arb 145

21-E-18

IN THE MATTER OF ARBITRATION BETWEEN:

INLAND STEEL COMPANY, EAST CHICAGO, INDIANA

and

UNITED STEELWORKERS OF AMERICA, LOCAL UNION NUMBER 1010, A.F.L.—C.I.O., EAST CHICAGO INDIANA

DECISION AND AWARD—
Employer's Refusal to Restore Willie Betts to His Former Work

MAR 24 1956

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Hearing at office of company, East Chicago, Indiana, February 2, 1956.

ARBITRATOR: Clarence M. Updegraff, appointed by mutual action of the parties.

APPEARANCES:

FOR THE EMPLOYER:

Herbert Lieberum, Superintendent, Labor Relations
L.R. Mitchell, Divisional Supervisor, Labor Relations
H.G. Gardiner, M.D., Director, Medical Department
G.L. Plimpton, Assistant Superintendent, Administrative Division, Quality Control Department

FOR THE UNION:

Cecil Clifton, International Representative
Fred Gardiner, Chairman, Grievance Committee
Joseph Wolanin, Secretary, Grievance Committee
Willie Betts, Aggrieved
Dr. H.L.G. Broemse, M.D., Witness

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All agreed steps preliminary to arbitration as contracted by the parties having been observed, waived, or modified by mutual agreement, a hearing was held at the office of the company, East Chicago, Indiana on February 2, 1956 at which written and oral evidence and arguments were received and heard. It was agreed by the parties at the hearing that post-hearing briefs would be submitted and the same were duly received.

THE ISSUE

The issue before the arbitrator is well indicated by the terms of the grievance filed by the union representing Willie Betts and the reply thereto made by the company. These are as follows:

The Grievance

"Aggrieved employee, Willie Betts, check number 24005 claims he has been suspended indefinitely and without cause in violation of Article IV, Section 1, and as a result has been deprived of his rights under Article VII, Section 5."

The step one answer, given by the company on July 22, 1955, reads as follows, "The aggrieved employee, a janitor in the main laboratory of the Quality Control Department, reported to the department on May 2, 1955 after having been off for medical reasons since December 27, 1954. He was examined by the company's Medical Department and restricted to 'such work as requires no heavy lifting.' The Quality Control Department is unable to supply such work. At such time as the Medical Department releases Mr. Betts to perform without restrictions the duties of his regular occupation he will resume his former position.

"There has been no violation of the collective bargaining agreement. The request of the griever is therefore denied.

/s/ Thomas V. Marsh
Thomas V. Marsh
Service Section Supv,
Administration Division
Quality Control Department"

The company adhered to this answer and to the position expressed in it through the later steps of the grievance procedure.

Contentions of the Union

In summary, the union's position is that the grievance claimant,

Willie Betts, by reason of the length of his continuous service had certain seniority rights which have been disregarded by the company in excluding him from employment. Willie Betts last worked at his job as a janitor with this employer on December 27, 1954. Thereafter, spinal surgery was performed upon him on January 12, 1955. He applied for reinstatement to his job on May 2, 1955 but the medical representatives of the employer, having examined Betts and his employment and health record, ruled that he should only be put back on active duty on a job which included only "such work as requires no heavy lifting." Betts applied for unemployment compensation on July 5, 1955. His claim was allowed by the Indiana Unemployment Division.

The union asserts that Willie Betts has been suspended indefinitely without justification since his own physician has released Him for employment expressing the opinion that Betts "is able to do any kind of work within reason, without restriction." (Union Exhibit 5)

The union strongly asserts that on the face of his record of employment and on the basis of the opinion of his doctor, Willie Betts is entitled to be returned to his former, regular job. It contends that the company acted wrongly and in violation of Willie Betts seniority rights under the contract when on the basis of its Medical Examiner's opinion it excluded him from work involving "heavy lifting" and "bending" and hence disqualified him from doing the work for which he was previously, regularly employed.

Moreover, the union contends that the regular duties of Mr. Betts' former position did not involve "bending" or "heavy lifting" of such nature as to justify excluding him from the employment concerned.

Essentially the position taken by the union on this point is that

the company is not entitled to exclude Willie Betts from his regular employment because of the fact that medical representatives of the company have expressed the opinion that if he returns to work some of the duties involving "bending" and "heavy lifting" might cause him further temporary or permanent injury and hence involve the company in possible compensation liabilities.

Position of the Company

The company asserts that Willie Betts had two laminectomies, spinal operations, in a thirty month period and that when he reported for work after the second of these, the Medical Director of the company decided that he should not be put upon any work that might bring about further strain upon and possible damage to his spine. The Medical Director, therefore, ruled that Willie Betts should not be assigned to any job that would require him to do "bending" or "heavy lifting." Since the job of janitor in the Quality Control Laboratory which he previously had held required bending and substantial lifting and since there was no other job available which did not require bending or lifting, Betts has so far not been assigned to any work. Management has stated, however, that as soon as some job within Betts' physical capabilities is open, the same will be given to him. The employer insists that Betts has not been discharged but only subjected to a layoff required by his physical condition until suitable employment opens for him.

The company interprets Article VII, Section 1 (Agreement p. 21) to invest it with the sole and exclusive right to determine the physical fitness of any employee for a job. That section of the contract contains a statement that seniority includes the factors:

"(a) Length of continuous service as hereinafter defined;

(b) Ability to perform the work; and

(c) Physical fitness.

"It is understood and agreed that where factors (b) and (c) are relatively equal, length of continuous service as hereinafter defined shall govern. In the evaluation of (b) and (c) Management shall be the judge; provided that this will not be used for purposes of discrimination against any member of the Union. If objection is raised to the Management's evaluation, and where personnel records have not established a differential in abilities of two employees, a reasonable trial period of not less than thirty (30) days shall be allowed the employee with the longest continuous service record as hereinafter provided." (Underlines supplied.)

In pursuance of the claim of the right of management to be the sole judge of the physical fitness of each employee for the duties of contemplated jobs, the company asserts that in its judgement, expressed by the Medical Director, Willie Betts is unfit to do the work of his former regular classification because of the great likliheod that the bending and lifting involved in it may cause him to suffer further spinal dislocation or injury.

In support of its position the company offered in evidence a somewhat detailed statement of the duties of a janitor in the area to which Willie Betts requests to be restored. (See Company Exhibit D) This included sweeping, using dust pans, emptying trash containers, moving sacks and cans of waste materials from the main laboratories to dump boxes, mopping floors and moving a bucket and contents weighing some fifty pounds, mowing a lawn which involved carrying a forty-eight pound lawn mower up certain stairs; shoveling snow; climbing ladders to wash

walls and ceilings and moving ladders weighing some fifty-two pounds. The Medical Director of the company has expressed the opinion that such work should not be undertaken by Willie Betts in view of the history of spinal difficulties and operations which he has experienced. In addition to the work above mentioned, certain other work was described in respect to which, if restored to the job in question, Betts would be required to participate with other janitors in handling of heavy items and in the use of mechanical lifts, etc.

The company contends that under Article VII, Section 1 of the Labor Agreement of the parties, "all employees" are to be considered in seniority status "relative" to one another. Since Willie Betts could not be restored to his own job, it contends that management has no right or authority to remove some other employee from his job and put Betts on it even if he were physically fit to do the work. Hence the company contends its only available course was the one which it took, that is of excluding him from all work until some job which he can perform without bending or heavy lifting is vacated or created. Here the employer relies upon Article VII, Section 6 (c) and contends it is governed by this provision in the contract in respect to the unavoidable "stepback" to which Willie Betts was subjected. This being the case, it asserts that seniority being a complex factor and Willie Betts having been stepped back in accordance with the contract, he is now in seniority below or behind the other janitors who continue to be physically fit to perform all duties of regularly assigned work. Strictly speaking, however, it is stated by management here, that since he was at the bottom rung of the ladder when he was forced to step-back he necessarily stepped out and thus he assumed

the status of a laid-off employee. In this connection his seniority rights such as they now are, will terminate at the end of two years if he is not called back, but if he is restored to employment within the two years because a job within his physical capacities opens for him, he will be entitled to be assigned to the same and his seniority status will continue on. According to the company, Willie Betts "still has fifteen months to go before his seniority terminates."

The company offered in evidence (Exhibit F) the attendance record of Willie Betts which shows a very unusual number of absences from the time he started working for the company, January 7, 1952 until the last day he was actively on the payroll. It asserts however, that Betts was not laid-off or disciplined for his bad attendance record but relieved of work because of his unfit physical condition. Again at this point, the company insists that the contract makes it the exclusive judge of whether any employee is physically fit for the job classification for which he makes his claim. It expressly emphasized that this exclusive right of the management to be the judge of physical fitness is not shared by the union, or any "outside doctor, or an arbitrater." (Company Brief p. 15) It argues the soundness of this view on the ground that the company is responsible for safety conditions within the plant and that it must have full and exclusive authority to judge the physical health and fitness of all employees or suffer the alternative that employees unfit because unsafe to work with others might otherwise be improperly imposed upon it to the possible loss and danger to other employees, to the company and to its various properties.

DISCUSSION OF EVIDENCE AND CONCLUSIONS

There seems to be little, if any, dispute between the parties on the matter of Willie Betts' record and his physical condition. Appar-

ently he had a laminectomy on or about May 26, 1952. He had an appendectomy on or about August 17, 1953. The record indicates he had an operation because of an ulcer in October 1953 and suffered from influenza in March 1954. He had a tonsilectomy in July 1954 and another laminectomy in December 1954. During the time while he was supposedly actively in the employment of the company, the possible work days totaled 707. Betts, for various reasons, was absent 203 leaving an actual attendance of approximately 504 days. He was absent approximately two-[illegible] of the work days. Entirely ignoring the problem of management of frequently finding replacement or substitution help to do the work supposed to be done by Betts, this poor attendance record and the health reports which are unavoidably related to it clearly indicate that Betts was in very bad health. It corroborates the Medical Examiner's conclusion that there appears to be some decided weakness or maladjustment of his spine.

Management asserts that on the basis of this record it is entitled to rely on the judgement of its Medical Department that Betts is physically inadequate to do the duties of his former job of janitor, to exclude him from the same and to refuse employment to him until a job is vacated the duties of which he can perform safely and regularly in the light of his present education, experience and physical condition "without bending or lifting." The number of such jobs, in view of Betts' limited education and experience, are very few around a steel mill where ordinarily some substantial physical effort is required of men in nearly all classifications. Some attention must be given to the company's claim that it, or its Medical Department is entitled to be the sole judge of employees' physical fitness and not bow to opinions of outside doctors, labor representatives or others in arriving at conclusions concerning the same.

As above quoted, Article VII, Section 1 defines seniority and in this definition the term "physical fitness" appears following "(c)." In this section it is stated that, "in the evaluation of (b) and (c) management shall be the judge..."

The undersigned cannot agree with management's contention that the contract by the text of Article VII, Section 1, makes it the sole judge of an employee's "physical fitness." The last sentence of that section is quoted on page five herein and it is significant. It virtually entitles any man to a minimum trial period of thirty days if the "personnel records have not established a differential in abilities of two employees." The entire text requires that physical ability as well as ability to perform the work be here regarded. If the personnel record supports the employer's conclusions, however, it may lay off an employee for any "legitimate reasons." (Article IV, Section 1.) No one can doubt that the lay off of a man whose personnel record indicates he is physically unfit for his former duties or for any available employment is a lay off for a "legitimate" reason.

The words "management shall be the judge" in Article VII, Section 1, then, means only that in the initial decision of any dispute arising under this clause, management shall have the right to put the man it selects on the job. Whether he stays on it or not must be decided by the usual grievance procedure and in the light of the "personnel records" as clearly indicated by the last sentence of Article VII, Section 1.

The testimony of Dr. H.S. Gardiner, Director of the Medical Department for the company extends over several pages of the transcript describing the several matters taken into consideration and, according to the witness, leading to the conclusion that Willie Betts should not be

restored to his former job because it involved exertion by way of bending and heavy lifting which might be dangerous to him because of his physical condition. Emphasis was placed on the fact that the witness had a "mechanically poor back" which had necessitated two operations each of which required removal of bone substance. (Transcript pp. 102, 103, etc.) The doctor stated that in his opinion it would be illogical to assume that the back "is as strong mechanically as the back of a person who had had no such experience." Some point was made that in general the Indiana State Industrial Board would consider a man who had had such an experience as being subject to a permanent partial impairment of from twenty to thirty per cent. (Transcript pp. 104, 105) Following this, the doctor testified on cross-examination that considerable efforts were made by the Medical Department to ascertain the nature of the usual duties of Willie Betts on the job he had filled and the extent of physical effort which would be required of him if he was returned to it. (See Transcript pp. 109, 110 and 111.) It must not be forgotten that lifting which might be described as "light" or "moderate" for a young or middle-aged man in good health, may be "heavy" indeed for an older man who has had trouble with his back.

As previously noted, it seems to be unavoidable that a thoughtful analysis of a man's capacity to work should involve a study of his attendance record in connection with his health record because of the fact that the two are inextricably related to each other. Exhibit F shows that of a possible 707 work days while on the payroll of the company, Willie Betts actually worked 504 days. In other words, he worked approximately only five days for every two days of absence on work days. When it is remembered that we are considering here only a five day work week,

it is evident that Betts worked on very little more than half the calendar days while he was supposedly active on the payroll of the company. The state of his health apparently was such that he required not only the two days of rest and recreation per week enjoyed by men in normal health and physical condition but substantially more than that. It must not be overlooked that after his appendectomy in August 1953, Willie Betts did not return to work until the middle of the following January. His first laminectomy took him away from the job from May 26, 1952 until September 22, 1952 and his second laminectomy took him off the job from December 27, 1954 until he reported for work apparently sometime in May 1955. Certainly, these long periods of absence in connection with ill health and several surgical spinal operations do much to fortify the company Medical Director's conclusion that a man subject to the serious physical defects from which Willie Betts suffers, and whose periods of illness and convalescence after treatment are so long, is an extremely poor risk for return to any job which involves substantial physical exertion.

The undersigned arbitrator was greatly impressed by the manner, and the professional knowledge of Dr. H.L.C. Broemes who testified on call of the union and of Mr. Willie Betts. This doctor stated that Betts desired to return to work earlier than his medical advisers thought suitable. Their opinion was that after the laminectomy the patient should not do work requiring physical exertion for at least five or six months. (Transcript p. 6.) Dr. Broemes said that after the operation, the patient's recovery was normal and that, having in mind the duties of the janitor as described for Willie Betts' job, there was no reason why Betts should not return to work. Dr. Broemes was asked the question whether, in his opinion, this patient, Betts, would be able to discharge the duties of his

job over a period of several long, hard unusually difficult days. The doctor's answering words were, "As long as I know Willie Betts he has been working as a laborer, doing things along that sort. He has been working 8 hours per day. And there is, in my opinion, nothing in the operation, nothing in our findings at the operation which at this time would let me think that he would no longer be able to work 8 hours a day. If it was a condition of a coronary heart condition or something like that, which would be taxing in more ways than one, ofcourse, my answer then would have had to be much more qualified. But in a case like this I don't think I can make any statement as far as limitation to such a person. Sometimes I get up, I don't feel like walking any distance. I am not sick.

"I quite appreciate what you are asking, but in view of my findings and in view of the fact that he had been working as such prior and today—I mean he hasn't even come to see me, medically speaking, for over, I think, eight months or something like that. As far as I know he still—he works outside." (See Transcript pp. 16 and 17)

It will be noticed that the difference between the testimony of Dr. Broomes and Dr. Gardiner is that Dr. Broomes apparently having in mind only the character of the work and the immediate condition of the grievance claimant, Betts, has testified that in his opinion there was no reason why Betts should not be regarded as "employable." He commented that Betts was able to bend, reach up, turn from side to side etc. with no "evident or obvious discomfort." (Transcript p. 7.) His testimony must be taken to indicate his opinion that the various tasks of the job to which Willie Betts desires reinstatement could all be done by him with the possibility that no adverse results would be suffered. Dr. Gardiner

however, was testifying on the broader question of the possible long-term effect or risk of this employment. The undersigned arbitrator understood Dr. Gardiner to testify that while Willie Betts might well discharge the duties of the job for a day, for several days,or perhaps even a substantial period, his condition was such that in view of his past history the various operations he had had and apparently established mechanical weakness of his spine, he would be highly likely to suffer some further or greater physical injury or disability than in the past, and hence should not be put back on a job for which, on the basis of not merely one but several incidents of injuries [illegible] resulting surgical operations he appears to be unsuited.

According to the definition of "seniority" which appears in the contract between the parties, Article VII, Section 1, a man cannot be said to have seniority entitling him to a position if he is not physically fit to do the work. The arbitrator does not understand the "physical fitness" requirement to be satisfied by proof that a man might do the work once or a few times without injury to himself or the job or others but rather that a worker's "physical fitness" must be such as to indicate a likelihood that he can undertake all the duties of the job concerned for an indefinite period and regularly discharge them without undue or unusual risks or necessities for absence due to inadequate physical condition. The record here tends to sustain the opinion of the Medical Examiner of the company that Willie Betts does not have such "physical fitness." Hence, within the definition of "seniority" in the contract he does not have the "seniority" which would entitle him to be put on such job nor apparently on any job now available.

In conclusion, it is the opinion of the undersigned that the contract (Article VII, Section 1.) does not provide that management shall be the sole and final judge of "physical fitness." The company is entitled to make the initial decision subject to the balance of that article and the grievance procedure. In pursuance of the final step of that procedure the undersigned finds that in the present instance the evidence relied on by management sustains its decision that Willie Betts is not physically fit for the work of his former job as janitor in the Quality Control Department.

THE AWARD

It is awarded that Willie Betts has been legitimately excluded from his job as Janiter in the Quality Control Department for the reason that the evidence sustains the conclusion that he is not physically fit to do the work required by an incumbent of such classification. The grievance herein considered is, therefore, disallowed.

Arbitrator

Iowa City, Iowa

MAR 24 1956