Award No. 800
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 31-R-77
Appeal No. 1411
Terry A. Bethel, Arbitrator
March 6, 1989

INTRODUCTION

The hearing in this case was held in Hammond, Indiana on February 9, 1989. Each party filed a pre-hearing brief. The Grievant was present throughout the heaping and testified in his own behalf. At the beginning of the hearing, the parties stipulated that this would be a non-precedent setting award.

APPEARANCES

For the Company
Michael T. Roumell, attorney
Robert Cayia, Supervisor, Union Relations
Richard Szprychel, Heating Supervisor, Plt. 2 Coke Plant
Jesse Avitia, Refractory Supervisor, No. 7 Blast Furnace
Dale Rosenow, Section Manager, No. 7 Blast Furnace
For the Union
Jim Robinson, Arbitration coordinator
Don Lutes, Secretary Grievance Committee
Eddie McCollum, Grievant
Lou Weathers, Witness
D. Walton, Griever

BACKGROUND

This case concerns the permanent demotion of Grievant Eddie McCollum from his position as a forklift operator in the No. 7 Blast Furnace Mobile Equipment sequence. The Company asserts that it took this action, which was effective Jan. 1, 1986, as a result of poor work performance. Although there is some dispute about the gravity of the incidents, there was no disagreement that the company had previously disciplined Grievant for substandard work on the forklift.

On May 21, 1985, Grievant was reprimanded for speeding and improper transporting of a load; on November 26, 1985, Grievant was reprimanded for improper stacking of material that led to damage to company equipment; and on December 26, 1985, Grievant was reprimanded for dropping a "super sack" of refractory material while unloading a truck. Grievant denies receiving this reprimand, although he did not dispute that the incident occurred. There is also no dispute that the reprimand is in his file. There is, however, some question about whether it was delivered to him.

The company has no direct evidence of delivery since it claims that the reprimand was given to Grievant by another bargaining unit employee, who was working that day either as a labor leader or an hourly foreman. The company is precluded by contract from calling that employee to testify. Grievant testified that he did not receive the reprimand. I assume the question of delivery is relevant to how Grievant's record is characterized. If Grievant had no notice of the reprimand, he had no opportunity to grieve it and, as such, might object to its inclusion as a prior disciplinary action taken against him. In addition, Grievant might claim that he should be given more leeway in this proceeding to explain his actions on December 26, 1985. The company did assert that it would object to any attempt to, in effect, try in this case Grievant's guilt or innocence in prior incidents. But Mr. Roumell did not, in fact, object to Grievant's explanations and he had, I thought, a sufficient opportunity to offer his version of the events.

In addition to these prior incidents, the company's action against Grievant was also prompted by what the parties referred to at the hearing as the "culminating incident." That is, on December 31, 1985, Grievant was involved in an in plant accident. In brief, Grievant had been sitting on his fork lift talking to a mechanic. He turned the machine to leave without assuring proper clearance and ran over the mechanic's foot. Although the mechanic was not seriously injured, there is no dispute that the incident occurred. Moreover, the company argues that Grievant's negligence could have led to more serious consequences.

Dale Rosenow, who was section manager at the no. 7 blast furnace at the time in question, testified that he made the decision to demote Grievant. He said that he took the action because on several days in 1985, Grievant had lacked judgment and exhibited poor work qualities. He had not improved over the previous eight month period and had exhibited a potential to injure other employees.

Discussion

At the outset, I should point out what evidence I will and will not consider in deciding this case. Each of the previous reprimands stands on its own. I do not have the authority to determine whether previous, ungrieved discipline was warranted. But the Union's evidence concerning those incidents was relevant to the question of how bad Grievant's work record really was. That is, since the company introduced substantial factual evidence concerning the previous violations (which, I assume, was intended to portray them in their worst light), the union had the privilege of trying to portray them as inconsequential (but not of negating them altogether.)

I did not consider the reprimand dated April 11, 1985. The evidence established that this document was prepared and presented to the Grievant but was subsequently withdrawn after discussions with the union. Union representative Robinson's argument was exactly right. Either the reprimand is disciplinary action appearing in Grievant's record (and therefore subject to the grievance procedure) or it is not. It cannot be prepared and then held in reserve for use at a later time. I think the April 11 letter is not properly a part of the record in this hearing and I think it was improper for Rosenow to rely on it in determining what disciplinary action to assess against Grievant. And I think there is no doubt he relied on it since it is mentioned expressly in his letter notifying Grievant of his demotion, see company exhibit 1.

In that regard, I think Mr. Roumell's explanation of company exhibit 1 (namely, that Rosenow did not rely on the April 11 reprimand but only included it in the demotion letter to explain his reasoning for the demotion) was probably the best he could do with a bad fact which obviously was not of his own making. But it was not a persuasive argument. If Rosenow did not rely on the April 11 reprimand, there was no reason to mention it at all. If it was necessary to list it to explain his reasoning, then it must have been part of his thought process. Since the company had agreed to withdraw it, it does not exist for the purpose of disciplinary determinations.

Finally, I have given little, if any, weight to Rick Szprychel's assertion that he had informally counseled Grievant about other alleged violations. Grievant denied that Szprychel had taken any such action. I find it plausible to believe that a supervisor, as a normal part of his job, counsels employees about proper work performance. And I think it is believable that Szprychel could have done that for Grievant as well as other employees. But I find it difficult to believe that these occurrences involved matters that could have led to disciplinary action or, at least, to matters serious enough to help justify this demotion.

To a large extent, Szprychel's assertions are like the April 11 reprimand. A supervisor cannot warehouse allegations of wrongdoing to use at a later time. If he thought Grievant's action warranted discipline, he should have imposed it. The testimony he offered at the hearing was not only devoid of specifics, thus making it difficult for me to determine either its seriousness or its credibility, but it was also impossible for Grievant to defend himself. I am expected to believe that the company's action against Grievant was proper based on unspecified previous occurrences which Grievant cannot adequately explain or deny exactly because they are unspecified. I will not do that.

In support of its position, the union cites cases indicating that the company has the burden of establishing that Grievant lacks the basic ability to do the job. In short, the union draws a distinction between inability and negligence. The latter, the union asserts, is not necessarily cause for demotion since the negligent employee's actions are subject to correction. If the employee manifests inability to perform, however, disciplinary action short of demotion cannot reasonably be expected to improve work performance. Although the union contests the seriousness of some of Grievant's infractions, it claims that, at most, they show correctable negligence which does not warrant permanent demotion.

The company asserts that, while there may be a difference between competence and negligence, a finding of one or the other does not necessarily resolve this case. That is, even if all of Grievant's infractions constitute negligence, it does not follow that the company acted improperly in demoting him.

I think there is significant merit to the company's position. That is, though there are differences between negligence and ability, a finding that Grievant was merely negligent would not necessarily result in a conclusion that his demotion was improper. It is almost too obvious to state that workers can manifest sufficient indifference to their jobs to disqualify themselves, even though they might possess the basic ability needed to perform the job satisfactorily. Moreover, some negligent acts can carry such dire consequences that they are in themselves disqualifying. But I think it is also true that the existence of some

episodes of mere carelessness by themselves is not sufficient to justify demotion or to support a conclusion that an employee is incapable of performing the job. And on this record, I think Grievant's record falls into this latter category.

I understand that grievant had committed 4 different infractions within a period of approximately eight months. But he had been qualified as a mobile equipment operator for about five years at the time of his demotion. There was no evidence that he had experienced any significant difficulty before 1985. Indeed, there was no evidence of any difficulty before 1985. Perhaps for that reason, the company's response to Grievant's problems did not demonstrate great concern about his work performance up until the time of his demotion. I have no authority to judge the company's choice of disciplinary action for Grievant's previous infractions. I have no opinion about whether the series of reprimands was appropriate or not. But think the company's action speaks for itself.

At base, Grievant violated company rules by speeding, by improperly stacking materials, and by dropping a sack of refractory material (although I think Grievant's explanation of this offense was not implausible.) In each case, the company reacted by imposing the most lenient form of disciplinary action -- a reprimand. Although its reason for doing so was not discussed at the hearing, its action seems easily justified. Grievant had, apparently, been a good employee who had committed what appear to me to be minor infractions. The purpose of discipline is not just punitive -- it is corrective, The company appears to have reasonably believed that Grievant's work performance could be rectified by, in effect, reminding him of proper procedures and warning him to improve.

I think the culminating incident was of a more serious nature and justified a different level of response. Although Grievant's action was not intentional, his failure to act responsibly endangered the well being of a fellow employee. But I do not think the company's action in removing Grievant from the mobile equipment sequence altogether was justified. I understand that the company has the responsibility to manage the operation and that it has the right to make decisions to safeguard its employees and equipment. But the company has also agreed that it will not take disciplinary action against employees without proper cause. Although Mr. Roumell advanced an argument to the contrary, citing United States Borax and Chemical Corp., 36 LA 970, I think it cannot be seriously questioned that the company's action against Grievant was disciplinary in nature. Indeed, even Mr. Roumell conceded in his final argument that the demotion was a form of punishment.

I think Rosenow's explanation of the reason for Grievant's demotion is inadequate. Although the company's response to Grievant's prior problems had not exactly been casual, it had let three different violations go by without demonstrating serious concern. Nothing in the company's previous discipline could reasonably have put Grievant on notice that his position was in jeopardy. And I think that is a crucial factor. I have no reason whatever to believe that Grievant could not have responded to corrective discipline.

Given the length of his service on the fork lift, it is difficult to believe that Grievant simply did not have the ability to perform the. job. Instead, for whatever reason, he appears to have become somewhat careless, a fact recognized by the company, but certainly with no apparent alarm. Given the number of previous infractions in a relatively short time, I might view this case differently if, in response to a previous infraction, the company had increased its level of discipline as a way of capturing Grievant's attention. If Grievant had been suspended previously, for example, and still had committed the infraction on December 31, that might indicate that, whatever his actual ability, Grievant simply was not willing to improve his performance. I might also view the matter differently if the December 31 incident had been of a more serious nature. But those are not the facts I have. Based on this record, I think the company has established that Grievant was negligent and deserving of some punishment. But I do not think his negligence to date justifies demotion. Nor do I think the company had proven that Grievant lacks the ability to do the job.

Remedy

As happens frequently, the parties did not give me much help in designing an appropriate remedy. In the typical disciplinary case, the union does not want to concede the possibility that discipline was warranted, so it asks only for full restitution. The company is similarly shy. Understandably, it is not anxious to acknowledge that the remedy it chose could be inappropriate, so it, too, offers no alternatives. Often, that situation is no impediment. But it causes some problems here.

As noted above, I think Grievant's action warrants some discipline, but I think there was not proper cause for demotion. In my view, there would have been proper cause for a suspension. Although Grievant had not been suspended previously, I think the potential gravity of his action on December 31, 1985, would have justified that action here. However, this incident occurred more than three years ago. In my view, little would be accomplished by suspending Grievant at this time. Given the length of this proceeding and the

number of steps it entails, I feel certain that Grievant understands the seriousness of his actions. But I do not think he should be entirely free from punishment.

I understand that it is a standard arbitral remedy to reinstate employees without any back pay. Although I use that remedy less often than other arbitrators, I have employed it in the past and will probably do so again. But I do not think it is justified here. As noted, I think Grievant was improperly demoted. But that action took place more than 3 years ago. If I reinstate him without back pay he will incur, in effect, a three year suspension from his regular job, with an accompanying loss of pay. I do not think his action justifies such a severe penalty.

I have limited information about how Grievant has been paid. I do not know what his wage rate has been since the time of his demotion, I do not know if he has worked continuously during that time and I do not know whether, had he not been demoted, he would have worked without interruption as a fork lift operator. The best I can do, then, is to describe his remedy in general terms.

My ruling is that Grievant be reinstated to his former position in the mobile equipment sequence at the number 7 blast furnace. I will not order full restitution because I think Grievant was deserving of some punishment. Moreover, I cannot simply deduct pay from him as a way of imposing a suspension because Grievant has already worked the time and, obviously, cannot be forced to forfeit pay for time actually worked. I therefore order that the company pay to Grievant an amount equal to one-half of the difference between what he has earned from the time of his demotion and what he would have earned had he not been demoted. I realize that this is an imperfect remedy, but it is the best I can do with the information I have.

AWARD

The grievance is sustained, in part. The company is ordered to reinstate Grievant to his former position as forklift operator in the number 7 blast furnace mobile equipment sequence and to award back pay as explained in the remedy section of the opinion, above.

Respectfully submitted,

/s/ Terry A. Bethel

Terry A. Bethel

Bloomington, IN, March 6, 1998