operations Manager, IRMC
J. Dobson, Administrative Resource - I/N Tek
D. Childress, Electrical Superintendent, IRMC
E. Teffeau, Retired, (former Section Manager, Wire Shop, IRMC)
For the Union
Jim Robinson, Arbitration Coordinator
Bill Trella, International Staff Representative
Jim Kumeiga, Witness
Phil King, Witness
Manny Martinez, Witness
Larry McMahon, Griever
Bill Veness, Grievant
Don Lutes, Secretary, Grievance Committee
Statement of the Grievance: The aggrieved, William Veness, Check No 11368, contends the action taken by the Company, when on June 17 1988 his suspension culminated in discharge is unjust and unwarranted
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.
CHRONOLOGY
Grievance No. 19-S-36
Grievance filed: June 20, 1988
Step 3 hearing: July 5, 1988
Step 3 minutes: August 23, 1988
Step 4 appeal: August 25, 1988
Step 4 hearing(s): September 21, 1988 - October 28, 1988; November 18, 1988 - November 22, 1988; December 13, 1988
Step 4 minutes: December 30, 1988
Appeal to Arbitration: December 30, 1988
Arbitration hearing: January 10, 1989
Award issued: March 3, 1989
Stipulations at Hearing:
No 1: The parties agree that the issue of whether the Company has the right to alter, modify, or amend an existing absenteeism policy or to implement a new absenteeism policy or whether the existing policy is reasonable or not are not involved in this case and the arbitrator will not have authority to rule on these issues. The parties further agree that a violation of the numerical guidelines of the absentee policy, per se, does not necessarily constitute a basis for discipline or discharge.
No. 2: The parties agree that the only issue for the arbitrator to determine in this case is whether just cause exists for the discharge of W. Veness, Check No. 11368 and if not, what should the appropriate remedy be.
No 3: The parties agree that the arbitrator's decision in Grievance No. 19-S-36 shall be non-precedential and shall not be cited or relied upon by either party in any future situation or grievance.
Statement of the Award: The grievance is denied
BACKGROUND

At the time of his discharge June 17, 1988 Grievant W. Veness was a twelve-year employee of the Company and held the position of Wireman Standard in the Field Services Department. The discharge resulted in whole or substantial part because of a physical altercation between Mr. Veness and fellow employee Karl Walker at about 7:20 A. M. June 1 in the Wire Shop. Following an investigation the Company discharged the Grievant for

...violation of Rule 127-A (and) your failure to work as scheduled, and over-all unsatisfactory work record.

Rule 127-A lists among offenses "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."

Grievant's attendance record had also just reached the point when an automatic monitoring system would have generated a report to supervision with proposed options to be selected in all cases following a personal interview with the employee. The options proposed in these standard reports included either a discipline letter, revision to attendance data or "no action". The computer report for Grievant had not been reviewed or acted on before the fight of June 1 occurred. On June 2, the direction to issue a discipline letter as the option for the absenteeism response was selected.

The Company evidence as to the fight offered at arbitration was the testimony of IRMC Operations Manager William Moore as to an investigation he had conducted within a few hours of the incident. Mr. Moore had separately interviewed (in addition to Mr. Veness and Mr. Walker) four bargaining unit employees (Kikalos, Rodriguez, Landis and Schneider). Union Griever McMahon and a Steward (Schultz) had participated at the interviews with the opportunity to question these employee witnesses. Mr. McMahon also, as a Union Griever, attended the arbitration hearing.

Mr. Moore testified that the Company's pre-hearing brief "accurately summarized" the eyewitnesses' testimony, but he also again testified as to what all witnesses and the two fight participants had said and as to the basis for his conclusion that Grievant was the "aggressor and instigator" of the fight such as to warrant discharge. A disciplinary suspension had been assessed against Walker who had, according to Mr. Moore, not "done all he could to diffuse" or prevent the "escalation of the argument." Additional Company Witness Dobson, who had attended and taken notes at the investigation, expressed his opinion that Mr. Moore's investigation testimony summary was accurate.

The Company had indicated to the Union by letter of January 4, 1989 its intent to utilize at arbitration the investigation testimony:

As you are aware, Article 7, Section 1, marginal paragraph 7.1, of the August 1, 1986 Collective Bargaining Agreement prohibits the Company from calling as a witness in arbitration proceedings any employee who is a member of the bargaining unit. While the above-mentioned employees have already testified at the departmental investigation of the incident that led to the discharge of the grievant W. Veness, and been cross-examined by Union Representatives in attendance at that investigation, in order to preserve your right to question these employees it will be necessary for you to call them as witnesses. Should you wish to pursue such a course of action, the Company will make all necessary arrangements to have these witnesses available at the hearing. I recognize that the Union has adopted this course in two previous cases, notably Inland Arbitration Nos. 724, 738, and 752.

Since about 1980 the contract has incorporated what has been a widespread practice in this industry. Within paragraph 7.1 the language states:

The Company agrees that it shall not subpoena or call as a witness in arbitration proceedings any employee from the bargaining unit. The Union agrees that it shall not subpoena or call as a witness in such proceedings any non-bargaining unit employee.

The Union argued vigorously at arbitration that the Company is seeking by use of the hearsay evidence of Mr. Moore to "circumvent the handicap they agreed to accept" contained in the above contract prohibition. At hearing the Union raised a continuing objection to Mr. Moore's testimony both as to its hearsay nature and also as being both contradictory and not sufficient to meet the Company's burden of proof.

The Company responds that the issue "is not a contract interpretation question, but merely one of the degree of weight and admissibility of hearsay." It asserts that Article VII does not prevent each party from calling "its own as (an) adverse" (witness). Since the Union did not avail itself of such offered opportunity, it should be "estopped from its (position of) denial that full evidentiary weight" is proper for the statements made outside the hearing. The Union, the Company points out, had the opportunity to itself bring the employees into the arbitration and question them, and did not do so. The Company further notes that prior to the formalization by contract of the pre-existing practice, the statements of Bargaining Unit personnel were nonetheless admissible at hearing and the contract does not prohibit such use now.

I have reviewed the awards on this issue cited to me by the parties (as well as the brief treatment of this topic in the Steelworkers Handbook on Arbitration Decisions. See, i.e., pp. 460-463, 1981 edition). My conclusion for purposes of this award is that the hearsay nature of the testimony goes to its weight; I do not conclude that Article VII per se prevents the admission of such indirectly reported statements for the "truth of the matter asserted." Certainly the greater or lesser weight I would accord such testimony depends to some extent on the degree to which at the investigatory or early grievance step stage there was opportunity for full questioning by experienced Union (or as case may be Company) officers and whether the Grievant had the opportunity to hear and respond at some level.

I concur with the reasoning by Arbitrator McDermott at pp. 6-7 of Jones and Laughlin Award III-297, 69-C-74. The admissibility question has moreover recently been addressed for this Company with the same conclusion (Award No. 782). Other well-respected steel arbitrators have reached similar results. In the matter of Grievant Veness two Union witnesses were able to pose questions at the June 1 investigation. One of them also attended this hearing. No challenge was made to the accuracy of the Company summary, and the Company step 3 minutes, created much closer in time to the investigation, were not corrected by the Union. Let me stress, however, that mere admissibility does not, of course, make any particular item of evidence more or less persuasive. In this case, the "out of court" investigation testimony was relevant and probative of the central questions; it was not, moreover, the sole evidence offered. Grievant's own testimony was consistent on major points.

I would distinguish on its facts the Award by Arbitrator Seward (Decision 2501). There, a crucial identification of the Grievant as the assailant was made through hearsay and there too the Grievant lacked "the opportunity...through the Union, to cross-examine her (accuser) and directly challenge in reply to her account of the assault." In this case, at the investigatory state, Grievant Veness did have this opportunity. Grievaant Veness testified on his own behalf and described the incident at hearing. He said that after he put his time card in the card box, he passed Karl Walker and "we exchanged words and I reached over and smashed (his) styrofoam coffee cup…He jumped up and grabbed me and he managed to get an arm around my neck and I bit his arm to make him release me. I held his other arm with my hand so he would not hurt me. We were (then) separated." The Grievant was unable to recall at hearing what Walker had said to him to provoke his action. The step 3 Company minutes indicate (under "Statement of Union position") that Grievant had reported Walker as making disparaging remarks and calling him an obscenity at which point Grievant had turned back a few steps to crush the coffee cup. There is no question but that on the record Mr. Veness has consistently maintained that it was Walker who jumped up and grabbed him (after he smashed Walker's coffee cup) and that thereafter his own efforts were made "just trying to get free of Walker's grasp." Grievant believes that a series of harassing night phone calls, including one the night previous to the incident were made by Walker. Unquestionably there was longstanding mutual animosity. The only other eyewitness to the incident offered by the Union at arbitration was Jim Kumeiga who heard yelling and saw Veness and Walker locked together, stationary "almost like they were dancing. Karl's arm was around Bill and Bill's hand was on Karl's other hand. It happened real fast." This witness had not seen what happened before he saw the two men locked together; he estimated it was ten seconds before the men were separated.

From my review of the reported accounts of the four employees I conclude that Grievant did precipitate the incident. Employees Rodriguez and Schneider both testified that first Grievant spoke, then Walker. (Rodriguez alone of the four witnesses described a series of back and forth walks and comments by Grievant; in fact Rodriguez alone describes two separate shoving incidents.) No one but Grievant stated that Mr. Walker spoke first. There is no question that Grievant smashed or swept away Walker's coffee cup. Only then did Walker stand up; the men were soon locked together. Both are sizeable men and it is plausible that the very observable bite mark received by Walker was part of Grievant's effort, as he reported, to get Walker to release him. But not only has no witness identified Walker as the instigator, Mr. Veness acknowledged "reaching over and smashing" the coffee cup. In view of the longstanding hostility between the two men, Mr. Veness' act at the very least caused a fighting response he could have predicted and avoided. Even if Walker had first insulted Grievant, the latter's response to the asserted verbal insult was an unacceptable hostile physical gesture.

Moreover, it is stretching to credit Grievant's claim that a provocative insulting remark was made to him as he passed Walker. A mumbled comment could, of course, be missed by the men nearby chatting or reading before work started. But, in fact, Grievant's remark to Walker (if not the actual words) was heard by fellow employees. What happened after Walker jumped up in response to the smashing of his cup (i.e., how the next sttep of grappling occurred) was directly described only by Mr. Kikalos via the third step minutes. He

indicated that Grievant then moved closer. I cannot conclude that Walker greatly escalated the matter or forced Grievant merely to defend himself. The totality of the evidence which is not limited to the hearsay reports, establishes clearly and convincingly that the physical altercation was initiated by Grievant. The burden of proof on the Company has been met as to that point.

Absenteeism

The second basis offered and argued as sufficient unto itself for Grievant's discharge is his absenteeism record. Grievant does have a history at least since 1985 of periodic short suspensions primarily for absenteeism. Since the inception in March 1986 in the Field Services Department of an "attendance improvement plan" (akin to no-fault, but allowing for mitigation) Grievant has received both a final warning (May 15, 1987) and a "suspension pending discharge" which was converted into another final warning February 3, 1988. The Union notes improvement by the Grievant in 1988. However, even with that, Grievant had still by June 1 reached the point of issuance by the computer of the automatic notice to supervision (for human discretionary review and decision-making discussed earlier). (I note, of course. stipulation No. 1, above at p. 2.)

Union witness Phil King testified that in his experience an absenteeism record like Grievant's would not have resulted at that point in an automatic suspension or firing. There would have been an "individual discretionary review." Mr. Veness' absenteeism was "not a good record or a bad record" and it did demonstrate a "vast improvement."

The Company absenteeism program while not excusing absence for illness does allow for modifications and last chances. Grievant had, in fact, received two final chances, the last being the February warning. From that time to June 1 he missed a total of four days plus one early quit. The decision that was made to proceed also on absenteeism grounds came after the assault incident. This coincidence weakens its usefulness. However, there is no need for me to reach a conclusion as to what the Company "could or would have done" on the absenteeism. I conclude that the fight alone was just cause for discharge. The Company obligation to maintain a safe and orderly work environment for all employees is a serious one. Strict enforcement of anti-fight rules is routinely sustained and for good reason. And while Mr. Veness' absenteeism record standing alone may not establish sufficient independent cause for discharge, it does negate any use of Grievant's moderately lengthy twelve year tenure with the Company to mitigate the discharge penalty.

AWARD

Grievance is denied.

/s/ Ellen J. Alexander

ELLEN J, ALEXANDER, Arbitrator

Evanston, Illinois

March 3, 1989