

IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

And

Award No. 1020

UNITED STEELWORKERS OF AMERICA  
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the Company's decision to discharge Grievant Todd Harbour for failure to submit to a drug test. Grievant had about five years of service at the time of his discharge. The case was tried on May 17, 2005. Pat Parker represented the Company and Bill Carey presented the case for Grievant and the Union. Grievant was present throughout the hearing and testified in his own behalf. Neither party raised procedural or other arbitrability issues. The parties submitted the case on final argument.

Appearances

For the Company:

P. Parker.....Section Manager, Arbitration and Advocacy  
C. Lamm.....Staff Representative, Union Relations  
S. Steele.....Mason, Hourly Supervisor  
K. Rajski.....Supervisor, No. 4 BOF  
R. Mazalan.....Plant Protection Lieutenant  
S. Buckner.....Manager, Union Relations, IHW West

J. Norris.....Mason Supervisor  
J. Zehnder.....Union Relations Intern

For the Union:

B. Carey.....Staff Representative  
D. Reed.....Secretary of Grievance Committee  
T. Harbour .....Grievant  
M. Suda.....Witness  
A. Brooks.....Witness  
T. Anapolis.....Griever

### Background

Mason Pusher (working foreman) Steve Steele testified that on April 28, 2004, he told Grievant and another laborer to repalletize a load of 12" bricks by standing them on their side. Steele testified credibly that this arrangement speeds the masons' work. Grievant and the other laborer, Mike Suda, both testified that Steele told them he wanted the bricks repalletized because he had a sore back, an allegation Steele denied. Steele said Suda went to work right away and continued working until Grievant arrived 5 or 10 minutes later. According to Steele, Grievant went "berserk," yelling and saying that he would "absolutely not" stack the bricks. Grievant also said, "We don't do this shit." Steele said he tried to speak with Grievant, but Grievant wouldn't listen. Steele is a working foreman in the mason bargaining unit and he had no supervisory authority over Grievant, who was one of the laborers who support the masons. The laborers are represented by USWA Local 1010. Thus, Steele called Ken Rajski, the Pit Supervisor for 4BOF.

Rajski testified that he has no supervisory responsibility for the laborers, who take direction from the mason pusher. However, when Steele said he was having problems with an employee, Rajski went to the ladle reline area. Rajski, who did not know either Steele or

Grievant, listened to the complaint and was not sure of the proper procedure, so he summoned a supervisor named Kelly. Kelly, too, was unsure of the normal procedure, so he told Grievant and Suda to comply with Steele's instruction and they would address the issue the next day. After the supervisors left, Steele said the two employees went to work, but that Grievant made disparaging comments about him.

Steele said he told the employees to break the pallet of 12" bricks into two pallets. Steele testified credibly that this was a more efficient arrangement. Nevertheless, the two employees put the bricks on one pallet, a fact Grievant confirmed in his testimony. While the two employees were working, Grievant called Steele an "asshole" and said he had gone from a "hero to a zero." He also said Steele was a "fucking dick," and, "Someone is going to get your ass." At around 5:30 to 6:00, Grievant told Steele he, "wouldn't be around long." On cross examination, Steele said he did not take these comments as a physical threat at the time. Instead, he thought they were a challenge to his supervisory authority and that Grievant meant Steele would be replaced as mason pusher.

Steele said he was not happy that Grievant and Suda had put the bricks on one pallet, but he said he and the other masons went into the pit and began work. Steele said the other masons were concerned about the threats and they asked Steele to lock the mason shack, where they stored tools and kept their lunches. The shack is not normally locked during the day. When Steele and the other masons came out of the pit around 7:00, they discovered that someone had put a plastic-type material inside the lock. The material dries with the hardness of brick, so the lock could not be opened. At this point, Steele said he began to take Grievant's threat more

seriously, and he became concerned for his safety. Grievant and the two other laborers were the only ones in the area outside the pit when the lock was tampered with.

Steele said he was upset and he called Rajski again. Rajski came “pretty quickly” and Steele described what had happened. Steele told Rajski that after the lock incident, he had “had it.” He said he told Rajski that he had to do something because the situation was “out of control.” Rajski went to speak to Grievant and returned later and asked Steele if he wanted to go to the clinic. Steele said Rajski told him he looked “shaken up.” On cross examination, Steele said he wasn’t shaking but that his lip could have been quivering. Rajski said Steele was not short of breath and that he didn’t blow up, but he was “very upset.”

Rajski said the second time he went to the area Steele was the only one there. Steele told Rajski about the lock and about his difficulties with Grievant that evening. Rajski said Steele looked exhausted and frustrated and his face was red. He described Steele as a “beat puppy.” Steele told Rajski he was afraid to walk to his car because Grievant had threatened him. This was at around 7:00. Rajski asked Steele if he wanted to go to the clinic and Steele did not.

Rajski then went to the laborer’s shanty to speak with the laborers. When he got there, two of the laborers were eating and Grievant was lying on a table. Rajski said he started to ask about the lock and before he could finish Grievant jumped up and was “loud and hyper and out of control.” All three laborers denied any involvement with the lock. Rajski said he was going to send all three of them home because of the lock incident. He then called Grievant out of the shanty and asked him if he had threatened Steele. Rajski said Grievant was louder and more hyper than he had been during Rajski’s first visit to the area. Rajski said he told Grievant he was going to send him for a fitness to work evaluation (FTWE) because he wanted to insure that

Grievant did not get in a wreck on the way home. Rajski said normal people don't act the way Grievant did and he didn't know if Grievant's actions were caused by high blood pressure or diabetes or drugs. Rajski did not ask Steele to take a FTWE because he didn't think it was warranted.

On cross examination, Rajski first said he decided to send Grievant for a FWTE when he spoke to Grievant outside the laborers' shanty. He said he left the area and went to the masons' shack to call plant protection. But Rajski then acknowledged that he had called plant protection when he received Steele's second call and before he even went to the area and spoke to Grievant. He said he told plant protection during that call that he planned to send Grievant for a FTWE. Rajski said that he did not smell alcohol, that Grievant's pupils were not dilated, and that his speech was not slurred. However, Rajski said Grievant was irrational and loud and was throwing his arms around like he was "on a buzz or a caffeine jolt."

There is no dispute that Grievant refused a FTWE and that a plant protection officer warned him of the consequences of doing so. Grievant said he had understood that both he and Steele were to take a FTWE and that he refused to go when he learned that Steele was not going. Grievant said it was unfair to have him submit to an evaluation but not subject Steele to one. Grievant said when he was in the plant protection car he asked the guard, "where's the other guy?" meaning Steele. The Guard left to inquire and returned to tell Grievant that he was the only one getting a FTWE. This was when Grievant refused to go to the clinic. Grievant also testified that he questioned the need to repalletize the load and that he asked Suda to call a supervisor. He said Rajski arrived "after all the hullabaloo" and that neither Grievant nor Suda said much. Grievant denied tampering with the lock or threatening Steele.

Suda testified that he did not see Grievant act irrationally or yell at either Grievant or Rajski. Suda agreed that Grievant made a comment about “hero to zero” but he denied hearing any threats. Like Grievant, Suda testified that he didn’t see anyone tampering with the lock on the masons’ shack.

The Company argues that it has the right to require employees to submit to a FTWE and to react with discipline when they refuse to do so. It also says there was justification for requiring a test in this case. Grievant reacted irrationally to a simple request to repalletize a load, which took only ten or fifteen minutes when Grievant and Suda actually did the work. And even then, the employees did not perform as instructed. The Company introduced evidence that it has routinely discharged employees who refuse a FTWE, although some of the employees were then reinstated under last chance agreements. But, the Company says, it did not offer a LCA to Grievant because he had less than five years of service. Such agreements are ordinarily given to employees with very long service. Finally, the Company says it isn’t fair to compare the level of cause required for a FTWE to that required by arbitrators in other union-employer relationships. Unlike most employers, the Company does not authorize its supervisors to determine whether employees will take drug and alcohol tests. Rather, the supervisor sends the employee for an examination by a paramedic who then determines whether such a test is warranted.

The Union says the case turns on whether the Company had justification for ordering a FTWE. There is no credible evidence, the Union says, that Grievant threatened Steele. Steele said he did not take Grievant’s comments seriously, which is reinforced by the fact that Steele waited an hour and a half to report them. Moreover, during that period Steele worked inside a ladle into which Grievant loaded brick from above. If Steele was actually afraid of Grievant, the

Union says, then he wouldn't have done this. The Union agrees that there was some exchange between Grievant and Steele, but nothing that could be taken seriously as a threat. Moreover, no one can prove that Grievant damaged the lock. The only possibility for upholding the discharge, the Union says, is that Grievant refused a FTWE. But even that is not sufficient unless the direction to submit to the evaluation was prompted by reasonable, objective considerations.

Such circumstances do not exist here, the Union claims. Grievant did not smell of alcohol, his speech was not slurred, his pupils weren't dilated, and he wasn't staggering. Rajski based his decision solely on what he perceived as abnormal behavior. But, the Union says, Rajski had never met Grievant before, so he had little basis to determine whether his actions were normal.

Moreover, the Union says it was not irrational for Grievant to question the need for unusual work. The Union also points out that Rajski made the decision to require a FTWE before he even went to talk to Grievant in the laborers' shanty. The Union also cites a USS-USWA Board of Arbitration award (USS-41,281; 282) that says obstinate behavior is not, of itself, justification for a drug test.

### Findings and Discussion

I cannot find that Grievant threatened Steel with physical harm. There is no doubt that Grievant made crude, disparaging, and abusive comments to Steele and that he also obstructively questioned a reasonable work direction. But in this case, Grievant is not charged with insubordination. Steele himself said he did not feel threatened by Grievant's comments when they were made. It is easy to believe that by the time he discovered the lock, Steele was exasperated and worn down by Grievant's antics (the "beat puppy Rajski described), and that the situation was

borderline. But tampering with the lock seems more like a childish prank than a threat of violence and I am unable to conclude that this incident significantly changed the tenor of Grievant's earlier comments.

I also cannot find that Grievant destroyed Company property by damaging the lock. It seems likely that one of the three laborers tampered with the lock because they were the only ones in the area. And, obviously, Grievant was the one who had a run-in with Steele. But this is not enough evidence of wrongdoing to uphold a discharge.

As noted above, the Union's final argument asserted that the Company's case depended on whether cause existed for the FTWE. The Company did not expressly limit its theory of the case, but its argument focused primarily on the FTW issue. And, because Grievant refused to take the test, the only real issue is whether the Company had justification for requiring it in the first place. If it did, then its authority to discharge Grievant is not at issue here.

The Company does not deny that it needs some justification before a manager can order a FTWE. But it says that requirement should be less taxing here than it is in other bargaining relationships where the supervisor, not a paramedic, decides whether a drug or alcohol test is warranted. It is not clear exactly what criteria the paramedics use to make that decision. But the paramedic presumably knows that a supervisor suspects impairment – or at least use – and the evaluation proceeds accordingly. If the supervisor suspected some other physical ailment – as Rajski unconvincingly said he did here<sup>1</sup> – then the evaluation could be limited accordingly. But

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<sup>1</sup>If Rajski wanted to send Grievant to the clinic because he thought his physical health might be in jeopardy, then it is surprising that he would not also have sent Steele. Rajski asked Steele earlier in the evening if he wanted to go to the clinic, a request that was obviously promoted by Steele's physical appearance and demeanor. Rajski said Steel was shaking, that his face was red, and that he was exhausted. In addition, Steele acknowledged that he was so upset his lip might have been quivering.



where there is no obvious physical ailment, it is hard to believe that possible impairment is not a focus of the paramedic's evaluation. In such circumstances, the Company cannot order a FTWE with only limited justification from the supervisor. There has to be a reasonable belief that drug or alcohol impairment influenced the employee's conduct.

There was no such belief in this case, a conclusion that probably would not change even if a lesser standard applied here than is required in other collective bargaining relationships. It is not accurate to say, as the Union does, that Rajski made the decision without having seen Grievant; he saw Grievant earlier in the turn during the dispute about repalletizing the bricks. But Rajski took no action then. Ladle reline was not Rajski's area and he understandably did not know the proper work procedure. But he obviously understood that strong emotions can sometimes accompany workplace disputes and he did not find Grievant's conduct to be suggestive of drug or alcohol problems.

Even though Rajski made the decision to evaluate Grievant before he saw him the second time, he still spoke with Grievant in the ladle reline area and, presumably, could have retracted his decision. He said he found Grievant to be hyper, angry, and irrational. But the fact that an employee is angry – or even that he acts like a jerk – does not of itself justify a decision to subject him to a possible drug test. Rajski, after all, did not know Grievant and couldn't have known whether he was often belligerent or easily excitable. This does not mean that Rajski was prevented from removing an angry and obstinate employee from the work place. But the issue here is whether it was reasonable for Rajski to send Grievant for a FTWE.

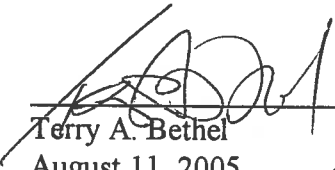
Rajski acknowledged that Grievant did not display any of the classic signs of impairment. His justification for a FTWE was Grievant's anger and what Rajski thought was irrational

behavior. It is clear that Grievant and Steele had been locked in a contest of will throughout the evening, one that exhausted Steele and seemingly excited Grievant. I do not condone Grievant's attitude or his actions. But I cannot conclude that his anger or other behavior toward Steele justified sending him for a FTWE that included the possibility of a drug test.

The Company also charged Grievant with using profane and abusive language toward another employee. I thought Steele's testimony about this was credible. Grievant called Steele a zero, an asshole and a fucking dick. This is abusive language, especially because Grievant said it to an employee who had been assigned to direct his activities. Although I have already found that these comments were not threatening, they were abusive and they constituted a violation of Rule 2-r. In the absence of threats, and taking into account that Steele was a working foreman but not a member of management, I find that Grievant's violation did not warrant discharge for a first offense. I will order that he be given a 30 day suspension without pay and that he be reinstated and made whole for time lost beyond the suspension.

AWARD

The grievance is sustained, in part. The discipline is converted to a 30 day suspension, as explained in the Findings. Grievant is to be made whole for the period in excess of the suspension.

  
Terry A. Bethel  
August 11, 2005

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GRIEVANCE COMM. OFFICE

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