INLAND STEEL COMPANY	)	Grievance No. 15-E-7
	)	Docket No. IH-2-2-9/29/55
and	)	Arbitration No. 166
	)	
UNITED STEELWORKERS OF AMERICA Local Union 1010	)	Opinion and Award

Appearances:

For the Company:

T. G. Cure, Assistant Superintendent, Labor Relations Department
Arnold T. Anderson, Divisional Supervisor

For the Union:

Cecil Clifton, International Representative
Fred A. Gardner, Chairman, Grievance Committee
Joseph Wolanin, Assistant to International Representative
Dalton Blankenship, Grievance Committeeman

The grievant, Bruno Jonaitis, a Mill Motor Inspector Helper, in the 44" Hot Strip Mill, complains that he was unjustly denied promotion to the Second Motor Room Operator job because of an alleged physical deficiency which it was later found he did not have. He requests that he be given the proper place in the Electrical Sequence standing which was denied him because of the Company's error.

Grievant was sent to the Company's Clinic on February 16, 1955 to be examined for an "S" rating, in anticipation of temporary vacancies in the position of overhead crane operator. For this work it is necessary for safety reasons that the applicant have depth perception, a requirement which is conceded by the Union to be a reasonable exercise of Management's judgment with respect to the evaluation of the physical fitness factor of seniority, as set forth in Article VII, Section 1. The Medical Department reported that he had failed the depth perception test and therefore did not qualify for the necessary "S" rating.

There was to be a two-week vacancy starting June 13, 1955 in the position the Grievant desired. He was sent to the Clinic on May 27 for re-examination, and again failed the depth perception test. The result was that an employee with shorter length of service, E. Knighton, Jr., was given the temporary promotion.

On June 25, 1955 Jonaitis went to the Kuhn Clinic in Hammond to have an independent check made and was informed by Dr. Hedwig S. Kuhn that his vision was normal, including depth perception. He reported this to the Company, and the Company's Medical Department examined him again on July 5, and then ascertained that his depth perception was normal and satisfactory, whereupon he was given the "S" rating.

Grievant's complaint is that he had always had depth perception, despite the Medical Department's earlier findings, and that he was therefore improperly denied the opportunity to fill the temporary vacancy which was assigned to Knighton on June 13, 1955. The Union calls this an error on the part of the Company's Medical Department for which Jonaitis should not suffer.

Two questions are presented: (1) May an employee or the Union question the Company's findings with respect to physical fitness; (2) if so, was there an error made in this instance for which the Company should be held responsible and be required to compensate the Grievant?

Seniority, as used in the Agreement of July 1, 1954, is described in Section 1 of Article VII as follows:

> "Definition of Seniority. Employees within the bargaining unit shall be given consideration in respect to promotional opportunity for positions not excluded from said unit, job security upon a decrease of forces, and preference upon reinstatement after lay-off, in accord with their seniority status relative to one another. 'Seniority' as used herein shall include the following factors:
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> (a) Length of continuous service as hereinafter defined;
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> (b) Ability to perform the work; and
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> (c) Physical fitness.
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> "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."

It is Management's view that in the evaluation of ability and physical fitness, it is the judge. It should be noted, however, that despite the statement to this effect in the quoted section, this judging process is qualified by the statement that the evaluation "will not be used for the purposes of discrimination." With regard to the ability factor, under certain circumstances a trial period must be given to the employee with the longest continuous service record, and, in Section 2, provision is made for disputes over the accuracy of the personnel record to be disposed through the grievance procedure.

In Arbitration No. 145 Arbitrator Clarence M. Updegraff held that Management is entitled to make the initial decision as to physical fitness but that this decision is subject to challenge through the grievance procedure.

With this holding I am in accord because it is evident that the Agreement confers on Management only a qualified right to judge. The rulings of judges are not uncommonly reviewable on appeal, and the intent of the drafters of the Agreement seems reasonably to be that Management's judgment as to physical fitness is not excluded from this possibility. Otherwise, it may be asked, how would there be a final determination as to whether the evaluation was predicated on discrimination when such a charge is made? Surely, the party charged with practising discrimination in violation of the Contract provision would not assert that it alone has the right to be the final judge as to whether it is guilty of discrimination.

The answer to the first question, then, is that the employee or the Union may employ the grievance procedure to question Management's finding as to physical fitness.

The fixing of responsibility depends on the issue of fault or error. Was an error made by the Medical Department for which the Company should be required to make the Grievant whole financially? The answer to this question must be furnished by medical authority. The parties agreed at the hearing that this is so, and authorized me to consult independent and recognized medical experts to determine the facts upon which this question of fault or responsibility must turn.

In Section 8 (b) of Article VII there is set up a procedure for correcting the cause for which an employee is, among other things, denied promotion, in these words:

> "Employees who have or shall request permanent demotion to a lower job may later change their minds, or employees who have been, or are, denied promotion in accordance with the provisions of this Article, and employees demoted for cause under Article IV, may later correct the cause for such action. In such cases the employees shall again be considered eligible for promotion, but they shall not be permitted to challenge the higher standing on the jobs above of those who have stepped ahead of them until they have reached the same job level above (by filling a permanent opening) as those who have stepped ahead of them."

The effect, applied to Jonaitis' case, would be that after the cause was corrected by the examination of July 5, 1955, he became eligible for future promotion but could not regain the place he had lost in the interim to Knighton. The Union regards this as an injustice, contending that it was caused by an error of the Medical Department.

After noting the opinion of Dr. A. Glenn Gardiner, the Director of the Company's Medical Department, I consulted my own ophthalmologist, a highly respected member of his profession, Dr. A. J. Reinhorn, of Paterson, New Jersey. I also wrote to Dr. Hedwig S. Kuhn of Hammond. Dr. Kuhn not only examined Jonaitis on June 25, 1955, but played a part in setting up the visual tests which the Company's Clinic uses. I found that the three doctors are completely in agreement. A person either has depth perception or not. He can not develop it. At the time of his first test on February 16, 1955 Jonaitis unquestionably had satisfactory depth perception. Nevertheless, given the usual type of examination, his responses to the technician's questions were such that a report was made that he failed the test. Was the technician administering the test at fault? In the absence of specific evidence of malice or negligence, of which there is not a trace in this case, the three doctors agree definitely that the trouble is ascribable to Jonaitis and not to the examiner. The opinions of all three, quite independent of one another, are almost identical, being summarized in the following paragraphs of Dr. Kuhn's letter in reply to my inquiry:

> "I am in receipt of your letter with reference to the problems of an employee who was given the regular battery of visual tests and who, as per your letter, apparently failed his depth perception test in February and again in May, and who was later examined here and found to have normal depth perception.
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> "Visual skills as measured on binocular battery tests of this nature do vary from day to day, even vary between the early morning hours and the late after work hours. Fatigue and stress affect all of our visual functions, which is one of the reasons that there are more accidents to be blamed on eyes of employees driving home from a hard day's work than driving to work after a night's sleep. There are various degrees of difference, of course, all of these depending on many factors.
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> "Therefore, in direct answer to your question as to whether it is 'likely that an individual may be found to lack normal depth perception and a month or six weeks later be able to demonstrate that his depth perception is normal', I would say yes, that it may be so temporarily found to be different."

In view of this evidence, it cannot be held that an error was made by the Company's Medical Department on either February 16 or May 27, 1955. Hence, when he was denied the promotion to the temporary vacancy on June 13, on the sound ground that he lacked the physical fitness essential to plant safety, no liability was thereby assumed by, or imposed on, the Company.

AWARD

The grievance is denied.

Dated: March 29, 1957

#6963

David L. Cole
Permanent Arbitrator