

Award No. 839
IN THE MATTER OF THE ARBITRATION BETWEEN
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

and

INLAND STEEL COMPANY

Grievance No. 31-T-15

Appeal No. 1450

Arbitrator: Terry A. Bethel

January 2, 1991

OPINION AND AWARD

Introduction

This is a discharge case between Inland Steel Company (the company) and Local 1010 of the United Steelworkers of America (the union). The grievant is Robert Reyes. The hearing was held in the company's offices in East Chicago, Indiana on December 14, 1990. Robert Cayia represented the company and Jim Robinson presented the union's case. Grievant was present throughout the hearing and testified in his own behalf. Both sides filed prehearing briefs.

Appearances

For the Union

J. Robinson, Arbitration Coordinator

D. Lutes, Secretary, Grievance Committee

D. Walton, Griever

C. Davis, Steward

D. Spann, Steward

R. Reyes, Grievant

J. Campblee, Witness

For the Company

R. Cayia, Section Mgr., Union Relations

S. Triplett, Supervisor

E. Payne, Hourly Supervisor

K. Kahl, Section Mgr.

B. Smith, Project Representative, Union Relations

R. Ferguson, Paramedic

Background

This case involves the discharge of Grievant Robert Reyes who, until the time of his discharge, was employed as a furnace keeper at no. 7 blast furnace. Although the company's discharge letter references grievant's past work record, the propriety of the company's action depends on its allegations of misconduct by grievant in the early morning hours of August 15, 1990. All of the pertinent facts surrounding that incident are in dispute, meaning that resolution of the case depends on my assessment of the witness' credibility.

As noted, grievant was employed as a keeper at no. 7 blast furnace. On August 14, 1990, grievant had been assigned to the 3 - 11 p.m. turn. There is no dispute that no. 7 blast furnace experienced serious operating problems that night. Accordingly, the company asked grievant and another employee, Jim Campbell, to stay over on the 11 p.m. to 7 a.m. turn. Both Campbell and grievant understood that their assignment during the extra turn was to prepare the no. 1 tap hole system for casting. They were to work under the supervision of hourly foreman Everett Payne.

Payne testified that when he arrived for work the no. 1 tap hole was punched out due to electrical problems, the no. 3 tap hole was also punched out and number 4 was a dead system. The furnace was full of metal and slag, thus necessitating a reduction of wind on the furnace. Payne described the situation as urgent, an assessment shared by both company and union witnesses.

Payne testified that initially he took the west side gang to the number 3 system. At about 11:15 he called the east side keeper on the radio and asked him to send grievant and Campbell to supplement the crew. They were in the east side shanty, which was about a minute away. After waiting for them for 10 minutes, Payne called again. Steve Triplett, the control room supervisor and Payne's superior, testified that he overheard both calls and that he went to the shanty to see what was delaying Campbell and grievant. When he got there Campbell was leaving but grievant was still in the shanty. Triplett told him he was needed at

no. 3, but grievant replied that he would go "in a little bit." Triplett told him he had 5 minutes to report. Payne testified that by the time Campbell and grievant arrived, the work was substantially complete and they were of no use.

Following the work on number 3, Payne went to the number 2 system to check on progress there and grievant and Campbell went back to the east side shanty. At around midnight, Payne went to the shanty and told grievant and Campbell what he wanted them to do on no. 1 and also explained the urgency. They replied "ok, we'll get it" and Payne left and returned to no. 2, where he remained until about 12:35 a.m. At that point he went to the control room to confer with Triplett. Triplett reminded him of the urgency of the situation and asked about the progress on the no. 1 system. Payne testified that as he left the control room to check on the status, he could see that nothing had been done on no. 1.

Payne went to the shanty where he noticed two other employees, Jim Shauvner and Manuel Watkins, sitting on benches. He walked further into the room and saw that both Campbell and grievant were lying down. Payne testified that he walked to the corner of one of the tables in the room, slapped his hand (or, as the union says) banged his hand on the table and told both employees that it was important to get the work done. Campbell replied that the system wasn't ready yet. Payne replied that it was ready and told the employees he expected them to do the job. At this point, Payne was standing near the door to the shanty. Campbell got up and walked out the door. Grievant then got up as well and walked toward the door. This is where the accounts differ significantly.

Both grievant and Campbell testified that grievant left the shanty and that nothing else happened. Actually, Campbell did not say he saw grievant leave. Rather, he said he (Campbell) walked out and that about a minute later he noticed that grievant was behind him. Grievant testified that he just walked out the door behind Campbell.

Payne said he saw grievant get up and head for the door. He did not, however, exit. Rather, as he approached Payne, grievant reached in his pocket with his right hand and pulled out a knife. He then grabbed Payne's shirt with his left hand and, pushing against his chest, backed him 10 or so feet across the room into a water heater, all the time waving the knife in his face. Payne said grievant told him "I'm sick of you punk motherfucker, I'm tired of fucking with you." Payne did not resist until he reached the water heater, when he was able to pull away. At about that time, Watkins got up and said "Bobby [grievant] just let him go."

At that point, Payne said he told grievant that he was sending him home. He said he went to the hot line and called Triplett and that he told Triplett grievant had threatened him, pushed him, cussed him and threatened him with a knife. Triplett confirmed both the phone call and the substance of the conversation. Payne asked Triplett to send plant security. At that point, Payne said grievant announced to the other three employees "Don't nobody see nothing" and left the shanty.

Payne said he went back to the control room where he was quite shaken up. Triplett confirmed this part of Payne's story. He said he saw Payne in the control room and that he was "pretty upset." His voice was unsteady and he was not in control of himself. Subsequently, Payne went to the clinic, where he was treated by a paramedic --- Randy Ferguson -- for contusions to the chest area. Ferguson said the contusions were caused by some external contact, but probably not a blunt object, which would also have caused bruising. He also noted that Payne's pulse rate was 96 and his blood pressure was somewhat elevated. On cross examination, he agreed that these readings were on the outer edges of normal for a 32 year old man like grievant.

Discussion

As noted above, resolution of this case depends to a large extent on a credibility determination. The company's version of the facts is supported only by the eyewitness testimony of Payne and the circumstantial evidence of Triplett and Ferguson, neither of whom saw what happened in the shanty. The union's version is supported by both grievant and Campbell. Employees Shauvner and Watkins, each of whom were in the shanty at the time of the alleged incident, did not testify.

The union attacks Payne's credibility in several respects, but most particularly as a result of a change in his testimony on cross examination. Prior to the hearing, Payne had said only that, when grievant approached him, he took out of his pocket an object that appeared to be a knife and waved it in front of him. I found this account somewhat confusing when I read the prehearing briefs and the minutes of the third step grievance hearing. In my view, it was either a knife or it wasn't. Finally, at the hearing he said it was a knife and that he had known it all along.

He explained his previous ambiguity by saying that shortly after the incident he received a telephone call at home from a union officer in the department. Although he was working as an hourly foreman at the time of

the alleged incident, Payne is a member of the bargaining unit and, as such, is represented by the union. The unnamed official asked Payne to have some sympathy for grievant and his family. The official asked Payne to at least deny grievant used a knife. Payne agreed that he would do so and, in fact, had stuck to the story until the day of the hearing. He had, however, reported the facts to company representative Cayia a few days before the hearing. Payne said he was unable to stay with his story about an "object" because the hearing was the first time he had testified under oath.

The union attacked this change of story in its final argument. It claims that Payne's story was merely a convenient way of trying to substantiate his version of the story and make grievant look even worse. The union also argues that Payne's refusal to name the union official undermines his credibility. I note, however, that no one asked Payne to identify the union official. He did say, under examination by the company, that he did not want to name the official. Mr. Cayia did not ask the name, thus leaving Jim Robinson, the union's representative, with a difficult decision about whether to press for the name. He elected not to, a wholly reasonable and responsible course of action. But it is nevertheless inaccurate to claim that the union was unable to verify or rebut Payne's testimony. He may well have revealed the name, had he been asked directly. Indeed, I would have directed that he answer the question.

Credibility determinations are among the most difficult decisions made by an arbitrator. Some have tried -- in my view without great success -- to establish objective factors for this most subjective of determinations. I am aware of some of the so-called general rules. It is often said, for example, that a disciplined or discharged employee's testimony should be viewed with suspicion, since he has incentive to lie in order to save his job. This same bit of wisdom posits that a supervisor has no such incentive and, therefore, should be assumed to be truthful. It may be the case that a discharged employee would lie to save his job, but the notion that managers have nothing to lose from the truth would seem almost too silly for serious comment. Supervisors, like other human beings, sometimes overreact, sometimes bear grudges, sometimes make mistakes. When they induce their superiors to take disciplinary action influenced by such factors, they too have incentive to hide from the facts.

The simple truth is that credibility cannot be reduced to general rules. Lying witness don't fidget and sweat on the stand. They don't avert their eyes. If their demeanor changes, such differences are typically not discernible by the arbitrator since he, unlike the others in attendance, has probably never seen the witness before. The matter is made even more difficult by the tendency of witnesses, in fact of us all, to convince ourselves of the virtue of our ways. While perhaps not true in this case, some cases involve fairly subtle shadings of fact, and most of us relate the facts in the light most favorable to ourselves. What's worse, we can often tell the story so well that we come to believe it, thus making it even harder for a disinterested party to tell who's lying and who isn't.

In short, I have no litmus test to apply to this contest between grievant and Payne. And, having decided to believe Payne, I may not explain my decision to the union's satisfaction and almost certainly not to grievant's. I will, however, do the best I can.

I begin with the basic story told by Payne and the denial from grievant. The union asserts that Payne made the whole thing up and speculates that he may have done so in order to retaliate against grievant over an unrelated matter. Grievant claims to have heard from another employee that Payne reported to work drunk on August 12 and that Triplett covered up for him. Grievant is alleged to have said he would call plant protection if he ever saw Payne drunk. The suggestion is that Payne made up the story about the assault on the 15th in order to get back at grievant for this comment.

Both Payne and Triplett deny that Payne was drunk on August 12. I wasn't there, of course, and can't say whether he was or wasn't. I note, however, that no one testified to having seen him in that condition. More important, grievant could not say where he heard the rumor and no one could testify that Payne had been told of grievant's comment. Indeed, Payne claimed never to have heard about the matter until after the discharge, specifically in the third step hearing.

What I find even more significant, however, are the circumstances which gave rise to Payne's story. I don't know Payne and I have no opinion about his ability as a foreman or, for that matter, his general reputation for veracity. He did not, however, strike me as a fool. I can imagine a supervisor manufacturing a story about an employee against whom he bears a grudge. If I was going to do that, however, I'd do it in front of a friendly fellow supervisor, who could be expected to support my account. Or, at the very least, I'd wait until the employee and I were alone, so it would just be my word against his. But that's not what happened here. Payne claims to have been assaulted in full view of three of grievant's coworkers. He also acknowledges that there were no other supervisors in the vicinity. Only a fool would manufacture such a story. In my view, his willingness to lodge the charges against grievant, under circumstances where he had

to know he'd get little support from the witnesses, adds to his credibility. In short, I think he chose to tell the story, despite the lack of favorable witnesses, because it was the truth.

I recognize that Campbell was there and that he supports grievant's claim that nothing at all happened. I did not believe him. I understand that he was anxious to protect a friend and coworker, but he was clearly not telling the truth. Moreover, I note that neither of the other two witnesses came forward at the hearing.

Because of Article 7, Section 1, the company could not call either employee against his will. Obviously, the union would not call the employees against their will either. There was also testimony that Watkins had tried to avoid the incident altogether, by claiming he wasn't there. When he was told he had been placed at the scene, he replied that he didn't want to get involved. I realize that both Watkins and Shauvner testified in the earlier grievance steps. But I attribute some significance to their apparent reluctance to come to the hearing and repeat their observations under oath.

The union also tries to discredit Payne's testimony by offering an alternative explanation for how Payne received the contusions on his chest. There is no question about the fact that earlier on the shift, Payne had assisted with work on a lifting device and that he had lifted a heavy object known as a bull ring. The union speculates that he could have held it or bumped it against himself, thus causing the contusions. This could have happened. I have pictures of the device, introduced by the company, which apparently are intended to demonstrate the difficulty of causing the injury in the way suggested by the union. It may be that the ring is too heavy for an employee to lift it in the manner that would cause contact with his chest. I can't say that the injury couldn't have happened that way. But, of course, there is no proof that it did. Moreover, because I am inclined to believe that grievant assaulted Payne in much the manner Payne described, I am willing to believe that the injury occurred during the assault.

In my view, a central issue raised by the union is not whether the assault occurred, but whether grievant used a knife to threaten Payne during the assault. I have described above the conflict in Payne's testimony. The union is correct in its assertion that such changes in story must be viewed with suspicion. In this case, however, I cannot find that Payne's revision damaged his credibility.

Given the seriousness of the charge against grievant, positive identification of the "object" as a knife was not essential to the case made out by Payne. Simply put, Payne had to know, especially after his conversation with company representative Cayia, that any change in his story at the hearing was likely to hurt more than it would help. And, of course, if he was lying anyway, as the union asserts, why not just continue with the same lie? Why try to make it look even better? An unprovoked assault on a supervisor may well constitute cause for discharge, regardless of whether a knife was used or not. So why change the story? Although explaining such subjective determinations is difficult, I believed his claim that he was just not willing to lie under oath.

Part of this willingness to believe Payne depends on the nearly untenable position he found himself in. As observed by Mr. Cayia, Payne is neither fish nor fowl. He is a member of the bargaining unit, represented by, and presumably a member of, the union. But he also works from time to time (the record doesn't demonstrate how often) as a supervisor. It is often difficult for supervisors to take (or at least cause) disciplinary action against employees. Although there may be a line between management and labor, the distinction sometimes blurs on the plant floor, where foremen and workers know each other and have worked together for years. Payne was in an even more difficult situation. He is not a permanent supervisor. Conceivably, he could supervise employees one week, but work along side them the next. He was, then, particularly susceptible to the kind of appeal made by the unnamed union representative.

That representative did not ask Payne to deny the incident altogether. He merely asked Payne to leave the knife out of it, appealing to Payne's knowledge of grievant's family. I think Payne took the request to heart and that he tried to comply. He was not, however, willing to lie at the hearing.

I am also persuaded, in part, because of grievant's actions later in the shift. As noted above, after the assault grievant announced "don't nobody see nothing" and left the shanty. Payne called Triplett. Triplett testified that Payne said grievant had assaulted him with a knife. (Note that this call occurred right after the incident and obviously before the union representative approached Payne. Payne, thus, was not yet referring to an "object.") Triplett called plant protection. When the plant protection officers arrived, Triplett went with them to confront grievant. Triplett told grievant he was accused of pulling a knife on Payne, of threatening him, shoving him and cursing him. Grievant replied only "I don't have a knife." And, a search of grievant and his belongings failed to reveal a knife.

Grievant, however, acknowledged company witness' testimony that he ordinarily carries a pocket knife. He said, however, that he had loaned it to mechanic earlier in the week, who had not returned it. He didn't identify the mechanic. I didn't believe him. Clearly, the issue of the knife was a central part of the

company's case. Had grievant really loaned his knife away, it would have been important for him to produce the mechanic to testify. He didn't do that, however, because his story isn't true. I think he pulled his knife on Payne and, realizing the seriousness of his conduct, disposed of it in some manner before plant protection arrived.

The union also raises a question about Payne's credibility because he was unable to explain how grievant opened the knife. Payne's testimony was that grievant reached into his pocket with his right hand and produced a knife and that he then waved the open knife in Payne's face. Payne identified that knife as a regular pocket knife, and not a switchblade. The union claims that this story cannot be true because Payne cannot account for how the knife was opened.

I agree with the union's claim that this is not merely an unimportant detail. To some extent, however, Payne's inability to explain every detail is understandable. He wasn't necessarily watching grievant with great interest in his every motion. He testified, in fact, that he thought grievant was getting ready to exit the room. Then, when the assault occurred, it happened quite fast. It could be that, although not a switchblade, the knife opened easily because of a loose clasp. Or, and this is more likely, grievant may have opened the knife and held it in his pocket (or at his side) as he approached Payne. Given the stress produced by such an unprovoked and unexpected assault, and the quickness with which it occurred, one can hardly blame Payne for being unable to explain each facet of the incident.

In summary, I find that grievant assaulted Payne in much the manner Payne's testimony described. He grabbed him by the shirt, he shoved him backwards to the water heater, exerting enough force to cause contusions, he cursed him, and he threatened him with a knife. The question, then, is whether this conduct justifies discharge. I think it does.

I recognize that grievant is a long service employee. As such, he is entitled to some consideration in disciplinary decisions. That is, the company might be expected to tolerate certain actions from long time employees that it would not expect for new workers. I need not say where that line is to be drawn since it is clear that grievant crossed it here in any event.

There was evidence that grievant has some history of questioning management decisions. That description is inapt in this case. Grievant did not merely question Payne's judgment, he physically assaulted him, grabbing him by the shirt and backing him across the room with enough force to cause a minor injury. And to make matters worse, he threatened him with a weapon. The assault may have been sufficient to justify discharge even without the knife. But there is no doubt that the presence of the knife adds another dimension to the case. No employee should be forced to suffer such brazen and dangerous conduct. The fact that Payne was grievant's supervisor only adds to the seriousness of the incident. There may be a point to which supervisory orders may be questioned. But there can be no credible contention that supervisors can be assaulted and threatened with serious bodily harm.

I feel sorry for grievant. I know little about the kind of employee he was or the kind of man he is. I suspect that he regrets the incident and the consequences for both himself and Payne. It isn't easy to see someone lose his career over one foolish moment. But there are some actions that pose sufficient danger to justify just that result. The contract allows the company to discharge employees for "cause." I conclude that it had cause in this case.

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

Bloomington, IN

January 2, 1991