Award No. 902
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America,
Local No. 1010.
Grievance No. 2-V-9
Appeal No.
Arbitrator: Jeanne M. Vonhof
May 22, 1995
REGULAR ARBITRATION
INTRODUCTION
The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Friday, April 28, 1995 at the Company's offices in East Chicago, Indiana. The Company and the Union filed pre-hearing briefs in the case.
APPEARANCES
UNION
Advocate for the Union:
A. Jacque, Chairman, Grievance Committee
Witnesses:
B. McGing, Grievant
E. Barrientez, Griever
COMPANY
Advocate for the Company:
B. Smith, Arbitration Coordinator, Union Relations
Witnesses:
B. Nanney, Police Chief, Environmental Health & Safety Dept.
E. Foster, President, Northlake Investigations/Security
P. Smith, Maintenance Section Manager, No. 2 BOF
Also present:
P. Soliday, Private Investigator, Northlake Investigations
J. Spear, Staff Representative, Union Relations
C. Garber, Plant Security, Inland Steel
L. Selby, Union Relations
P. Berklich, Union Relations
RELEVANT CONTRACT PROVISIONS AND RULES OF CONDUCT:
CONTRACT
ARTICLE 3
PLANT MANAGEMENT
Section 1. Except as limited by the provisions of the Agreement, the Management of the plant and the direction of the working forces, including the right to direct, plan and control plant operations, to hire, recall, transfer, promote, demote, suspend for cause, discipline and discharge employees for cause, . . .and to manage the properties in the traditional manner are vested exclusively in the Company. . . .
RULE
132. The following offenses are among those which may be cause for discipline, up to and including suspension preliminary to discharge:
1. Stealing or malicious conduct, including destroying, damaging, or hiding any property of other employees or of the Company and the destruction, damaging or pilfering of vending machines or any equipment made available to employees for in-plant feeding.
BACKGROUND:
This dispute involves the discharge of a long-term employee for stealing. The Grievant, B. McGing, had been employed by the Company for seventeen (17) years, and at the No. 2 and 3 Coke Battery for about ten (10) years prior to his discharge. He was employed at the No. 2 Coke Battery when it shut down at the end of 1993, and participated in the clean up and transfer of equipment which occurred there for several months after production ended. The Grievant was laid off in February, 1994.

Mr. R. Nanney, the Chief of Security for the Company, testified that he received a series of telephone calls from a woman beginning in late July, early August, 1994. The caller stated that her husband, from whom she was separated, worked for the Company, and had brought home Company tools and equipment on numerous occasions, which were stored in their garage. According to Mr. Nanney, the woman was reluctant to divulge either her name or her husband's, unless Mr. Nanney could answer her questions about what would happen to her husband, and how deeply she would have to become involved in the matter. According to Mr. Nanney, she stated that she did not know what to do with the tools.

After several telephone calls spanning several weeks, the caller did identify her husband by name (the Grievant) and herself as his estranged wife. The Grievant testified that he was living with his former wife at the residence in question until February, 1994.

Mr. Nanney testified that he went to the residence during about the second or third week in September, 1994, and entered the garage belonging to the Grievant and his wife, with her permission. He found the garage cluttered and filled with equipment, tools, and material of all sorts. He testified that he hunted through the clutter and found various tools and equipment marked with the Company's name and with other identification marks used by the Company. He stated that the Company's property was scattered throughout the garage, stacked in boxes, laying on workbenches and on shelves. He also testified that the garage and the items in it were dirty and dusty, and that he had to wipe off items to see if they bore the Company's identification marks.

Mr. Nanney left and turned over the investigation to a private investigator, because he discovered that his wife's family knew the Grievant's wife's family. The President of the private investigation company, Mr. E. Foster, a former member of a county sheriff's department, was hired by the Company, met with Mr. Nanney, called the Grievant's wife, and went to her residence in October, 1994.

Mr. Foster looked in the garage with the Grievant's wife's permission. He testified that he found many items marked with the Company's identification. Like Mr. Nanney, he testified that the items belonging to the Company were dirty, dusty and greasy and were scattered throughout the garage and in the rafters and in buckets. He made a list of the items he could identify as belonging to the Company and photographed them.

Mr. Foster returned to the residence on November 11, 1994 when the Grievant was scheduled to appear to remove his property from the premises, as a result of his divorce action. Mr. Foster allegedly told the Grievant that he was there only to retrieve property which had been identified as the Company's property, and that the Grievant should let him know if any of the objects in question belonged to the Grievant rather than the Company. The items believed to be the property of the Company were brought out and placed on a picnic table, and a list of them was prepared at that time. The Grievant signed and dated the bottom of a sheet of paper containing the list of items and containing the following paragraph:

I, Brian McGing have received the above list of hand & power tools & other misc. items, i.e. gloves (industrial) torch hose, 1" drill sockets, box wrenchs, etc. and to the best of my knowledge, private investigators Ed Foster & Jim Price of Northlake Investigations have not included any tools or items listed which are my personal property, only those owned by Inland Steel.

(Company Exhibit No. 3).

The group of items included a 150,000 BTU heater, several air drills, a hand-held grinder, a torch, a flame spreader for a torch, air and electric impact tools, a drive extension, several regulators with and without gauges, a hydraulic porta-power unit, large wrenches and drill sockets, several boxes and bundles of heavy duty industrial gloves and several pairs of mill gloves. There was testimony that the drills and drill-like hand-held equipment are operated by hydraulic systems rather than by regular electricity. There also was testimony that the items were not of a type which ordinarily would be used by a typical homeowner.

Mr. P. Smith, the former Maintenance Planning Supervisor at the No. 2 Coke Plant, identified the objects in the photographs taken by the investigation service as items which were used in the No. 2 Coke Plant. He testified that those which were marked with identification from other Inland departments were of a type which might be exchanged with Coke Plant items when the Coke plant items needed to be repaired. He testified further that sometimes maintenance people assigned to all parts of the plant leave their equipment at the sites on which they are working, including the No. 2 Coke Plant.

He also testified that the area where tools and equipment were stored in the No. 2 Coke Plant was not readily accessible to non-department personnel. In addition, he testified that some of the equipment, like the hot mill gloves, are not used widely in other departments throughout the mill.

Mr. Smith also testified that the Grievant sometimes worked as an hourly foreman, and therefore had the privilege of parking inside the plant when he worked in that capacity. He testified further that all employees in the No. 2 Coke Plant were permitted to drive in and park near the coke battery after August, 1993.
The Grievant testified that he has been laid off since February, 1994 and has not been back in the mill since that time. He testified further that he has not lived in his house since about the time he was laid off, and only went there once between February and November, 1994, when he went to retrieve the rest of his belongings.
The Grievant further testified that in August, 1994 his former wife called the Company and attempted to have him fired for fraudulent use of sick leave. There was an investigation and it was determined that he was not fraudulently using his sick leave, according to the Grievant.
The Grievant testified that he did not steal the items in question and that he did not know who stole them or how they came to be in his garage. He suggested that his wife was trying to set him up and testified in this regard that she worked for another steel mill and that her boyfriend worked as a truck driver for a trucking firm which hauls steel from the Company. He also testified that he would have no use for the tools or equipment in question.
Mr. E. Barrientez, the Griever for the No. 2 Coke Plant, testified that employees other than those assigned to the coke plant had access to the tools and equipment in question. He testified that these tools and equipment commonly were lying around the shop, and that outside contractors, general maintenance employees, and lost drivers of delivery and pick-up trucks would be in the department, asking for directions or performing work.

THE COMPANY'S POSITION

The Company contends that the discharge should be upheld. According to the Company, arbitral precedent indicates that theft is adequate grounds for discharge, even for a long-term employee. The Company contends further that there is sufficient evidence that the Grievant is guilty of theft.
The Company argues that it is not required to prove that the Grievant is guilty beyond a reasonable doubt, but rather only by a preponderance of the evidence. According to the Company, the standard of proof established in arbitration cases between the Parties is the "preponderance of the evidence" standard.
The Company argues that it is undisputed that numerous items belonging to the Company were found in the Grievant's garage at his residence. The Company contends that these items were in the Grievant's possession without the Company's permission. The Company contends further that this was admitted to by the Grievant when he signed the paper prepared by Mr. Foster on the night of November 11, 1995.
The Company acknowledges that the evidence against the Grievant is circumstantial, but argues that this is not a case in which the Company has only a suspicion that an employee has stolen something. When an employee has possession of stolen property from his employer, a presumption arises that he has been involved in stealing it, the Company argues. If the employee fails to notify the Company of the presence of the property, then that presumption is virtually irrefutable, the Company contends. The employer need not prove that the Grievant actually stole the property, because it would be impossible for the Employer to meet that burden. The Company relies upon arbitration awards to support its point that an employer may rely upon circumstantial evidence to support a charge of theft.
According to the Company it has met its prima facie case that the Grievant engaged in theft. The Company contends that in response to this prima facie case the Union has raised as an affirmative defense that the Grievant was "set up" by his former wife, which shifts the burden of proof to the Union. The sole evidence offered by the Union to support this affirmative defense, according to the Company, is the self-serving testimony of the Grievant.
In contrast, the Company offers the testimony of its witnesses that the equipment and tools had been in the garage for some time. In addition, the Company argues that the behavior of the Grievant's ex-wife does not indicate that she was trying to set up her ex-husband, because of her reluctance to give his name to the Company.
There was no reasonable explanation from the Grievant for why the property was in his garage, the Company asserts. According to the Company, the Grievant's suggestion that his ex-wife's boyfriend could have stolen the property is not believable.
The Company asserts that the evidence indicates that the Grievant was the only person who could have stolen the recovered property. Thus the Company requests that the Arbitrator deny the grievance and the relief sought.

THE UNION'S POSITION

The Union first disputes the Company's contention that the burden of proof somehow shifts to the Union at any point in this proceeding. According to the Union the Company retains the burden of proving that the Grievant took the items in issue.
The Union argues that neither the Union, the Grievant nor the Company knows how the items got in the Grievant's garage. The fact that Company property was found in the Grievant's garage does not mean that he is guilty of stealing from the Company. The Union notes that there was no evidence that anyone saw him remove any items from the plant.
Although it may seem like the Grievant is guilty because the items were found at his house, the Union argues that the Grievant did not live there, and had not lived there for a period of several months before they were found. According to the Union the Grievant does not know who was at his house after he moved out, or who had access to the property.
The Union argues that the Company speculates that the tools had been there for a long time. However, the Union argues that there is no way to know for certain that this is so, because it does not take a long time to accumulate dust and dirt on unused tools in a garage.
The Union notes further that the Grievant's ex-wife had attempted to get him fired for fraud in August, 1994. If the items had been there for all that time, the Union questions why she would not have done something about them sooner. The Union also argues that there was evidence that the Grievant's ex-wife's boyfriend did have access to the plant through his job.
The Union contends that people steal things either for personal use around the house or to sell. Here the Union argues that the items cannot be employed for personal use. In addition, the Union argues that if the Grievant had stolen the property, it would not make sense for him to leave it at the house when he moved out, rather than selling it quickly.
The Union argues that the evidence indicates that other people had access to the No.2 Coke Plant, and that tools were lying all around. The Union also points to evidence that at least twelve (12) people had access to the plant after it was closed down.
According to the Union the awards cited by the Company involved instances where the grievant was still living at the premises. The Union also points out that the Grievant had a good record, had been appointed an hourly foreman, and had no reason to take the tools. The Union argues that the evidence of guilt must be strong enough to overcome the presumption of innocence in order to sustain the discipline, and that is not the case here. Therefore the Union requests that the grievance be upheld and the discharge overturned.
OPINION
The case before the Arbitrator involves the discharge of a long-term employee for theft. The discharge of any employee with seventeen (17) years' seniority and a clean disciplinary record is a very serious matter. The fact that the discharge here is for theft makes it even more serious.
The primary issue in this case is whether the Company has established that the Grievant stole the property in issue. Two major facts implicate the Grievant: 1) the testimony that the Grievant's ex-wife reported to the Company that he had taken the equipment and tools from the Company over a long period of time and stored them in the garage, and 2) the presence of the Company's property in the garage.
The Union attacks the credibility of the Grievant's ex-wife, because of bias on her part. Although the Arbitrator has no reason to doubt Mr. Nanney's testimony that she was reluctant at first to divulge certain information, nevertheless she did initiate the contact with the Company over the stolen property and she called the Company several times to discuss it.
In addition, there was other evidence that her actions may have been motivated by ill will towards the Grievant. The Arbitrator draws this conclusion partly from the Grievant's description of his divorce, and partly from his unrefuted testimony that at about the same time his estranged wife was talking to Mr. Nanney about the stolen property, she also called the Company to suggest that her husband was fraudulently collecting sick leave pay.
Because she did not testify at the arbitration hearing or in the grievance procedure, the Grievant's ex-wife was not subject to cross-examination by the Union. Therefore it is difficult to determine exactly what she did know about the stolen property or what were her motives. In addition, it is not clear that the Company offered her statements to prove their substance, i.e. that her husband had taken the goods, or rather simply to explain why the investigation was undertaken. Under these circumstances, the Arbitrator has given no weight to the substance of her hearsay statements concerning how the property came to be in her garage.
The one undisputed objective fact which most clearly implicates the Grievant is the discovery of a large number of items belonging to the Company in a garage owned by the Grievant and his ex-wife. There is no dispute here that the items found in the Grievant's garage and listed in the exhibits belonged to the

Company. Some of the items are labeled with words like, "Inland Pipe Shop," "Coke Oven," "Inland No. 3 Coke Plt.," and "Inland #7 Blast FOE." The Grievant himself signed a written acknowledgement at the time the property was recovered indicating that it was found at his property and that it belonged to Inland. <FN 1> Therefore, the person or persons who took the items had to have access both to the steel mill and to the Grievant's garage.

The presence of employer property in an employee's garage generally gives rise to a presumption that the employee has unauthorized possession or control of company property. Even if the employer cannot reconstruct precisely how the items got there, their presence is strong proof of employee theft, unless the employee can offer a credible explanation for their presence on his or her property. <FN 2>

Against the undeniable fact that a large cache of the Company's property was found in the Grievant's garage, the Union here argues strongly that the Grievant had been out of the house for a period of several months before the property was discovered. The Grievant claims that he does not know who took the items, and he does not know who had access to his house during that period.

The Grievant's absence from the premises for a period of time before the discovery of the items weakens the presumption that he took the Company property in his garage. The question then becomes whether there was enough evidence to link the Grievant, rather than someone else, to the Company property in his garage, even given his absence from the premises for the period immediately prior to its discovery.

The evidence indicates that the Grievant had used the garage for years, and still continued to store items in it at the time the Company property was discovered in it. He still owned the garage and testified that he was not barred by any divorce proceeding from access to the garage during the period after he moved out of his residence.

There were many Company items found in the Grievant's garage, and some of them were heavy or bulky. Thus, it is likely that whoever took them had to make at least several (and probably many) trips to take them all out of the mill. Therefore the person who took them most likely had continuing access to the mill. Mr. Smith presented unrefuted testimony that all of the items found in the Grievant's garage could be found in the No. 2 Coke Plant. Of the items which were marked with specific locations within the mill, more of the identification marks were from the coke plants than from any other part of the mill. In addition, the Company presented convincing testimony that some of the recovered items which were not specifically marked as being from the coke plants were more likely to be found there than in other parts of the mill, such as the hot mill gloves and the chemical gloves. From this evidence the Arbitrator concludes that whoever took the items most likely had access not just to the mill in general, but to the coke plants in particular.

The Grievant of course had access to the coke plants, their equipment and tools through his many years of working there. He went in and out of the plant many times over the years, and therefore had the opportunity to carry away many items off Company's premises. In addition, he sometimes worked as an hourly foreman, which permitted him to drive into the mill and park near the coke plant. This arrangement would have made it easier for him to remove equipment from his department than if he had to carry it a long way to his car.

All the employees of the coke plant had the right to park near the coke plant after August, 1993 until it closed in December, 1993. But, according to the Grievant's testimony, none of the Company property was placed in his garage until sometime after he left his residence in February, 1994. Therefore, under the Grievant's time frame, the person who took the goods did so in one of two ways. Either he had access to the coke battery after February, 1994, when even most of the clean-up team had left. Or he took the items from the coke battery before February, and then waited until after the Grievant moved out to place them in the Grievant's garage.

Either scenario is very unlikely. The small size of the clean-up crew reduces the number of people who had direct access to the goods from the coke battery after February, 1994. The view that someone took items from the mill before the Grievant moved out, and then placed them in his garage afterwards, suggests a conspiracy against the Grievant involving a level of access, knowledge and planning that is just not believable, given other factors explained below.

The testimony regarding the condition of the goods when discovered suggests that they were not placed there shortly before being discovered. According to both Mr. Nanney and Mr. Foster, the Company's property was scattered throughout a crowded, dusty, dirty garage, and was located on shelves, on workbenches, on the floor, in buckets and even in the rafters. Their scattered location throughout the garage also suggests that they had been brought there over a period of time rather than all at once.

The items themselves were covered with dirt, dust and grime, the two men asserted. The Union suggests that tools could become dusty very quickly in a short period of time in a garage if they were not being used. This is true. However, their condition, when added to the fact that they were spread randomly throughout the garage, suggests that they had been there for a while. Even the Grievant, when asked how long he thought the items had been there, said that he thought they had been there almost as long as he'd been gone. If someone had planted the items in order to set up the Grievant, it is unlikely that he or she would have spread them so thoroughly throughout the garage that they were difficult to locate, as Messrs. Nanney and Foster reported. It is more likely, as the Company suggests, that the items would be placed in a way that made them easy to locate and identify. It is also unlikely that the property would have been placed in the garage shortly after the Grievant left, as he suggested, and not reported to the Company for several months, if someone were trying to falsely implicate him.

Furthermore, the Grievant failed to explain how his ex-wife's boyfriend, from an outside trucking firm, could have sufficient access to the tools and equipment in the coke plant to steal the volume of items involved in this case. There was a dispute between the Parties over how much access non-employee truck drivers would have to the tools and equipment of the coke plant. There was testimony that these tools and equipment were lying all over the department, countered by testimony that the area where this type of equipment was stored was not accessible to non-employees. Union Witness Barrientez testified that truck drivers did come to ask for directions because of the central location of the coke plant, but he also testified that he never saw a flatbed truck loaded with finished coils in the area, which is what the man in question transported. Furthermore, the evidence indicates that the steel hauling area is not near the coke plants. Even assuming that a non-employee truck driver came by the coke plant to ask for directions, it is not clear that he could have taken any equipment during such a brief visit. Most importantly, it is not clear how he would have been able to make enough trips to collect all the Company property at issue here.

The Union is correct in asserting that in a case of theft it need not generally prove who did steal the goods; it is up to the Company to establish that the disciplined employee stole them. The ultimate burden of establishing sufficient evidence that the Grievant took the equipment remains with the Company. The property was found in the garage owned by the Grievant and used to store his property. A large amount of property was found, suggesting that whoever took it had continuing access to the mill, and an easy way to remove the items. A substantial portion of the property could be traced to the department where the Grievant had worked for fifteen (15) years. The condition of the items suggested they had been there for some time before being discovered, and were not all taken at the same time. All of these factors point to the Grievant as the person who had the greatest access to his garage and to the Company property located in it. This is circumstantial evidence. However, it is strong enough evidence that the Company has a right to expect some explanation from the Grievant as to how the property got there.

Here the Grievant offered the explanation that the property was placed there after he left the residence in order to set him up, and that it was probably done by his ex-wife and her boyfriend. Having raised this argument, the Union has the burden of establishing it. For the reasons discussed above, however, the objective evidence does not support this explanation.

The Union also argues that the Grievant could not use the items for his personal use and would have sold them quickly if he stole them for resale, or at least removed them from the garage when he moved out. The Arbitrator has considered these arguments. However, having discovered sufficient evidence that the Grievant took the goods, the Company need not also establish why the Grievant took them or what he planned to do with them. On the basis of all this evidence the Company had a reasonable basis for concluding that the most believable explanation for the presence of the Company property in the Grievant's garage is that he took it and placed it there.

The "presumption of innocence" referred to by the Union in Award No. 632, is defined in that case as meaning that "the evidence of guilt should be stronger than the evidence of innocence to establish 'proper cause' for discharge." Here the evidence of the Grievant's guilt is stronger than the evidence of his innocence.

No argument has been made directly in this case that if the Grievant were guilty of the theft at issue here he should not be discharged. However, the Parties informed the Arbitrator of at least one case between the Parties in which Umpire Bethel overturned the discharge of a long-term employee for stealing food from a Company vending machine. Arbitrator Bethel did so, however, on the basis that the front of the vending machine was open, and the employee acted on an impulse and stole one small snack cake.

Here the evidence indicates that the Grievant took many valuable items, and that he removed the property over a period of time, carrying things out of the plant on more than one occasion. The testimony indicated that the total worth of the goods exceeded $2,000.

This is clearly not a case involving a one-time impulsive theft of a small item. On the basis of this evidence, the Arbitrator concludes that the Grievant has breached the basic level of trust which must exist between an employee and an employer. Although the Arbitrator has considered the Grievant's long tenure with the Company, theft of this magnitude subjects an employee to discharge on the first offense. On this basis, the Arbitrator cannot conclude that the Company erred when it discharged the Grievant, even given his long years of service.

AWARD

The grievance is denied.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof

Labor Arbitrator

Acting Under Umpire Terry A. Bethel

Decided this 22 day of May, 1995.

<FN 1> The Arbitrator does not view this written statement as serving as an admission that the Grievant took the items, however, or even that he knew they were in his garage before that date. He testified that by signing the statement he intended only to indicate that the items were not his, and that they belonged to the Company, which he said he could determine from the markings on the items. The language of the statement supports the Grievant's interpretation. So does the testimony of Mr. Foster, who stated that he told the Grievant at the time that he was not there to determine anyone's guilt or innocence, but only to recover the property.

<FN 2> The employee in most cases would have a responsibility to return the goods, even if he or she did not know how they came to be on the employee's property. Therefore the employee in a case like this would also have to show that he or she had no knowledge that the property was there.