Award No. 774
OPINION AND AWARD
In the Matter of Arbitration Between
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 2-R-112
Appeal No. 1385
Arbitrator: Herbert Fishgold
October 7, 1987
Appearances:
For the Company
R.V. Cayia, Arbitration Coordinator, Union Relations
S. Korthauer, Section Manager. Maint., No. 2 Coke Plant
R. Vela, Section Manager, Advocacy, Arbitration and Administration, Union Relations
R. Coots, Maintenance Supervisor, No. 2 Coke Plant
R.K. Schloes, Project Representative, Operations, Union Relations
J. Svetanoff, Grievance Record Clerk, Union Relations
For the Union
W. Trella, Staff Representative
Gavino Galvan, Chariman Grievance Committee
Bobby Thompkins, 2nd Vice Chairman
Don Lutes, Secretary
Melvin Adams, Griever
Charles Warren, Grievant
Michael Williams, Witness
Wessie Anderson, Witness
Statement of the Grievance: "The aggrieved, Charles Warren, Pauroll No. 14956, contends the action taken by the Company when on June 24, 1986, his suspension culminated in discharge, is unjust and unwarranted in light of the circumstances."
Relief sought: "The aggrieved requests that he be reinstated and paid all monies lost."
Contract provisions cited: "The Union cites the Company with alleged violations of Article 3, Section 1, and Article 8, Section 1 of the Collective Bargaining Agreement."
Statement of the Award:
CHRONOLOGY
Grievance No. 2-R-112
Grievance filed: June 27, 1986
Step 3 hearing: July 8, 1986
Step 3 minutes: August 15, 1986
Step 4 appeal: August 29, 1986
Step 4 hearing(s): May 8, 1987 and May 15, 1987
Step 4 minutes: June 11, 1987
Appeal to Arbitration: June 15, 1987
Arbitration hearing: June 25, 1987
Award issued: October 7, 1987
The grievant, Charles Warren, was employed by the Company on July 3, 1978. At the time of his discharge, the grievant was established in the Welder Standard occupation in the No. 2 Coke Plant Department. During the last five years of the grievant's employment, he received the following disciplines:

Date	Infraction	Action
6/16/81	Insubordination	Discipline - Balance of the turn
4/17/85	Out of the work area	General foreman record review
7/30/85	Horseplay	Discipline - 1 turn
11/15/85	Insubordination	Discipline - Balance of the turn
3/12/86	Improper wearing apparel	Safety warning
3/25/86	Job neglect	Discipline - 1 turn

4/24/86	Insubordination	Discipline - Balance of the turn plus 2 turns
5/1/86	Work performance	Discipline - 3 turns
6/6/86	Overall unsatisfactory work record	Record review

The issue in this case is whether there was just cause to terminate the grievant, Charles Warren, on June 24, 1986, for the culminating incident of June 12, 1986, involving the violation of Rule 127-1 of the General Rules for Safety and Personal Conduct by allegedly being away from his assigned work area without the permission of his supervisor.

At the outset of the hearing, it was agreed to by the parties that the prior disciplinary letters forming the underlying progressive discipline, and which involved grievances that had not been fully processed at the time, be considered properly before the Arbitrator and consolidated for purposes of this hearing. Accordingly, the Arbitrator will also address, chronologically, the merits of Gr. 2-R-110, challenging the March 25, 1986 discipline letter; Gr. 2-S-2, 4 and 7, challenging the April 24, 1986 discipline letter; and Oral Complaint 02A-86-037, challenging the June 6, 1986 Record Review.

Gr. 2-R-110 - Job Neglect - Discipline - 1 turn

With respect to the incident, the grievant admits that he was notified of a welding assignment on the one-spot car on the 11-7 turn on March 22, 1986. According to the Company, this was the first assignment given to the grievant on that shift. There is some disagreement as to when the grievant was actually given the assignment. The grievant at first testified that he received instructions from a Mechanic at about 11:00 p.m., but then indicated that it might have been 12:00 a.m. However, the grievant admitted that he did absolutely no work between 10:30 p.m. and 12:00 a.m.

The grievant further testified that he performed another welding assignment on a steam spray between 12:00 a.m. and approximately 1:10 a.m., and that when that job was completed, he returned to the weld shop and did no other work for the balance of the turn which ended at 6:30 a.m. By way of explanation, for not proceeding to the one-spot repair area, grievant stated that he did not know whether the mechanic at the one-spot car still needed him for any welding work, and believed that if the mechanic still needed him, the mechanic would have returned to the shop to get him.

S. Korthwer, Maintenance Section Manager, No. 2 Coke Plant, testified that rather than sit idle for the remainder of the shift, that there were a number of alternatives available to the grievant to contact the mechanical crew to determine whether there was work still to be done on the one-spot car. First, both the mechanics at the one-spot repair area and the mechanical crew working on the steam spray had walkie-talkies. When the girevant was asked why he failed to ask the mechanics at the steam spray site to radio the mechanics at the one-spot car, he replied, "At the time, I didn't think about it." Second, the grievant could have used the phone in the north repair building which is commonly used by Coke Plant employees, to contact the one-spot crew. Finally, the grievant could have walked to the one-spot area, a distance of approximately a quarter of a mile, to determine if his services were still needed. When asked why he failed to do this, the grievant testified that he did not walk to the one-spot area because he did not think about it.

Based on the record presented, and particularly noting the specific assignment and grievant's "free" time between 1:10 a.m. and the end of the shift, the Arbitrator is unable to find any justification for the grievant's failure to pursue any of the above available opportunities to determine whether he was still needed at the one-spot car. Accordingly, the Arbitrator finds that the Company could reasonably conclude that the grievant neglected his job, and that the imposition of one-turn discipline was reasonable.

Gr. 2-S-2, 4 and 7 - Insubordination - Discipline - Balance of the turn plus 2 turns

On the 7-3 turn on April 18, 1986, the grievant was assigned in his regular Welder occupation to perform certain repair work on the locomotion unit of the one-spot gas cleaning quench car positioned inside the repair facility, as described above. After affixing his personal lock on the locomotion unit to prevent accidental travel by the unit, and after performing welding work for a period of time, the greivant complained to his supervisor, R. Coots, that he felt the work of welding on the locomotion unit was unsafe because he could possibly be exposed to flash burn since other welders were performing work in the relatively confined area of the locomotion unit along with the grievant.

Supervisor Coots reexamined the work area in light of the grievant's complaint and decided there was merit to the grievant's complaint. Consequently, Supervisor Coots assigned the grievant to the task of tack welding wear plates on the bottom of the mainframe of the coke containment unit on the one-spot gas cleaning quench car. The wear plates were not scheduled to be welded onto the mainframe until the next day. Supervisor Coots reasoned that the welding may be completed faster the next day if the wear plates were tack welded into place by the grievant on the subject turn.

The grievant refused to perform this second assignment, claiming that it, also, was unsafe. According to Coots, the grievant's origianl complaint regarding this assignment was that there was inadequate lighting in the area of the coke containment unit to perfrom the welding work. Supervisor Coots arranged for additional lighting to be directed on the area. However, the grievant then complained that the work was unsafe because the grievant would be required to perform the welding work in a squatting position, which, if the coke containment unit moved unexpectedly, could possibly subject the grievant to injury.
Supervisor Coots reminded the grievant that the grievant's personal lock remained on the locomotion unit, making that unit inoperable as long as his lock remained in place, and that the coke containment unit was also blocked from movement by wedges securely positioned under the wheels. Despite those conditions, the grievant requested that the work be performed only by using the repair pit, but Supervisor Coots replied that was not necessary in this instance. The grievant also expressed concern about a mobile crane positioned outside of the repair facility, and the fear that the crane boom could come to within approximately one foot from the coke containment unit. Coots pointed out that there was no risk that the coke receiving car could have been accidentally struck by the mobile crane because the distance between the car and the crane was approximately 40 feet and the crane itself was immobile because the outriggers were deployed.
Supervisor Coots then examined the area thoroughly and determined that the work of tack welding wear plates in the manner directed was not unsafe, and directed the grievant to perform the work as prescribed or be subject to possible discipline. The grievant continued to refuse to perform the work. Despite the above precautions and accommodations, the grievant was still not satisfied, yet, he could not state what, if anything further, was unsafe. Moreover, Coots testified that, as he was talking to the grievant, Warren merely smiled as though he was not listening to Coots.
As a result of the above incident, the grievant was escorted from the plant for violation of Rule 127-0 (insubordination) of the Plant General Rules for Safety and Personal Conduct. On April 24, 1986, the grievant was issued a discipline statement, which called for the loss of the balance of the turn in question (2.4) hours, plus 2 turns.
The Union contends that since the grievant had a sincere belief that the work to which he was being assigned was unsafe, he had a right under Article 14, Section 6 of the Collective Bargaining Agreement, to refuse to perform the work. Accordingly, the Union maintains that he should have been given relief from the job, as provided under Article 14, Section 6, rather than being sent home and disciplined for insubordination.
It is clear from Article 14, Section 6, and the Awards interpreting and applying its language, that an employee cannot be required to work under unsafe condtions. On the other hand, it is also clear that an employee cannot manufacture reasons for not working on the grounds of unsafe conditions, but rather must have a sincere belief that he/she was being exposed to hazards beyond those inherent in the operation. As stated by Arbitrator David Cole in Inland Award No. 208, at pp. 2-3:
"The primary test must, then be the sincerity or the good faith of the employee's belief that the work is unsafe or unhealthy beyond the normal hazard inherent in the operation. Clearly, this calls for more than a mere assertion that he has such a belief.
This provision certainly was not meant to provide a shield for malingerers or shirkers. This presents obvious difficulties, since a person's state of mind must be inquired into. There are a number of situations in which similar problems arise. In criminal cases intent, malice, or premeditation are often in issue. How does one determine this? Admissions or statements by the employee contradicting the assertion may cast doubt on the sincerity. A failure to be able or willing to explain why a fear has developed as to the safety of a job which the employee has frequently and recently been performing without objection or protest may be enlightening... .
Where it is shown by whatever method is available or effective that an employee is not in good faith when he asserts his belief, and asks for relief from a job, then we have the case of an employee refusing a normal work assignment. In such a case, discipline will be warranted."
Applying the above-quoted rationale, the Arbitrator herein finds the Union's argument to be without merit. In reaching this conclusion, the Arbitrator first found it necessary to resolve a credibility dispute between Supervisor Coots and the grievant regarding several facts pertaining to this incident, as set forth above. As noted by Elkouri and Elkouri, How Arbitration Works, BNA, 4th Edition, 1985, p.32:
Special considerations are involved in weighing testimony in discharge and discipline cases. Thus Umpire Harry Shulman recognized that an accused employee has an incentive for denying the charge against him, in that he stands immediately to gain or lose in the case, and that normally there in no reason to suppose

that a plant protection man, for example, would unjustifiably pick one employee out of hundreds and accuse him of an offense, although in particular cases the plant protection man may be mistaken or in some cases even malicious. Umpire Shulman declared that, if there is no evidence of ill will toward the accused on the part of the accuser and if there are no circumstances upon which to base a conclusion that the accuser is mistaken, the conclusion that the charge is true can hardly be deemed improper. (footnote omitted)

In the instant case, the Arbitrator finds that grievant's testimony with regard to the disputed facts lacks credibilty. Supervisor Coots had no motive or reason to fabricate his testimony on this incident, nor did he have any ulterior motive to send the grievant home on that day because the assignment was one that needed to be accomplished.

Accordingly, the Arbitrator finds that Mr. Coots investigated and addressed all of the concerns raised by the grievant and advised him he would be subject to disciplinary action if he failed to perform as directed. In this regard, the Arbitrator further notes that Supervisor Coots read the grievant the rule proscribing insubordinate conduct, paced off the distance from the receiving car to the mobile crane, and personally talked to the mobile crane crew, alerting them to the fact that the grievant would be inside the repair facility working on the coke receiving car. Moreover, after Coots had addressed each of the grievant's concerns, the grievant still refused to do the work even though he was unable to state any specific objections to the then existing working conditions.

Furthermore, the Arbitrator cannot find that the use of the repair pit was necessary in order to perform this job in a safe manner. The grievant admitted that, in the past, he has performed the same assignment without using the repair pit. He further acknowledged guarantee a person's "pinch point." Thus, that using the repair pit does not safety since one could still be in a considering the record presented, the Arbitrator cannot find it unreasonable for the Company to conclude that the grievant's expressed reasons and demands were not based on a sincere good faith belief that the work was unsafe beyond the normal hazards inherent in the operation. As Arbitrator Peter Kelliher stated in Inland Award No. 378:

"...Where a question of the safety of employees is involved, this Arbitrator does not believe it proper to ignore the Supervisor's judgement in the matter unless clear and convincing evidence requires it. The ultimate conditions and procedures under the law rests upon the Company -- it is held liable for damages if injuries occur."

Finally, the Union argues that the denial of the use of the repair pit herein demonstrated racial discrimination against the grievant. In support of this argument, the Union points to testimony that several days prior to the incident in question, the grievant was assigned to perform welding work similar to that assigned in this case. At that time, he performed the work with a white welder and the repair pit was utlized with the Company's permission. As already discussed, the work at issue herein was not planned for the day in question, and was only assigned to the grievant as a result of his being relieved from his original assignment on the basis of safety. The repair pit was covered, and it would not have been reasonable under the existing conditions, to uncover it. Moreover, as recognized by Arbitrator Cole in Inland Award No. 623: "...But a charge of discrimination requires more than a mere assertion; it requires proof." The Union has failed to meet its burden of proof in this regard.

In sum, the Arbitrator cannot find it unreasonable for the Company to conclude that the refusal to do work when there is no basis for claiming unsafe working conditions constitutes an adequate basis for imposing discipline for this infraction.

Gr. 2-S-3 - Work Performance Discipline - 3 turns

The next incident relates to the grievant being disciplined on May 1, 1986 for poor work performance. With respect to this incident, there is no dispute that on the 7-3 turn over the course of two days - April 21 and 22, 1986 - the grievant took approximately six and one-half to seven hours to fillet weld a stainless steel patch measuring five inches by seven and one-half inches. According to the Company's estimate, this job should have been completed within two hours. Therefore, the Company claims that the grievant's failure to complete the job until seven hours of actual work time represents unsatisfactory work.

In an attempt to justify the extra time, the grievant claims that stainless steel is more difficult to weld, that he was working in tight quarters, that he made two or three passes on some portions of the perimeter of the patch, and that he had to chip some of the welds that did not hold.

Supervisor Coots testified that he based his estimate taking these factors into account, that he has assigned other welders to weld stainless steel patches similar in size to those involved herein, and the job has never taken longer than two hours to complete even when performed under circumstances similar to those involved here. Furthermore, the Arbitrator credits Coots' testimony that he checked the grievant's progress

at the end of April 21, and determined that the job was only half done. The Arbitrator further credits Coots' testimony, denied by the grievant, that at the start of the 7-3 turn on April 22, Coots informed the grievant that he was not satisfied with his work performance.

Although the grievant proffered reasons as to why the job might take longer than two hours, he admitted at the hearing that he did not attempt to complete this job as quickly as he could have on April 22. Even assuming that the two hour estimate was a conservative one, there was nothing presented on the record to explain why the job should have taken the grievant seven hours to complete unless, as he admitted, he was not working as quickly as he could have.

In sum, the failure to complete assigned tasks in a timely fashion, particularly after being spoken to by one's supervisor, can reasonably be considered to be poor work performance and, accordingly, there was just cause to discipline the grievant for the May 1, 1986 incident.

Oral Complaint 02A-86-037 - June 6, 1986 Record Review

In the No. 2 Coke Plant Department, when an employee reaches the three-turn discipline level of the progressive system, a record review is held and an employee is specifically put on notice of the consequences of future unacceptable conduct. Herein, having found that the underlying discipline actions leading to the three-turn discipline were all proper exercises of management's discretion, the Arbitrator finds that the June 6, 1986 Record Review was issued for just causes.

Gr. 2-R-112 - June 24, 1986 Discharge

There is no dispute regarding the facts associated with the culminating incident. On the 7-3 turn on June 12, 1986, the grievant was assigned to welding work in a repair area immediately north of the coal storage field on the west side of the coke batteries in the No. 2 Coke Plant Department. At approximately 1 p.m., the grievant left his assigned work area without the permission of his supervisor to walk approximately one-quarter of a mile to use a restroom facility located in the maintenance section office complex in the mechanical shop. In order to reach this location, the grievant passed and did not use portable toilet facilities located near his assigned job site, toilet facilities located between No.8 and No.9 Coke Batteries, and toilet facilities in the door repair shop.

The grievant used the restroom facility for fifty minutes and was gone from his work area for one hour and fifteen minutes. The sequence of events is not in dispute, and is summarized in the report of grievant's supervisor, R. Bartley, completed at the time of the incident:

"At 1:35 p.m. I received a call fromt the mechanics working on the one spots informing me that their assigned welder C. Warren had left the job at 1:00 p.m. to use the restroom and had not yet returned. A. Simpson and myself immediately started looking for Mr. Warren. I found Mr. Warren at approximately 1:40 p.m. still using the restroom at the main north change house, and told him he was holding up his assigned job and should hurry back to work. He stated he would.

Giving him 10-15 minutes to finish, I then returned to see if he had left the washroom and found him still on the stool and then told him I was documenting his time off the job. Waiting outside the washroom for another 5 minutes or so I then went into find him washing his hands and adjusting his trousers.

He finally returned on the job at approximately 2:15 p.m."

On June 13, 1986 the grievant was interviewed concerning the above incident, and during this interview did not dispute any of the above facts, but offered as an explanation for his lengthy absence that he was constipated. As a result of this incident and in light of his previous discipline record discussed above, the grievant was suspended pending discharge for violation of Rule 127-1 of the General Rules for Safety and Personal Conduct, which prohibits an employee from being away from his assigned work area without the permission of his supervisor. Following further investigation, on June 24, 1986, the grievant was discharged.

The Company concedes that the grievant had a right to go to the restroom. However, the Company claims that grievant's absence from his work place for one hour and fifteen minutes without the permission of his supervisor is unreasonable. Moreover, the Company maintains that the decision by the grievant to use the restroom that he used rather than one closer to the job site, demonstrated that the grievant was motivated to be away from the job for as long as possible.

The Union does not dispute that the grievant took more time than usual to go to the restroom. However, the Union claims that the restroom the grievant used is immaterial, and that the fact that the grievant was constipated should be considered a mitigating factor.

Under the circumstnces of the instant case, noting particularly the grievant's prior disciplinary record, the Arbitrator finds the Unon's argument to be unpersuasive. On June 6, only one week prior to this culminating incident, the grievant participated in a review of his work record by his department manager in

which he was warned that any future incident of poor work performance, including violation of a Company rule, would be cause for his suspension subject to discharge.

Rule 127-1 is a well-established, long standing Company policy, one which the grievant acknowledged he knew. It strains any rule of reason to believe that it would ordinarily take an individual one hour and fifteen minutes to complete a bowel movement. Although the grievant cliams that he was suffering from constipation, which may result in longer than normal periods in the restroom, the grievant never complained of constipation to his supervisor on the day in question. This is particularly noteworthy since Supervisor Bartley, upon finding the grievant, put him on notice that his conduct was deemed unacceptable. Therefore, if the grievant thought he had a valid explanantion for his conduct, he would have expressed that to Mr. Bartley in a timely fashion. Yet, the grievant did not mention a problem of constipation until the following day when the incident was investigated.

In addition, even assuming arguendo that the grievant was constipated, the fact not only does not explain, but appears inconsistent with, his decision to walk past several closer restrooms to go to a restroom a quarter-mile from his work station. This hardly lends credence to the grievant's case.

In sum, the Arbitrator finds that the Company could reasonably conclude that the grievant's conduct on June 1986 was in violation of Rule 127-1. The remaining question is whether the decision to discharge the grievant as a result of this incident was for "just cause." As already discussed, the Arbitrator has found evidentiary basis for affirming the disciplinary pernalties in the underlying grievances involving progressive discipline. Furthermore, the Arbitrator believes grievant's actions have demonstrated that he is either unable or unwilling to accommodate himself to the requirements of the Company and of his job. Accordingly, the Arbitrator must conclude that the Company had just cause for discharging the grievant on June 26, 1986.

AWARD

For the reasons stated herein, Greivances 2-R-110; 2-S-2, 4 and 7; 2-S-3; and 2-R-112 are denied.

/s/ Herbert Fishgold
Herbert Fishgold
Arbitrator
Washington, D.C.
October 7, 1987