1-19-1971

United States Steel Corporation Heavy Products Operations and United Steelworkers of America Local Union 1397

Sylvester Garrett
Chairman

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ARBITRATION AWARD

January 19, 1971

Case USS-8102-H

BOARD OF ARBITRATION

STATES STEEL CORPORATION

Subject: Discharge

Grievance No. HH-70-167

Local Union 1997

United Steelworkers of America

and

Homestead Works

Heavy Products Operations

United States Steel Corporation

Sections 8-D of the August 1, 1968

Agreement:

Contract Provisions Involved:

"Adhere to the above request.

Management is aware of the physical problems of the worker involved; and the problem should be handled as such. Him be ill; the slip issued to him be lifted; and the aggrieved be reinstated to his job; and the aggrieved requests that he be reinstated to his job; and the aggrieved requests that he be reinstated to his job.

Provisions Involved:

Agreement.
Grievance Data:

<table>
<thead>
<tr>
<th>Step</th>
<th>Date</th>
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<tr>
<td>Grievance filed:</td>
<td>May 19, 1970</td>
</tr>
<tr>
<td>Step 2 Meeting:</td>
<td>Not applicable</td>
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<td>Appealed to Step 3:</td>
<td>May 22, 1970</td>
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<td>Step 3 Meeting:</td>
<td>June 1, 1970</td>
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<td>Appealed to Step 4:</td>
<td>July 20, 1970</td>
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<td>Step 4 Meeting:</td>
<td>August 21, 1970</td>
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<td>Appealed to arbitration:</td>
<td>October 20, 1970</td>
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<td>Case heard:</td>
<td>November 9, 1970</td>
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<td>Transcript received:</td>
<td>November 16, 1970</td>
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Statement of Award:

The grievance is sustained to the extent of finding that grievant's discharge was improper, but the usual remedial back pay is inappropriate, since he was not able to perform the full scope of his job owing to incomplete recovery from his back injury. Since it would have been appropriate to place him on sick leave, however, the parties should agree upon appropriate remedial payments to him on this basis. His continuous service shall be restored and he shall be placed on sick leave until such time as a qualified specialist certifies to the Company that he is able to return to work and to perform the full scope of his job as Boilermaker Helper.
This grievance from Central Maintenance Division of A. M. Homestead Works protests the discharge of Boilermaker Helper Grievant is 46 years of age, with more than 19 years of continuous service. He always has worked as a Boilermaker Helper. The discipline slip which preceded the discharge describes the infraction in the following terms:

"During the 4 to 12 turn, May 1, 1970, you were away from your assigned place of duty without permission of your foreman. You acknowledged this, admitting that you had gone to the General Labor building to lie down because of your back discomfort. You are in violation of General Safety and Plant Conduct Rules and Regulations, Section I, Rule a, which reads in part: 'Leaving employee's working place or visiting around the works from his usual or assigned place of duty at any time, either during or outside of his regular working hours, without permission of his supervisor.' Subsequently, you refused to comply with supervisory instructions to leave the plant. You are also in violation of General Safety and Plant Conduct Rules and Regulations, Section II, Rule 6, which reads in part: 'Insubordination ... ''

Grievant's work record since 1966 includes five prior suspensions, as follows:
"3-25-66 Leaving assigned working area without
permission - 1 day
6-14-66 Leaving assigned working area without
permission - 1 day
7- 8-66 Leaving plant without permission - 2 days
9-14-67 Leaving plant without compliance and
insubordination - 5 days (returned to work)
8-27-68 Leaving plant without compliance and
insubordination - 5 days plus 55 additional days"

No details have been provided by the parties concerning these earlier infractions. On January 6, 1968 grievant suffered a compression fracture of his first lumbar vertebra in a tobogganing accident and was hospitalized until January 24, 1968. After a long period of recovery, he was deemed sufficiently fit to return to work by his personal physician. He finally returned to work on August 17, 1968 after having been examined by the Plant Doctor, who determined that grievant was fully capable of performing his regular job without limitation. At this time there was one X-ray taken (posterior) of his spine, which showed a distinct compression of the first lumbar vertebra, with two apparent areas of calcification as a result of the injury, but this was deemed to provide no basis for finding A.M. to be less than fully fit.

About 10 days after his return to work, grievant was disciplined with a 60-day suspension, but there is no detail in this record as to what produced this discipline. It is clear, however, that grievant was complaining of back pains frequently at this time, and seemed to feel that he was not—in truth—fully fit to perform his duties. Thereafter grievant's record shows no discipline, until the events here under review. During
this interval grievant continued to suffer back pain and would lie or sit down in the plant from time to time to relieve it. No Foreman ever authorized him to do this, and no one reprimanded him for having done so. There is no showing that any member of Management specifically was made aware of this situation.

As to the present infraction, it appears that on Friday, May 1, 1970, grievant was scheduled to work as Boilermaker Helper from 3 p.m. until 12, while the 52" Mill was down for repair. He reported as scheduled and after working on another assignment for about an hour, was assigned to the installation and tightening of bolts on rail clamps for the 52" Mill Hot Bed, working with Boilermaker Apprentice O'Toole.

Around 7:15 p.m., Turn Foreman Cheponis came by and noticed that grievant was absent from the work area. Cheponis spoke to O'Toole, who did not know of grievant's whereabouts. About 7:20, Cheponis saw grievant coming up a walkway, apparently on his way back to work. Cheponis went to the office to make a telephone call; about 5 minutes later he noticed grievant entering the Boiler Shop van, which had parked a short distance away to dispense food orders for the usual lunch break to commence at 8:00 p.m. Cheponis assumed that grievant was discussing a food order with the driver, so he proceeded on to check the progress of other work under his supervision. Shortly before the lunch break was to commence, Cheponis was in the Hot Bed area where grievant should have been working and noticed that he still was not there. Cheponis then walked with the other employees to the van at 8:00 p.m. and saw grievant inside. Some moments later Cheponis noted that grievant had left the group in and around the van, and someone told him that grievant had gone to an area behind the storage racks. Cheponis proceeded there, found grievant lying flat on his back, and told him to report to the pulpit after the lunch break was over at 8:20.
When grievant subsequently arrived at the pulpit, Cheponis asked him how long he had been away from his job. Grievant replied that he did not know the exact amount of time, but that he had left the job to go to the labor shanty for a soft drink and to lie down because of pain in his back. Upon hearing this Cheponis stated that he would have to send grievant to the Plant Hospital. Grievant did not want to go to the hospital; he said that he could go back to work because his back no longer hurt. Cheponis insisted that grievant had to go to the hospital and grievant indicated that he would not. At this point Cheponis called Master Mechanic Seery, who came to the pulpit office. Seery asked grievant why he had left his work area, receiving substantially the same explanation as grievant had given to Cheponis. Seery thereupon phoned the hospital and asked Cheponis to take grievant to Station 15 to be picked up by a plant car for transportation to the hospital. Seery also instructed grievant to return to the Boiler Shop office upon his release from the hospital.

Seery testified that at this point he had told grievant that he probably would be suspended and should report back to the Boiler Shop after completion of his check-up at the hospital.

At the hospital, the nurse gave heat treatment to grievant for about an hour and suggested that he take aspirin, which he declined because of a conviction that aspirin caused stomach problems. The nurse also told him to see his own physician for further treatment. Later she telephoned to advise Cheponis and Seery that grievant did not want to leave the hospital. Seery called Plant Protection and had grievant escorted to the Amity Street gatehouse.
By this time Seery and Cheponis had decided to send grievant home for the balance of the turn as a disciplinary measure. Both testified that they had reached this decision during discussion in the 52" Mill pulpit. Grievant, however, refused to leave the gatehouse and the Plant Guards called the Homestead Police to remove grievant as a trespasser. This was done. After a hearing some days later the trespass charge was dismissed.

About five days after the incident grievant returned to work on his regular assignment following an examination by the Plant Medical Director, who found no medical reason to preclude his performing his regular job. The doctor at this time, however, gave him a rating indicating that his condition should be checked from time to time. No X-rays were taken. Grievant then worked for three turns on his regular job without incident. Then he was handed the copy of the Notice of Suspension Subject to Discharge which produced the present case.

The Summary of Discussion in the Step 3 Minutes is as follows:

"Union representative Toth stated that M. was working at the 52" Mill hot beds with an apprentice. He needed a drink of water but instead decided to go to the Labor Shanty to have a coke. Grievant had been suffering with back problems and believed that if he had a coke and sat down, it would relieve him. On the way back to the job site at about 8 p.m., he decided to sit in a man carrier and rest a few minutes. He had a conversation with his foreman and advised his foreman that he
had been resting because of his back problems. When he returned to his work area, he was told to leave the job, go to the hospital, then leave the Plant.

"At the hospital, according to Union representative Toth, grievant told the nurse he wanted to complete his 9-hour turn. There, the nurse put hot compresses on grievant's back, but after about one hour grievant went to the plant gate where his foreman insisted that grievant leave the plant. Grievant's refusal to leave the plant as directed by Management resulted in his being escorted to the local Homestead Police Station by a Homestead police officer.

"It is the Union's position that Management's discharge of grievant was hasty and too severe, despite grievant's acknowledged history of discipline; also, in view of his 19 years service with the Company and the fact that he has three foster children.

"In response to Management's question relative to why the grievant had been away from the job so long, grievant stated his back bothered him. Management's representative suggested that grievant should have told his foreman if he had a back problem and should have gone to the hospital. Grievant responded that when he was returned to work in 1968 following his back injury, he had not been advised that he should go to the hospital when his back bothered him. Grievant acknowledged
that his injury was not a company case but he believes there is a company responsibility inasmuch as the company returned him to work following his injury when company representatives were aware that he suffered some back discomfort.

"Management's representative stated that the facts are clear and are admitted by grievant that he was away from his assigned work location without permission of his foreman on May 1, 1970.

"Grievant acknowledged that he was away from his assigned work area for at least 45 minutes without permission.

"Management's representative noted that if the grievant believed he was suffering some physical discomfort while at work, he should have notified his foreman. Notwithstanding, grievant did not have Management's permission to be away from his assigned work; and after he was located, his foreman acted properly when he instructed grievant to leave the plant; that because of grievant's assertion that he had some back discomfort, he was first sent to the Plant Hospital. It is noteworthy that when the plant nurse instructed him to go home and visit his family physician, grievant refused to leave the plant.

"Grievant was unable to explain satisfactorily his conduct at a plant gate on May 1, 1970 which caused Plant Protection to seek the services of the Homestead Police Department to
have grievant removed from the premises. The Union representative acknowledged that grievant may not have done all that he should have done under the circumstances.

"Management's representative noted that, according to the Plant Medical Department, grievant refuses to do what has been recommended to him to alleviate his back discomfort, noting that grievant acknowledges that he had not seen a physician since 1968, until May 12, 1970.

"Grievant was reminded of his previous remarks that he intends to lie down whenever his back hurts. Management's representative noted that grievant could not be in the plant without being able to work and grievant did not have the privilege to leave his assigned work location without permission of Management. He noted that grievant has done nothing to help himself since his accident (which occurred outside the plant in 1968) but he claims a persistent and severe back pain. He emphasized that grievant is required to come to work and do his job or he may be considered an unsatisfactory employee.

"Grievant agreed to Management's assertion that he has disciplinary problems and that he is not a satisfactory worker.

"The Union agreed with Management's position to hold this matter pending until grievant has been examined by his family physician and the results of that examination shall be communicated to Dr. Evans, Plant Medical Department.
"Subsequently on June 25, 1970, Chairman Toth presented Management with a 'To Whom It May Concern' letter from a Doctor Fronduti, attached hereto as Union Exhibit I.

"In examining that letter, Management gets the impression that current X-rays disclose 'no change in the compressed lumbar vertebra (L1),' which for the purposes of this case must mean no change since 1968 in the grievant's complained-of back condition. If that is so, then no basis appears to exist for either the Union or the grievant to use this as an argument in defense of an acknowledged rule violation, which the record reveals has been violated on numerous previous occasions by the grievant, and which the record also shows certainly did not leave the grievant with a feeling that he could continue to pursue this course of action without it eventually resulting in his dismissal. Copy of the Supplemental Violation of Rules slip is attached as Company Exhibit I.

"It is also noteworthy that in the uncontested settlement of Homestead Case No. HH-68-269, it was mutually understood and agreed by the Union and grievant that he is required to comply with all of the rules and regulations in effect at Homestead Works. In that case, grievant signed the settlement letter dated October 24, 1968 indicating his understanding of the rules and his agreement to comply with them, including notice to grievant that his failure to comply with plant rules and regulations would result in appropriate disciplinary action."
In Step 4 the Union representatives emphasized their belief that grievant needed medical attention on the basis of the undisputed facts. They requested that Management consider reinstating the employee on the basis that he finally had come to realize that he had no right to take self-determined work intermissions because of his back problem.

In light of the entire record in the case, and grievant's belief that his back problem is chronic, while nonetheless being disinclined to take medication to relieve his pain, and in view of earlier instances of inability to observe essential plant rules, the Company was unwilling to reinstate the grievant. In this regard, particular attention was called to a letter agreement of October 24, 1968 under which grievant had been returned to work following his 60-day suspension:

"Mr. Paul M. Hilbert  
Director, District Fifteen  
United Steelworkers of America  
1228 Long Run Road  
White Oak, McKeesport, Pennsylvania  

Attention: Mr. M. E. Krehely  

Dear Sir:  

"This will record the understandings we reached for settling all of the claims and issues involved in Homestead case 68-269.  

"The disciplinary action slip issued to Grievant A.M. for his conduct on August 25 & 26, 1968,
resulting in his discharge from employment will be modified to the extent that the discharge is changed to a suspension from work extending until he is rescheduled for work in accordance with the terms of this settlement agreement.

"It is understood and agreed that the Grievant's return to active employment will be dependent upon his passing the customary physical examination.

"In addition, it is mutually understood and agreed by the Union and Grievant M. that he will be required to comply with all of the rules and regulations in effect at Homestead Works, including the rule which requires employees to permit Plant Protection employees to inspect the contents of lunch boxes, shopping bags, and other containers carried by employees entering or leaving the plant premises. Failure to comply with these rules and regulations will result in appropriate disciplinary action. In this connection, the grievant is to sign the original copy of this letter in the spaces provided below indicating his understanding of the rules and his agreement to comply with same.

"It is understood and agreed that the Grievant is not entitled to any retroactive wages whatsoever during the period of his disciplinary suspension which will expire only after he has been rescheduled for active employment.
"If the above accurately reflects your understanding of our conclusions on this matter, will you please sign and date the original copy of this letter after obtaining the signature of the Grievant and return same to this office.

Very truly yours,

(Signed) G. J. Connors,
Manager Labor Relations
Pittsburgh

(Signed) Michael Krehely,
Staff Representative

Date Oct. 30, 1968

(Signed) A. A. M.
Grievant

Date Oct. 28, 1968"

The present instance apparently is the first occasion when a Foreman noted, and objected to, grievant's leaving his assigned work area in order to rest his back. Foreman Cheponis has known grievant for about 15 years but had only rarely supervised him before May 1, 1970. He regarded grievant as a "good" worker, when he worked, and did not know any of the details of his back problem.
FINDINGS

The discharge here under review resulted from grievant's insubordination in resisting a direction to go to the hospital and later refusing to leave the plant on May 1, 1970. This conduct, moreover, seemingly was in the same pattern as earlier infractions by grievant which had resulted in significant earlier disciplinary action.

If grievant's conduct on May 1, 1970 thus were to be viewed in isolation from his back injury, and from his seemingly abnormal conduct at work over a period of 18 months before May 1, without any supervisory notice or reprimand, then his discharge clearly would be supported.

But this record raises a most serious question as to whether grievant's conduct on May 1, 1970 fairly may be judged without reference to his back injury and troubled personality.

The grievance minutes do not reflect any detailed consideration of grievant's medical history, which emerged only partially at the hearing. All of the medical evidence concerning grievant which now is in the record in this case, with the exception of a "To Whom It May Concern" letter from his doctor dated June 22, 1970, was presented through the testimony of the present Homestead Works Medical Director. It appears that after a recovery period of more than six months, the grievant's doctor believed that grievant was fit to return to work. There is no detail as to this doctor's findings in the evidence. Thereafter, however, grievant was examined by a Company doctor. One X-ray of grievant's spine, from the posterior position, was taken at this time. The X-ray revealed his healed compression fracture, and also showed two abnormal areas of
calcification which presumably had developed in the healing process. The Company doctor found no particular limitation of motion in grievant's back and gave him a "1" rating. This authorized his return to work without any limitation as to the duties which we could perform.

Upon his return to work, grievant promptly complained about pains in his back. Accordingly he was examined a few days later by another Homestead Works physician. This examination also resulted in a "1" rating. Around November 1, 1968 the Company had him examined by still another doctor, who again gave him a "1" rating.

When grievant returned for his second examination in August of 1968 the Company doctor could find nothing structurally wrong with his back on the basis of the X-ray in the file and his examination of grievant. Nonetheless this doctor advised grievant that if he continued to have pain, making it difficult for him to work, he should stop working, return to Sickness and Accident Benefits, and receive further treatment until his own doctor certified that he again was able to return to work.

Grievant did not follow this advice for reasons which never have been elaborated nor apparently explored at all by the parties in this case. It appears, however, that grievant had had a misunderstanding with his own doctor (who is not a specialist in orthopedics) and felt that he was not being provided with a full and frank disclosure concerning his condition. It also is clear that grievant felt that, since the Company doctors had given him a "1" rating, the Company had assumed full responsibility for his inability to work without resting his back from time to time.
Thus, from around November 1, 1968 to May 1, 1970, grievant would leave his assigned duties when his back pain became severe and find a place to rest. Nobody in Management seems specifically to have been made aware of this, although it is hard to believe that it escaped the notice of all of his Foremen. Neither Foremen Cheponis nor Seery, however, had knowledge of this practice (or of grievant's chronic back problem) when they had to deal with his apparent flagrant insubordination on May 1, 1970. Cheponis had supervised grievant only on rare occasions before May 1, 1970.

Grievant freely told both of these Foremen on May 1 that he always had felt free to rest his back while at work after August of 1968. He made substantially the same statement to the nurse that same night. He repeated it in the grievance procedure and in his testimony at the hearing. And the evidence establishes that he had acted on this basis without reprimand for 18 months. There is no suggestion that his back pains are not real to him and he appears to have been convinced in good faith—even if wrongly—that he was entitled to proceed on this basis because he felt the Company doctors, as well as his own doctor, had erred in returning him to work without limitation as to the kinds of duties he could perform.

What happened after the May 1, 1970 incident is worth particular note. The Company nurse told him, on the night of May 1, that he should consult his own physician as to his back problem before returning to work. Next day, General Foreman Shuder phoned to direct grievant to see his own doctor before returning to work. Grievant tried to make an early appointment with his doctor but was unsuccessful because the latter was out of town on vacation. Then two days later, Labor Contract Administrator Dague phoned grievant and told him to report for a physical examination at the plant. This examination took place on May 5 and resulted in the 2XE classification, as already
noted. Then grievant was back at work for three days before being advised of his suspension and discharge about May 8 or 9. Finally, he got to see his own doctor on May 12, after the suspension had been imposed. His doctor made no written report until June 25, 1970. Then he wrote a "To Whom It May Concern" letter, closing with the statement that "this man is not capable of doing work which requires heavy lifting."

This medical finding, if accurate, seems to mean that grievant should not have performed the full scope of duties of a Boilermaker Helper after his accident. The duties of this job, according to the Homestead Medical Director, may be excessively heavy at times.

Under the limited medical evidence before the Board there thus was at least a question as to whether grievant ever should have been rated as fully fit to perform his regular job at any time after January 6, 1968. The single X-ray taken by the Company in August of 1968 does not provide a conclusive basis to support a "1" rating for him, in the face of his continued complaints of pain in his back, his hips, and his legs, and in the absence of any diagnosis by a qualified specialist.

Under these circumstances the Chairman suggested that grievant should be examined by an impartial specialist in orthopedics, and the parties approved such action. Following examination and X-rays the impartial specialist gave his opinion that the patient should be able to perform items of work "which involve limited lifting, bending or stooping." The doctor also advised that in his opinion "a definite course of postural exercises certainly would help to strengthen this patient's back and allow him to return to his normal duties in a period of two to four weeks."
Under the evidence presented, and in light of the conclusions reached in the impartial medical examination, it seems apparent that grievant's discharge was taken on the basis of inadequate knowledge as to his medical condition. Instead of discharge, it would have been proper to place him on sick leave to undergo further medical examination. In view of the impartial doctor's findings, moreover, it is imperative that the grievant now undertake rehabilitative exercises in order to be able to resume work on his regular job as soon as it is safe for him to do so, from a medical standpoint.

AWARD

The grievance is sustained to the extent of finding that grievant's discharge was improper, but the usual remedial pay is inappropriate, since he was not able to perform the full scope of his job owing to incomplete recovery from his back injury. Since it would have been appropriate to place him on sick leave, however, the parties should agree upon appropriate remedial payments to him on this basis. His continuous service shall be restored and he shall be placed on sick leave until such time as a qualified specialist certifies to the Company that he is able to return to work and to perform the full scope of his job as Boilermaker Helper.

BOARD OF ARBITRATION

Sylvestre Garrett, Chairman