Award No. 840
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF
AMERICA, LOCAL UNION 1010
Grievance No. 2-T-19
Appeal No. 1451
Arbitrator: Terry A. Bethel
February 19, 1991
OPINION AND AWARD
Introduction
This case involves the discharge of grievant Larry Cauble on August 28, 1990, principally as the result of an incident that occurred on August 13 of the same year. The hearing was held in the company's offices in East Chicago, Indiana on January 17, 1991. Bradley Smith represented the company and Jim Robinson presented the union's case. Grievant was present throughout the hearing and testified in his own behalf. The company filed a prehearing brief.
Appearances
For the company
B. A. Smith, Project Representative, Union Relations
E. Jackson, Hourly Supervisor, No. 2 Coke Plant
D. Wright, Section Manager, No. 2 Coke Plant
R. Hughes, Representative, Union Relations
W. Peterson, Representative, Union Relations
For the union
Jim Robinson
Larry Cauble, grievant
Melvin Adams, griever
Ernie Barrientez, steward
Jim Hunt, witness
Joe Noel, witness
Calvin Richardson, witness
Background
This case involves the discharge of grievant for insubordination and poor work performance. Many of the facts are in dispute. Prior to his discharge grievant was employed as no. 9 larry car operator. He testified that he had been working in that position "on and off" for about a year, although he has been employed by the company since 1978. On August 13, 1990, the day of the incident that led to his discharge, his immediate supervisor was Ed Jackson, hourly foreman. Both Jackson and grievant testified that, shortly after he reported to work on the 13th, grievant informed Jackson that the gooseneck cleaner on the larry car was not working. Jackson told grievant to clean the goosenecks by hand and grievant said he would. This was sometime around 7:15 a.m. Jackson then went to a meeting and apparently did not return to the area until about 9:00 a.m.
At that point Jackson was concerned because grievant had only charged 3 ovens. Jackson said that grievant should have charged 8 ovens in that time period. Jackson said he went to the top of the oven and went aboard the larry car. He asked grievant why he had charged only 3 ovens and grievant replied that the gooseneck cleaner was not working and that he was charging out of compliance. Both at the hearing and from the tape, I understood Jackson to mean that grievant used that terminology -- that is, that he was charging "out of compliance." Jackson interpreted that to mean that grievant was charging the ovens without cleaning the goosenecks, a violation of OSHA regulations.
Jackson said he told grievant that he had instructed him to do the work by hand and grievant replied that he didn't have a bar. Jackson testified that it was not uncommon for the gooseneck cleaners to stop working (a fact I noted for myself since the gooseneck cleaner did not work when I viewed the oven after the hearing) and that it was common practice to clean them manually with a bar. Jackson said he pointed out a bar on top of the oven and directed grievant to get it, but grievant refused. According to Jackson, grievant said twice that it was not his job to get the bar.

Grievant's testimony differed in material respects from Jackson's, although he does concede that Jackson told him to get the bar. Grievant claimed that his poor production rate was due to two different power failures and that he so informed Jackson when he came on the larry car to ask about the rate of production. He said that he was talking to an electrician when Jackson arrived. Jackson, too, testified to having seen the electrician on the larry car, although he said the electrician inquired only about the inoperable gooseneck cleaner.

As noted, however, grievant admitted that Jackson then told him to get the bar. Grievant claimed -- not particularly persuasively -- that he couldn't see any bar. He also claimed, this time with somewhat more credibility, that it was not common practice to use a bar to clean the goosenecks when the power cleaners were down.

Discussion

There was a significant dispute between the parties about whether grievant mentioned a power failure as the reason for his poor rate of performance. There was also a dispute about how realistic the company's expectations were. In my view, not much turns on this latter controversy. The union contends that it takes approximately 20 minutes to charge an oven and that the company's scheduling practices would have required grievant to charge one every 12 minutes, given the block time built into the schedule.

It does appear to me that the company scheduled grievant's August 13 work load in accordance with its ordinary practice and that the union had not complained previously that such work load was excessive. In any event, whether one chooses the union's estimated time or the company's, it appears that grievant was behind schedule when Jackson went onto the larry car at around 9:00 a.m. It also seems likely that grievant mentioned the gooseneck cleaner to Jackson since otherwise there would have been no reason for Jackson to bring up the subject of the bar.

I have difficulty understanding, however, how the gooseneck cleaner failure could have been raised by grievant as a reason for his slow performance. If he was charging out of compliance, as Jackson said he claimed to have been, then it seems likely that grievant's production would have been faster rather than slower. That is, he would have saved the time he ordinarily spent cleaning the goosenecks. This lends some credibility, then, to grievant's claim that he told Jackson the reason for his slow performance was the two power failures.

The company questioned whether there were any power failures at all. I wasn't there, of course, and will never know for sure, but I am persuaded from the testimony that the power failures occurred. In the first place, Jackson himself admitted encountering an electrician when he went onto the larry car. Employee Calvin Richardson confirmed that grievant had yelled down to him about the power outage and that he (Richardson) had "called someone." I was also influenced by the testimony of Jim Hunt and particularly by that of Joe Noel, who ultimately turned the power back on. He did not do so immediately, however, because he said it wasn't his job and he was concerned that he might get in trouble. The company's brief essentially confirms his hesitation since it asserts that Noel was "neither trained nor authorized" to take such action.

There is a dispute about how long the power failures lasted. The company contends that, if they occurred, they could not have lasted longer than 10 minutes, since it would have taken Noel only about 5 minutes or less to get to the breaker and trip it. That much is certainly true. It seems likely, however, that the actual time out of production exceeded 10 minutes. Loss of power affected grievant's FEMCO system. Thus, he had to leave the larry car to find someone who could pass the word. Moreover, Noel testified credibly that he was reluctant to turn the handle and that there was some delay before he did so. Grievant estimated that the delays totalled 40 minutes. I suspect that the total time was less than that, but still in excess of the 10 minutes claimed by the company.

Based on the credible testimony of Richardson, Noel and Hunt, as well as grievant's assertions, I find that there was, in fact, a power failure that morning. I also find that this fact accounts, at least in part, for grievant's slow rate of production. I also believe, frankly, that it was not grievant's rate of production that led to the discipline. I base this principally on Jackson's own testimony.

Jackson said he went onto the larry car to inquire about grievant's slow work, but was told only that grievant was charging out of compliance. As I note above, this doesn't explain why grievant would be behind schedule. In any event, at that point, Jackson directed his attention to the cleaning bar. He did not tell grievant that his poor work performance had jeopardized his employment or that there was any deficiency in his explanation for its cause. Rather, his primary concern was making sure that grievant cleaned the goosenecks. Since his direction to grievant about the gooseneck obviously contemplated that grievant would continue to work, it is fair to conclude that it was not grievant's work performance that

cause him to be taken off the job. Indeed, I suspect that if grievant had gotten the bar as directed, he would not have been disciplined for his work performance at all. In any event, I cannot say with confidence that grievant's performance was, in fact, poor enough to justify disciplinary action, given the power failure. At base, then the case depends on the company's charge of insubordination.

There is no question that grievant refused Jackson's direction to get the bar. I did not believe grievant's claim that he did not see the bar. Because I think Jackson genuinely believed that the bar could be used to clean the goosenecks, this was clearly a legitimate order and grievant just as clearly disobeyed it. In my view, however, that does not necessarily mean that the discharge was for just cause.

The point of the directive to get the bar was so that grievant could clean the goosenecks. Because of their conversation, Jackson may have believed that grievant had not been doing that work. Jackson, however, acknowledged that he did not inspect the goosenecks to see whether grievant had done the work. Although the company would like for me to draw the contrary inference, I think on balance it is reasonable to believe grievant's testimony that he cleaned the goosenecks manually with the cleaner itself.

Both grievant and other employees testified credibly that standard procedure is to use the gooseneck cleaner manually when it won't work under power. The gooseneck cleaner is a large device that the larry car operator inserts into a pipe. When it is activated, some "teeth" spin around and clean accumulated material from the inside of the pipe. These teeth, however, are not retracted into the machinery when the power is off. Rather, they protrude from the equipment which can still be inserted into the pipe manually. During the hearing, Mr. Smith argued that the machinery is too big and bulky to handle manually in that fashion. Jackson, however, testified that the cleaner is always inserted and moved around manually. The power operation apparently involves the spinning teeth. My own observation led me to believe that an operator could move the cleaner against the inside wall of the pipe, thus gaining whatever effect the stationary teeth would provide.

Grievant and others testified that the cleaner can be moved around manually, thus bringing the exposed teeth into contact with deposits adhering to the inside of the pipe. Although this procedure is obviously less efficient than power application of the machine, it does not appear to me to be any less efficient than scraping out the deposits with a bar, which is the procedure advocated by Jackson. Both techniques would appear to do about the same thing.

All of the employees who testified claimed they had never heard of cleaning the goosenecks with a bar, at least given the present configuration of the equipment. While those claims may be something of an exaggeration, I am nonetheless persuaded that when the gooseneck cleaner is not under power, it is common for employees to use it manually, as grievant claims he did on the day in question. I am, thus, unable to conclude that grievant had ignored his responsibility to clean the goosenecks, even though he clearly ignored Jackson's directive to retrieve the bar.

In short, then, I think it is fair to conclude that grievant refused Jackson's directive to retrieve the bar, but that he had not ignored the assignment to clean the goosenecks. I cannot account for grievant's refusal to get the bar, except to note that it does not appear inconsistent with some of his previous actions. Nevertheless, and despite Mr. Smith's earnest attempt to portray it differently, this particular incident was not that serious in itself. Although grievant refused to retrieve the bar and do the work in the fashion preferred by Jackson, he did in fact do the work in question (or he had been until the time he was relieved) and he performed it in accordance with the usual routine. I do not mean to suggest that grievant's action was merely trivial. I do suggest, however, that but for grievant's previous record, this incident would not have produced such severe consequences.

I recognize that grievant's past difficulties have been substantial. He was discharged in March of 1989 and reinstated under a last chance agreement in May of the same year. The agreement provides that any further violation "will be cause for immediate suspension . . . subject to discharge." I understand that the utility of such agreements depends on the willingness of arbitrators to grant their enforcement, as I also observed in Inland Award 828. Nevertheless, it is not the last chance agreement that is of principal importance in this case. Rather, the question is whether the character of the offense committed by grievant justifies the penalty of discharge. The last chance agreement -- and the previous work record that led to it -- are essential ingredients in that characterization. But, despite the existence of the last chance agreement, not just any offense will justify discharge as the company itself has recognized.

In this case, for example, grievant allegedly committed one other offense subsequent to his reinstatement under the last chance agreement. Although that offense is presently under review in the grievance system, the importance here is the company's recognition that the last chance agreement is to be applied with some flexibility and with some reasonableness.

Employees with work records like grievant's, certainly, are entitled to significantly less leeway than employees with good, or even average, work records. Grievant admittedly is much closer to the edge than an average employee committing the same offense. But the contractual standard is still cause and the question before me is whether this violation establishes the requisite cause, even in light of grievant's history. I think it does not.

This is a very close case. Although the balance tips in favor of grievant, it does so almost imperceptibly. His record is not one that inspires pride or confidence. His actions have sometimes been marked with immaturity and obstinance. Nevertheless, I think he did experience power outages on the morning of August 13 and I think he was cleaning the goosenecks in the matter used by most other employees under like circumstances. His refusal to get the bar at Jackson's direction, then, did not amount to a refusal to work and did not unduly hinder production. It was, of course, a childish display of stubbornness and, given his previous record, grievant deserves to be disciplined. In my view, however, his conduct fell just short of the line that would warrant discharge.

This award will, in effect, give grievant one last chance. He should understand just how precarious his position is. Some arbitrators would have upheld the discharge this time. Another such incident will clearly exceed the tolerance of any reasonable person. In the future, grievant would be well advised to do what he is told.

REMEDY

Although I will order his reinstatement, grievant is to receive no back pay and no reimbursement for any lost benefits. The period between the date of discharge and the date of reinstatement will serve as a disciplinary suspension. In addition, in order to restore the circumstances under which he worked at the time of his discharge, I will order that the last chance agreement continue in effect as drafted for a period of nine months following his reinstatement.

AWARD

The grievance is sustained, in part. The company will take the remedial action set forth in the Remedy section of the Opinion.

/s/ Terry A. Bethel

Terry A. Bethel, Arbitrator

Bloomington, IN

February 19, 1991