

Award No. 947
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY

and

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

Arbitrator: Terry A. Bethel

August 30, 1998

OPINION AND AWARD

Introduction

This case concerns the discharge of grievant William Budny for alleged insubordination and for allegedly threatening and assaulting his supervisor, Bill Miller. The case was tried in the company's offices on June 15, 1998. Patrick Parker and Gayla DeArmond represented the company and Mike Mezo presented the case for the union. The parties submitted the case on final argument.

Appearances

For the company:

P. Parker -- Section Mgr., Arbitration and Advocacy

W. Miller -- Area Supervisor, Plant 1 Machine Shop

S. Korthauer -- Section Mgr., Machine Shops

B. Bainbridge -- Senior Planner, Machine Shops

G. DeArmond -- Contract Admin. Resource.

For the union:

M. Mezo -- USWA Fourth Step Rep.

C. Hoot -- Steward

W. Budny -- Grievant

D. Shattuck -- Secretary, Grievance Comm.

G. Busick -- Griever

Background

The events which gave rise to this grievance occurred on January 22, 1998. Grievant is a machinist who works from 7:30 p.m. until 7:30 a.m. Bill Miller is the area supervisor, who works day turn. Thus, Miller's and grievant's working hours do not overlap. Miller said that before leaving work on January 22, he left a lineup for the hourly foreman who worked the 3 to 11 turn. Miller instructed the hourly foreman - C. Semchuck - to assign grievant to work on machine B-54. Miller already knew that grievant had previously raised safety concerns about that machine, so the lineup said that if grievant refused the assignment for safety reasons, Semchuck was to have him fill out an "unsafe condition report" and offer him work on the fitting floor. Miller said Semchuck called him at home at about 7:45 p.m. and said that grievant had refused the assignment to B-54 and that he would not accept alternative work that Semchuck had offered him. Miller, who lives in Valparaiso, Indiana, about 40 miles from the plant, drove in and arrived at around 8:40 p.m. After he confirmed the story with Semchuck, Miller said he approached grievant, who was sitting next to machine B-53, with his feet on a stool reading a newspaper.

Miller said he asked grievant to show him the unsafe condition on B-54 but that grievant refused, commenting that he "didn't have to." Miller said grievant told him he had made out an unsafe condition report the previous night. Miller said he repeated his instruction for grievant to show him the unsafe condition, and that grievant again refused. Miller said he thought this over and then told grievant that he was "directing" him to demonstrate the unsafe condition. Grievant again declined and told Miller to "leave the balcony and quit fucking harassing me." Miller said he told grievant he was being insubordinate and repeated the instruction one more time. Grievant again refused and, by this time according to Miller, had gotten very loud and "out of sorts." Miller said he told grievant he was going to call plant protection, to which grievant replied, "You can't fucking do that, you asshole." Miller said he was so concerned about grievant's conduct that he left the balcony and went to his office and summoned two plant protection guards.

After calling the guards, Miller said he went back upstairs to see grievant again. He said he told grievant to go to his office and that grievant refused and said Miller couldn't make him do so. Miller responded that he was directing grievant to comply, at which point, according to Miller, grievant stood up, stepped over the stool, and bumped him in the chest which knocked Miller backwards. Miller said grievant drew back his fist as if to hit him, and that he still had the newspaper in his fist. Miller said he felt threatened and told

grievant to "think about what you're about to do." At that point, Miller said he turned and noticed a bargaining unit employee -- William Kirk -- standing nearby. According to Miller, grievant said to Kirk, "Leave the fucking balcony so I can kick his [Miller's] ass." At that point, Kirk asked Miller where he wanted some material and Miller told him to move it to the lunch room area. Miller and grievant then moved aside so Kirk could get by. At a subsequent interview conducted by management, Kirk denied overhearing anything said between grievant and Miller. Miller said he left the balcony and went to wait for the plant protection guards. He had the guards escort grievant off the property. Grievant asked the guards to file assault charges against Miller, though they told him he would have to go to the police department. Miller testified that he knew grievant did not want to work on machine B-54. He said he had first made the assignment a week or so before the incident on January 22 and that he and grievant had had words because of it. Apparently, that meeting occurred on January 9. Grievant was upset about the assignment to B-54. He raised no safety issue at that time, but simply wanted to continue to work on B-53, which he had worked on for some years. According to Bob Bainbridge, senior planner for the machine shop, grievant was upset and called Miller a liar at that meeting. Someone summoned a union steward to be with grievant and, according to Bainbridge, the steward reminded grievant several times not to lose his temper. As the meeting ended, Miller left the room and, according to both Craig Hoot, the steward, and grievant, grievant said he was going to go have a "fag," meaning a cigarette. However, Miller - who did not testify about the incident, but also did not rebut anything said about it by Hoot and grievant - overheard the comment and thought that grievant had called him a "fag." Hoot said Miller came back into the room, threw his hard hat on the desk and "got nose to nose" with grievant, telling him that his conduct amounted to sexual harassment. Hoot said Miller was very upset.

Miller was on vacation the following week and, although grievant had been told to operate B-54, he spent the week working on B-53. The company has not charged grievant with insubordination for his actions that week and, presumably, could not do so since both the hourly foreman who worked 3 to 11 and the regular foreman who worked 11 to 7, acquiesced in grievant's actions. Indeed, Bainbridge, who is second in command in the machine shop, learned of grievant's work on B-53 on January 16, and decided to wait until Miller returned to resolve the issue. Miller was not due to return until Tuesday, January 20, since Monday the 19th was a holiday. When Miller returned on Tuesday, grievant still asked for safety relief for machine B-53, so Bainbridge said he went to look at the machine himself. According to Bainbridge, the machine would reverse about an inch, though he did not consider that a safety issue since it happened in one motion. The inspection by Bainbridge on Wednesday, January 21 was not the first occasion anyone had inspected the machine. Grievant testified that he tried to work on the machine on January 12, but it would not start. The company did not rebut this assertion because it says grievant had never mentioned it before the hearing. In any event, someone must have reported a difficulty with the machine on or about January 12, since it was inspected on January 13. The notes from that inspection indicate that the hydraulic pressure switch and the zero speed switch were bad, that the pressure switch was adjusted but still "touchy," and that the zero speed switch was replaced with a "different type" while the original was repaired. A new pressure switch was ordered. Company Exhibit 2 is a memo from a machine service employee -- Konnie Czaban -- which says that on January 14, he went to adjust the pressure switch and found that it needed to be replaced.

Grievant apparently continued to complain about the machine. On January 21, Czaban checked the complaint that it was reversing. He found that it was and that it needed to be corrected, but that "it posed no safety problem," though the machinist operating it needed to be aware of the condition. Bainbridge said that by January 22, management wanted to find out if grievant was genuinely concerned about safety or if he simply did not want to operate B-54. Thus, they assigned him to the machine with a direction to Semchuck that he be offered alternate work if he claimed safety relief. Bainbridge said he did not understand why grievant refused to demonstrate his alleged safety concern with the machine when Miller confronted him on the 22nd and that it would have been easy to do.

Grievant testified that after machine B-54 failed to start on January 12, he continued to work on B-53 the rest of the week. He said he showed Hatcher what was wrong with B-54 and that Hatcher, the regular foreman who came on at 11 p.m., told him to stay on B-53. Hatcher did not testify. On some occasions, grievant apparently had to take work off of B-53 from the day shift and then replace it at the end of the shift, which management said was one reason they did not want him to do his work on Machine B-53. However, grievant testified without rebuttal that there was nothing on B-53 on the 22nd and that it was easy for him to move his work from B-54 to B-53. Grievant said that after his conversation with Hatcher, there was no further issue about the matter until January 21, the day before the incident at issue here.

On January 21, grievant said foreman Valdez told him to work on B-54. Grievant told him that B-54 was down for safety reasons and that he could do his work on B-53. Valdez told grievant he would have to claim safety relief and grievant said, "ok, I'm claiming safety relief." According to grievant, Valdez left and grievant stayed on B-53. Valdez came back about 45 minutes later and told grievant that he was supposed to be on B-54. Grievant responded that he was claiming safety relief. Valdez told him he would have to fill out a form and grievant said he would. Valdez then procured a form and, as grievant explained the problem with the machine, Valdez filled out the form. The form was a Request for Maintenance form. Later, Hatcher came in and told Valdez that grievant was going to stay on B-53. Valdez did not testify at the hearing. Grievant said he also showed Hatcher what was wrong with B-54 and Hatcher told him to stay on B-53.

Grievant said on the night of January 22, Semchuck showed him the lineup, which assigned grievant to B-54. Grievant said he told Semchuck that he thought B-54 was unsafe and that he was going to do his work on B-53. Grievant said Semchuck didn't say he would be insubordinate or subject to discipline if he refused work on the drill press which, on cross examination, grievant grudgingly acknowledged that Semchuck had offered him. Grievant said Semchuck told him he was going to call Miller and he left the area.

Grievant said that when Miller arrived, he was sitting near machine B-53 on a break doing a cross word puzzle. He said Miller called to him as soon as he got on the balcony. He approached grievant and told him to show him what was wrong with the machine. Grievant said that he didn't move immediately, so Miller grabbed the paper out of his hand and grabbed his arm. Grievant said he was shocked that Miller laid hands on him and he said, "get your fucking hands off me." At that point, Miller turned and left. Grievant said he did jump up when Miller grabbed him, but that he didn't chest butt him and that he would have had to go over the stool to get to him, which was 18 to 20 inches high. Grievant denied raising his hand as if to strike Miller. After Miller left, grievant said he went back to work. Subsequently, Miller came back and said he had called plant protection. Miller told grievant to stop working and grievant said he would as soon as he finished the cut. At that point, Kirk happened by and asked the two of them to move so he could get by. Grievant said this incident was the first time he had seen Miller since Miller got back from vacation.

The company says that grievant was insubordinate, both to Semchuck and to Miller. Grievant refused to respond to Semchuck's orders to work on B-54 or take alternate work on the drill press. And he was insubordinate to Miller when he repeatedly failed to demonstrate the difficulty with the machine. Even more significant, the company says, was that grievant chest butted Miller and threatened to hit him. The company says that such conduct cannot be tolerated in an industrial environment.

The union says the entire problem was caused by the company's ignorance of the proper method of claiming safety relief. The company's real case about safety relief, the union says, is that the supervisors and the repair staff did not believe the machine was dangerous. But the union says that isn't the standard, and it cited Inland Award 208 for the proposition that the issue is whether the employee feels threatened, not whether a reasonable person would discern some danger. The union also questions whether the alleged assault took place. It notes that there were no witnesses except Kirk and he claimed to have seen nothing. The union questions why Miller would have returned to the plant from Valparaiso and why he would have gone back to see grievant a second time if he thought grievant presented an actual danger to him. The union says that grievant's story is more worthy of belief.

Discussion

Although grievant reluctantly acknowledged that Semchuck mentioned work on the fitting floor or on a drill press, he denied that he did so in a manner sufficient to warn him that he was subject to disciplinary action. I need not resolve in this case exactly what Semchuck would have had to say to make that point. Although the company could have called Semchuck to testify, it did not do so. The only account of Semchuck's actions, then, was hearsay and, absent special circumstances not present here, hearsay evidence cannot support a discharge. That does not mean, however, that grievant's conduct with respect to his refusal to run B-54 is not at issue at all. Even though Semchuck did not testify, grievant acknowledged that he had seen the lineup and that he knew he was supposed to run B-54. His excuse for not doing so was that he claimed safety relief, a matter I will discuss below.

There is also no issue in this case about grievant's refusal to operate machine B-54 during the week Miller was on vacation. Frankly, I am inclined to agree with the company's claim that grievant seized the occasion of Miller's vacation as a way of avoiding the assignment to B-54. But there is no evidence that anyone ordered him to operate the machine during that week and there was un rebutted testimony that Hatcher told him to stay on B-53. The issue in the case, then, boils down to the confrontation between Miller and grievant on the night of January 22.

Frankly, I was not overly impressed with the credibility of either of the principals in this case, a situation which, inevitably, hurts the party with the burden of proof. In my view, the incident actually started on January 9, when grievant became upset and called Miller a "fag." No rational person could believe grievant's account of that incident, in which he innocently observed that he was going outside to smoke a "fag." Grievant is neither British nor obviously trapped in the 1950's. He clearly called Miller a fag and Miller, just as clearly became incensed. The fact that Miller left this encounter out of his testimony entirely, even though he mentioned the meeting on the 9th, was telling.

Miller's reaction to grievant on the 9th helps to understand why he drove 40 miles or more to return to the plant on January 22nd. He had had little occasion to confront grievant following the encounter on the 9th since Miller had been on vacation for most of the intervening period. On cross examination, Miller said he returned to the plant on the 9th solely because of his concern over the safety issue. I did not believe that explanation. He had already satisfied himself that there was no safety issue so he could not have been worried, as he claimed, that someone would get hurt. Moreover, if he had a genuine concern about grievant's claimed safety problem, he could have gone in early the next morning, since grievant would have still been there. I think Miller went back to have a confrontation with grievant, one in which he knew that grievant would not yield his position because he had been telling everyone who would listen that B-54 was unsafe and that he would not operate it.

Grievant, of course, did little to help his own cause. It seems likely that he greeted Miller with the same belligerence that Miller felt for him. I cannot find, however, that grievant chest butted Miller or that he physically threatened him. Miller's description of the encounter was simply not credible. Grievant claims to have arthritis and, whatever his condition, he walks with an obvious limp. I do not understand how he got over the stool that was between him and Miller and Miller was unable to explain it. Nor does it make sense to believe that grievant threatened to hit him with a newspaper, especially since Miller was unable to offer any description of the paper. I am willing to believe that Miller approached grievant and that the two of them had words and, perhaps, traded insults. I am not willing to believe that either assaulted the other. Nor did I believe Miller's claim that he felt so threatened by grievant that he had to call two security guards. If that was so, then why, after calling the guards, did he return to the balcony area to confront grievant again? This is not the conduct of a man who feels threatened. Finally, it makes no sense to believe that Miller felt threatened by grievant and that in the middle of the confrontation, he calmly moved aside to let Kirk pass without telling Kirk to summon assistance.

In summary, I do not think the assault occurred and I will not sustain the company's disciplinary action against grievant for that reason. There remains, however, the contention that grievant refused to show Miller the problem with B-54 and that grievant unreasonably refused to work on B-54 and, on his own authority, moved the work to B-53. This is not exactly the same charge as insubordination to Semchuck's alleged order, since there is no first hand testimony about what Semchuck told grievant to do. But grievant testified that he saw the lineup and he knew he was supposed to be working on machine B-54. He did not do so, he claimed, because he thought there was a safety hazard. I need not address the union's argument that an employee can claim safety relief even unreasonably, as long as his belief is genuine. That position depends on the existence of a genuine belief and I am satisfied that grievant did not have a genuine safety concern in this case.

As noted above, the entire matter started on January 9, when grievant objected to his assignment to B-54, not because he thought it was unsafe, but only because he wanted to continue working on B-53. He was able to do so the following week because Miller was gone and, by the time Miller got back, grievant had decided the machine was unsafe. I note, however, that other than to say the machine was "broken," grievant did not explain why he thought it was unsafe even at the arbitration hearing. The fact that the machine may be running in a defective manner does not necessarily mean it was unsafe. Grievant had the obligation to establish that he had a genuine concern for his safety in this case, and there was no evidence from which I can draw any such conclusion. I find, then, that grievant had no right to refuse to run B-54 on the night in question and that he did not have the right to remove his work from that machine and take it to B-53. In addition, I find it likely that grievant refused to demonstrate the alleged defect to Miller on the night of the 22nd. This is a matter of less importance, since Miller already knew about grievant's allegations and grievant had assisted a supervisor in filling out a repair order the previous night. However, that does not entirely excuse grievant's attitude, though it may not have differed all that much from Miller's.

Although grievant's conduct was improper, it is worth noting that he did not refuse to work altogether. Rather, he apparently did the work he had been told to do, albeit on a different machine. He also testified, without rebuttal, that there was nothing on B-53 that night, so he did not need to affect someone else's work

in order to move the job to B-53. That does not excuse grievant's conduct, but it provides some mitigation. I find, then, that grievant had no right to refuse the assignment to B-54. His conduct does not warrant discharge and he shall be reinstated, but without back pay. The period off work shall serve as a disciplinary suspension.

AWARD

The grievance is sustained, in part. Grievant is reinstated, but without back pay. The period off work shall serve as a disciplinary suspension.

/s/ Terry A. Bethel

Terry A. Bethel

August 30, 1998