Award No. 959
IN THE MATTER OF THE ARBITRATION BETWEEN
ISPAT INLAND STEEL COMPANY
And
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
December 5, 1998
OPINION AND AWARD
Introduction
This case involves grievant's discharge for allegedly throwing an iron bar at his supervisor. The case was tried in the Company's offices on October 19, 1998. Pat Parker represented the Company and Alexander Jacque presented the case for grievant and the Union. Grievant was present throughout the hearing and testified in his own behalf. The parties submitted the case on final argument.
Appearances
For the Company:
Pat Parker -- Section Manager, Arbitration and Advocacy
S. Tavarczky -- Section Manager - No. 2 BOF Maintenance
W. Boos -- Senior Representative, Union Relations
L. Peterson -- Caster Coordinator, No. 2 BOF
L. Berdine -- Turn Coordinator, No. 2 BOF
For the Union:
A. Jacque -- USWA Staff Representative
E. Harvey -- Griever
D. Shattuck -- Chairman, Grievance Committee
A. Trevino -- Assistant Griever
D, Johnson -- Grievant
A. Stoffer -- Witness
B. Mulvihill -- Witness
N. Morales -- Witness
S. Santiago -- Witness
David Hunter
Background
At the time of his discharge, grievant was a mechanic assigned to No. 2 BOF/CC. On June 18, 1998, he was summoned to bring equipment to the dummy bar car to help free a stuck connecting pin. The dummy bar car is essentially a platform used for insertion of the dummy bar, a procedure not involved in this case. After arriving at the car, there is no dispute that grievant stood near the front of the car and attempted to free the pin by using a pinch bar, a steel bar about 6 feet in length that weighs 30 to 40 pounds. Extending from the front of the car is a rack that has four or five guide pins, which are small rectangular fixtures that protrude from the rack After viewing the car and the location where grievant stood that day, I estimate that he was about five or six feet behind the guide pins. The front of the car sits a foot or so behind the guide pins. Grievant was almost at the front edge of the car, on the east side. Two of his coworkers, electrical technicians Mulvihill and Stoffer, stood seven or eight feet behind him and off to his left. Turn Coordinator Lee Berdine stood on an elevated walkway about 8 to 10 feet above the car. He was farther to the west (or left of grievant) than Stoffer and Mulvihill, though he was not as far behind grievant. Also, his elevated position gave him a good vantage point. There were other employees in the area, including one on the dummy bar car, but none of them saw the incident at issue here.
There were two people in front of the car. One was the caster operator, L. Martinez, who was leaning on the front of the car at the east side, in front of grievant. Actually, Martinez leaned on the rack that holds the guide pins. The other person in front of the car was Caster Coordinator Lee Peterson. The diagram furnished me, as well as Peterson's testimony, indicate that he stood about 6 feet in front of the car. When he stood in the spot where he said he was, however, he appeared to me to be farther away, maybe 7 or 8 feet. Peterson stood off to the west, or to the left of grievant. The diagram shows that he stood inside the tracks the car travels on, at the west edge of the car. But the position he assumed at the scene was slightly outside the tracks, maybe a foot or two farther west.

The incident started when Peterson observed grievant trying to free the pin with the pinch bar. Peterson said he noticed that grievant almost fell off the car, which could have seriously injured him. Peterson said this made him angry because grievant was trying to do something that was not his job and that he did not know how to do. Peterson testified that he was "seriously upset." He yelled for grievant to stop what he was doing and give the bar to Nick Morales, who was behind him on the car. According to Berdine, grievant heard Peterson's instruction, stopped work, and glared at Peterson. Peterson then yelled, "You don't know what the fuck you're doing. Give Nick the goddamn bar and get the fuck off there." At that point, according to Peterson, grievant looked at him and threw the pinch bar at him. The bar, however, hit the west guide pin and spun off to the right (or east). Everyone agrees that the bar nearly hit Martinez, who ducked out of the way. Berdine supported Peterson's account of the incident. He said after Peterson yelled at grievant, grievant straightened up and raised the bar to his shoulders as if he was raising a barbell. He then pushed it out in the direction of Peterson. At first, Berdine said he did not know whether the bar would have hit Peterson if it had not hit the guide pin, though he thinks it would have at least hit him on the bounce. Later, he said he was sure the bar would have hit Peterson.

The other two witnesses, Stoffer and Mulvihill, said they saw grievant throw the bar, but that he threw it out in a downward motion. The inference was that he was throwing it either on the car itself or on the floor immediately in front of the car. Stoffer, in fact, said that grievant could easily have hit Peterson, if that had been his intent. But he threw the bar down and not up. Neither of them thought grievant threw the bar at Peterson. Stoffer said he refused to go to the investigation because he thought grievant had been suspended for almost hitting Martinez with the bar. And, since he had almost hit Martinez, Stoffer said he thought he would just get grievant in more trouble. He said he was surprised when he learned that grievant had been charged with throwing the bar at Peterson and that "it never occurred to [him]" that anyone would think that. Mulvihill said he was "shocked" to learn that Peterson thought grievant had thrown the bar at him. Like Stoffer, Mulvihill said grievant threw the bar down, but he also said that he threw it in a northwesterly direction. That would have been the direction where Peterson was standing, but Mulvihill said that bar was not thrown at him.

However, both Peterson and Berdine thought that grievant threw the bar at Peterson. Peterson said that immediately after the incident, he called up to Berdine to call for plant protection and "get him out of here." Berdine said he did not hear Peterson convey those instructions because as soon as he saw what happened, he whirled immediately and went inside to call for plant protection After doing so, he immediately went downstairs because he thought there could be a confrontation over the incident. Berdine said he could see grievant's eyes when he threw the bar and that they never left Peterson. He said grievant threw the bar at Peterson, "without a doubt". On cross examination, Berdine was asked how he could have seen grievant's eyes if he was behind him. Berdine then looked at the diagram and said he was actually closer to him than it appeared on the diagram.

The principal problem with the Union 's case is that grievant's testimony does not agree with that of his two witnesses. Like Mulvihill and Stoffer, grievant denied that he tried to hit Peterson with the bar. But, he said, he did not throw it down, as his two witnesses claimed. Rather, he said he tried to throw the bar into the empty space to the east of Peterson (which would have been to Peterson's left) and behind Martinez. Grievant, then, said he threw the bar out and to the east, while his two witness said he threw it down and to the west. It is not entirely clear why grievant threw the bar at all. He said that he knew it was the wrong bar, so there was no reason to give it to Morales. He said he was throwing it to an empty space, apparently to get it out of the way. Grievant said he "heaved" the bar.

There was some dispute about exactly what happened after the incident. Peterson said grievant approached him and asked if he was going to be sent home. Peterson said he replied that Berdine was calling plant protection and that "you cannot throw a pinch bar at people and not expect to get sent home." Berdine testified that he did not talk to grievant. Rather, he said he contacted grievant's union representative and told him to stand by grievant and wait for plant protection. Grievant said he approached Peteson, who told him he shouldn't have thrown the bar. He said Peterson also apologized to him for using profanity. Grievant said he then went to Berdine and apologized, but Berdine said it was "too late". Grievant said he and Berdine went down on the elevator together to meet plant protection and it was not until he heard Berdine give his report to the officer that grievant realized Berdine and Peterson thought grievant had thrown the bar at Peterson. Grievant said until that time, he thought he was in trouble for almost hitting Martinez.

The Company says that when grievant threw the bar, he forfeited his job, whether he threw it at Peterson or not. All of the witnesses, including those for the Union, agreed that throwing the bar was a foolish act. The Company says there is some conduct that crosses the line and grievant's action here is an example of that.

The Company points out that grievant's testimony did not make sense. No one would deliberately throw a large heavy bar simply to get it out of the way. It was not, the Company says, a rational act. Rather, it was an act taken in anger and it was directed at Peterson. The Company also points to the conflict between the Union's witnesses and grievant's story and says that, while grievant's coworkers efforts for him were laudable, they were not worthy of belief.

Despite grievant's contrary testimony, the Union says that grievant clearly threw the bar down and out and did not throw it at Peterson. There really is no way to reconcile the discrepancy between the witness' testimony and that of grievant, so the Union did not attempt the impossible. It merely argued that grievant threw the bar in a manner that made it clear he was not going to hit Peterson. The Union does not defend grievant's conduct in throwing the bar, but it says that it was not thrown at anyone and that it is not conduct that should justify discharge.

The Union also raised a procedural issue at the hearing. Prior to the suspension hearing provided for in Article 8, the Company conducted an investigation in which it interviewed several employees, though not Stoffer and Mulvihill. Senior Representative Wendi Boos testified that no one had identified these two employees as witnesses at the time of the investigation. The Union brought both employees to the suspension hearing and asked that they be able to testify about what they had seen. Boos denied the request, which the Company says is in accordance with its usual practice of not having witnesses at such hearings. Rather, the Company says the purpose of the hearing is for the grievant to tell his side of the story. Although Boos did not allow the two employees to testify, she did agree that she would interview them as part of the investigation, before the Company acted on the suspension. It was that comment that created the issue the Union raised at the hearing.

The Union says that it thought the suspension hearing had simply been adjourned and that it would be reconvened after Boos had interviewed the witnesses. Boos, however, said she thought the hearing was over, but that the Company would not make a decision about whether to convert the suspension to a discharge until after she had talked with the witnesses. Although I find that Stoffer genuinely could not remember the meeting, it is clear - and, in fact, both parties agree - that the Company interviewed both Stoffer and Mulvihill before converting the suspension to discharge. It is also clear that grievant had an opportunity at the suspension hearing to tell his side of the story, though the Union claims that his comments were less meaningful than they would have been if the Company had allowed the witnesses to testify. The Union claims that this procedure amounted to a lack of due process, both because the witnesses did not testify at the hearing and because the grievant's suspension hearing was never finished.

Discussion

a. Procedural Issues

There is no due process violation in this case. Boos' testimony was that the parties did everything in the suspension hearing that they normally do. That is, she informed grievant of the charges against him, told him of the possible outcomes, and allowed him to state his position. Dennis Shattuck said that Boos told the Union representatives that she would speak to the witnesses and then get back to the Union. There was, Shattuck said, no discussion of whether the suspension hearing itself would be reconvened, though the Union thought that was the case. He acknowledged, however, that Boos went through the normal suspension hearing process. Boos said in her testimony that she probably should have called the Union before sending the discharge letter. But she did interview the witnesses and she testified that nothing they said caused the Company to change its mind. It is hard to see, then, how failure to reconvene the hearing prejudiced grievant. Boos' failure to call the Union before sending the letter would have changed nothing. Shattuck's testimony suggested, however, that the real issue the Union wanted to raise was whether witnesses are permitted at suspension hearings. The Company says they are not, and points out that the procedure is principally intended to give grievant a chance to tell his story.

There is, in fact, a subsequent hearing which the Company refers to as the third step hearing and the Union calls the discharge hearing. Witnesses are permitted to testify at that hearing. Shattuck agreed that it is not common to have witnesses at the suspension hearing but he said it sometimes occurs. On the basis of the record in this case, I cannot determine whether there are occasions when it would be essential for the Company to allow testimony at a suspension hearing. I note, however, that even the Supreme Court's Loudermill case, which established the need for a pre-deprivation hearing for public employees, does not require an evidentiary hearing. Rather, it merely requires the employees be allowed to speak in their own behalf before suspension or discharge, which is what grievant was able to do here. In the instant case, obviously Loudermill does not apply, but it is also clear that grievant was not prejudiced by the procedure used here.

b. Merits

It is sometimes hard to see an employee lose his job over one impulsive and foolish act, and the problem is compounded even further when the discharged employee has an otherwise uneventful employment history. The Company says, however, that there are some actions which cross the line and which cannot be forgiven. In general, I agree; the difficult question here is whether grievant's conduct crossed that line. If I was convinced that grievant threw the bar at Petersen, I would uphold the discharge. Obviously, the greatest difficulty in determining what grievant actually did is the conflict between his story and the two witnesses tendered by the Union, though Peterson and Berdine also offered their assessment of his motive. I thought both Petersen and Berdine were credible, but they cannot have known what was in grievant's mind. Moreover, given his testimony about where he was - and the demonstration he gave me at the view of the premises - I doubt seriously whether Berdine could even see grievant's face.

I suspect what happened is that grievant was momentarily angered by Peterson's reaction to his work. Even Peterson acknowledged that it was out of character for him to swear at employees, something that grievant would obviously have known. Grievant's response was to throw the bar down in anger, which is what Stoffer and Mulvihill saw. Grievant's story about what he did was obviously false. It makes no sense at all to think that someone would try to throw a 30 pound bar several feet to an open area merely to get it out of the way. I suspect grievant settled on that story because that seemed to him to be a neutral reason for throwing the bar. The fact that he lied about where he threw the bar, however, does not necessarily mean that he was covering up having thrown it at Peterson; it could mean only that he was lying about throwing the bar as an angry response to Peterson's criticism. Frankly, but for Stoffer and Mulvihill, I might draw the inference that grievant threw the bar at Peterson. But I found them to be credible witnesses and I believed their testimony that the bar was thrown in a downward motion. Moreover, the fact that the bar hit the guide pin supports this conclusion. If grievant had thrown the bar at Peterson, he might not have hit him, but he should have at least been able to clear the car.

The fact that I believe grievant did not throw the bar at Peterson does not resolve the case. As the Company's representative appropriately argued, it was a foolish act in any event, and it very nearly had disastrous consequences. There is no reason to suspect, however, that grievant would do something this stupid again. There is nothing in the record that suggests this is typical conduct from grievant. If there were, the case might come out differently. In these circumstances, however, I am persuaded that this single incident was not sufficient to warrant discharge. I will order that grievant be reinstated but, because of the severity of his conduct, he is to receive no back pay and the period off work shall be viewed as a disciplinary suspension.

AWARD

The grievance is sustained, in part. Grievant is to be reinstated, but without back pay.

/s/ Terry A. Bethel

Terry A. Bethel

December 5, 1998