United States Steel Corporation American Steel and Wire Division Donora Steel and Wire Works and United Steelworkers of America Local Union 1758

Sylvester Garrett
BOARD OF ARBITRATION

Case No. A-1025

June 1, 1964

ARBITRATION AWARD

UNITED STATES STEEL CORPORATION
AMERICAN STEEL AND WIRE DIVISION
Donora Steel and Wire Works.

and

UNITED STEELWORKERS OF AMERICA
Local Union No. 1758

Grievance No. U-1291

Subject: Seniority; Physical Fitness.

Statement of the Grievance: "Management violated Section 13-L of the Basic Agreement and the Local Seniority Agreement when it failed to recall me from layoff and assign me to a plant pool job. "That I be assigned to the pool job which I am able to perform."

This grievance was filed in the First Step of the grievance procedure January 22, 1963.


Statement of the Award: The grievance is denied.
This grievance from Donora Works alleges that Management's refusal, for medical reasons, to assign grievant to a "Pool" job in January of 1963 violated Section 13-L of the April 6, 1962 Agreement and the Local Seniority Agreement of September 1, 1962.

Grievant had been a Pipefitter in the Steel Works Division of Donora Works and has continuous service back to 1924. He was laid off in June of 1960 because of what was then thought of as a temporary shutdown of steel-producing facilities at Donora. Over the next two years, such maintenance work as was required in the nonoperating Steel Division was handled by recalling maintenance employees as necessary on the basis of relative seniority. During this period grievant worked intermittently, averaging about four days' work per month.

In July of 1962 the decision permanently to shut down steel-producing facilities at Donora was announced. In August grievant was interviewed along with other employees regarding the employee benefits to which he might be entitled in the circumstances. He elected to remain on layoff and to wait for establishment of a seniority pool under Section 13-L of the recently negotiated April 6, 1962 Agreement.

A new Local Seniority Agreement was executed at Donora in August of 1962, establishing two seniority pools in accordance with 13-L, and one of these, Seniority Pool A, is relevant here. Because of the permanent shutdown of steel-producing facilities, actual establishment of that pool was deferred by agreement until January of 1963.

Prior to recall of laid-off employees to this pool, they were given the usual physical examination incident to recall from layoff. Grievant, whose last day of work was in July of 1962, was so examined by Dr. McLane, the plant physician, on December 28, 1962. From that and his past examinations of grievant, Dr. McLane concluded that grievant's hypertensive arteriosclerotic heart disease was such that he was not physically fit to perform any job in the pool. Grievant was so informed in early January of 1963, and this grievance followed.
Grievant was 62 years old when the grievance was filed and had been examined several times by Dr. McLane, beginning in October of 1960, upon occasion of a recall from layoff. That examination showed that, aside from hospitalizations in 1924 and 1934 for a peptic ulcer condition, grievant's medical history was largely negative. He is 5' 5" tall and at the time of that examination weighed 180 pounds, and his blood pressure was 150/90. Dr. McLane considered grievant qualified to return to work as a Pipefitter in October of 1960.

Grievant next was examined by Dr. McLane in January of 1961, again because of recall from layoff. The findings were essentially the same as before except that grievant's weight was 187 pounds and his blood pressure 160/90. He was again returned to work as Pipefitter.

This brings us to the four critical examinations in 1962. The first was on February 12, upon recall from layoff, and indicates that grievant's weight was 191 pounds, his blood pressure 160/106, and his pulse rate resting was 92. He was characterized as obese. An X-ray, taken that day but interpreted later, was read as showing that grievant had a hypertensive heart. Grievant was graded "2-1," "2-5," and "2-11," the figure 2 indicating limited employability and the suffixes 1, 5, and 11 referring, respectively, to the area of the body as a whole, the cardiovascular system, and the sensory organs (eyes), and the notation "must wear CL" meant that grievant had to wear corrective lenses, which has nothing to do with the present dispute. Again he was deemed qualified to return to work as a Pipefitter.

Dr. McLane's next examination of grievant was on July 13, 1962, which was again occasioned by return from layoff, and which followed a period during which grievant was hospitalized because of his heart condition. This examination showed grievant's weight as 174 pounds, his blood pressure as 160/96, indicated that Dr. McLane was to do an ECG, repeated the 2-1, 2-5, and 2-11 classifications and that grievant had to wear corrective lenses, and said "May be taking digitalis." At this time there were available also Accident & Sickness Insurance forms on grievant's behalf, signed by grievant's Drs. Koehler and
Rongaus, indicating that from March 12 to June 3, 1962, grievant had been continuously disabled from returning to work by "chest pain undetermined origin," "arteriosclerotic heart disease," and "myocarditis." Dr. McLane again concluded that grievant could return to work as a Pipefitter.

The next examination was on October 12, 1962, when a number of employees including grievant were examined for recall to a temporary vacancy on the Barb Machine Operator job. Here grievant's weight was noted as 178 and his blood pressure as 150/90. He was again characterized as obese, and an ophthalmoscopic examination was recorded as "Eye grounds shows some segmentation, retinal arteries." Those arteries were found to be thickened and hardened, with some degree of arteriosclerosis present. The significance of the latter finding was explained by Dr. McLane at the hearing on the ground that retinal arteries are considered as noteworthy indicators of the condition of similar medium caliber arteries elsewhere in the body. Grievant was found to be abnormally short of breath after exercise, two minutes after stepping up and down a six-inch step 40 times. His pulse was 80, resting, and, most significant, after exercise there was detected for the first time in this series of examinations a systolic mitral murmur, indicating an ineffective valve. Dr. McLane testified that the systolic mitral murmur was consistent with grievant's recent history of chest pain, arteriosclerotic heart disease, myocarditis, X-ray findings of hypertensive heart, his response to exercise, his overweight condition, and his blood pressure, and that all these factors taken together caused him to conclude that grievant's heart condition was such as seriously to impair his working capacity to the extent that he was not qualified physically to perform the work required of the Barb Machine Operator. Grievant was so informed, was advised to consult his personal physician for treatment, was not assigned to the job, and remained on layoff.

On December 28, 1962, grievant and others were examined in connection with assignment to jobs in Seniority Pool A. Grievant's weight was then 170 pounds, his blood pressure was 130/90, he was listed as "obese," and his retinal arteries showed essentially the same condition as in the previous examination. The heart murmur was then more pronounced, being
detectable at that time even without exercise. The pertinent notation says "Syst. murmur left border of sternum while lying l.l. position AE." A vital capacity test indicated that grievant’s capacity to oxygenate his blood, as a result of his heart condition, was 82%, and Dr. McLane testified that anything less than 90% is considered an impairment. An ECG done at the time also showed some impairment, both that and the severe deficiency shown by the vital capacity finding being consistent in Dr. McLane’s mind with the other findings, indicating hypertensive, arteriosclerotic heart disease.

On the basis of these findings, Dr. McLane concluded that grievant’s weakened heart condition was such that it would be dangerous for him to engage in heavy work even for limited periods or in light work for sustained periods and without frequent opportunity for rest. Thus, his opinion was that grievant could not perform with safety any pool jobs, including those requiring the least exertion, such as the Janitor jobs which involve carrying loaded trash cans weighing approximately 30-40 pounds, moving up and down stairs and between buildings, carrying cleaning equipment, mopping, sweeping, and frequent bending and stooping, or the Tag Maker jobs which vary from day to day and require intermittent lifting of tag material of about 30-35 pounds. In light of that medical advice, local Management concluded that grievant did not possess the physical fitness requisite for performance of any pool job, and he was so advised on January 4, 1963.

Shortly thereafter arrangements were made for Dr. Rongaus, grievant’s personal physician, to visit the plant and observe the requirements of pool jobs. This proposed visit was not carried out because the parties fell into dispute on January 15, Management saying that grievant insisted that the Company make a firm advance commitment to be bound by Dr. Rongaus’ opinion, if he should state that grievant was physically fit to perform a pool job, and grievant stating that he felt that Dr. Rongaus’ visit would be futile since he said that the Company stated that it would give no weight at all to the doctor’s opinion.

The grievance was filed on January 22, 1963, and in the Step 3 meeting of March 20, grievant presented the following document signed by Dr. Rongaus and dated January 15, 1963:
"To Whom It May Concern: -

The above stated patient has been examined this day & found in good health & able to go back on regular job."

In the Step 4 meeting of May 1, the parties agreed that Drs. Rongaus and McLane should meet at the plant to review grievant's entire medical record, including various hospitalizations, and the requirements of the various pool jobs in order to make a joint recommendation, if possible.

The two doctors met in early June but could not agree on grievant's work capabilities. Thus, they recommended that grievant be examined for an opinion by a named third physician.

The doctors' joint recommendation was accepted by Management but not by the Union, which wrote to the Company that "The joint recommendation on the selection of Dr. Wilkins for further evaluation and opinion is another stalling tactic and is therefore completely unacceptable to the Union."

Grievant testified that in recent years he removed some sod and topsoil in front of his house, that he takes two garbage cans about 80 feet to the street, and that he did some furnace and sewer work for friends. Therefore, he feels that he could do Janitor work.

The Union argues that Management was aware of grievant's myocarditis as early as June of 1962 and nevertheless allowed him to return to work for a period as a Pipefitter. It is said that grievant's weight, blood pressure, and pulse rate were lower in December, when he was not assigned to a pool job, than they were the previous July, when he was returned to work as a Pipefitter.

The Union cites Case USC-1313 and an Inland Steel Award.
The Company, too, relies on USC-1313 for the standard of decision stated there, and cites also A-1005, USC-976, and A-777 as supporting its view that, when the Union does not present any medical testimony, the Board should follow the medical judgment of the Company physician who appeared and testified in detail.

FINDINGS

The sole question here is whether grievant was physically fit to perform any job in Seniority Pool A.

It is first necessary to put the problem in proper perspective. That is, the dispute does not go to the nature of the significant disabilities from which grievant suffers; they are virtually admitted. The disagreement relates to whether grievant, in light of his impaired cardiovascular condition, had the physical fitness required to perform the kind and degree of exertion required by any job in the pool to which his seniority otherwise would have entitled him, and, of those jobs, the Janitors and Tag Makers appear to be the least strenuous, so that, if he could not perform those jobs, of necessity he could not perform any other pool jobs.

Much of the Union's case seems to be based upon the belief that Management has not treated grievant fairly, charging that the decision not to assign him to a pool job was based, not on medical grounds, but upon improper considerations. These suspicions, however, do not withstand analysis.

For example, when the dispute arose in January of 1963, there was absolutely no medical opinion in grievant's favor or even casting the slightest doubt on the validity of the medical judgment of the Company's physician. Thus, at that time Management had no occasion even to question the opinion of its physician. Surely, the Group Accident & Sickness Insurance form submitted by Dr. Rongaus in June of 1962, stating that grievant had been continuously disabled by myocarditis from
March 5 through June 3 but that he should be able to return to work on June 5, could not be considered as in any way undermining the Company physician's opinion in January of 1963, since the latter had examined grievant three times since the date of the insurance form, the last time being in late December. Thus, in light of the medical judgment presented to it and the total absence of any countervailing medical opinion, Management had no choice but to follow the advice of its physician at that time.

The Company nevertheless agreed to have grievant's personal physician come into the plant so that he could familiarize himself with the physical requirements of pool jobs in January of 1963. On the disputed matter of whether it was the Company's or grievant's undue rigidity which frustrated this proposed visit, it must be found, on grievant's own testimony, that even after Management's spokesmen had put the Company position in such terms that grievant admits that he then understood that that position complied with his demands as explained at the hearing, grievant nevertheless broke off discussion of the matter. Thus, it was not Management's fault that grievant's personal physician did not come to the plant to observe pool jobs in January.

When the grievance was filed later in January of 1963, there was still no medical opinion in the record supporting grievant's position or casting any doubt on Dr. McLane's judgment. It was not until the March 20 Step 3 meeting that grievant presented the "To Whom It May Concern" note, signed by Dr. Rongaus on January 15, nearly two months before that time. The very general character of that note, coupled with the fact that at that time Dr. Rongaus admittedly was not familiar with the physical requirements of any pool jobs, makes it clear that the note was not sufficient at that time to shake Management's basis for following the medical advice of its physician.

Further negating the charge of unfairness by the Company is the fact that at the May 1 Step 4 meeting Management agreed to have Drs. Rongaus and McLane meet at the plant, review the physical requirements of pool jobs and grievant's various hospitalizations, and make a joint recommendation, if possible. This shows, contrary to the Union claim, that Management desired to have the ultimate decision based on medical grounds.
Finally, after the two doctors had failed to agree on the basic question but had jointly recommended that grievant be examined for an opinion by a named third physician, it was the Union and not the Company that resisted that suggestion. Moreover, whether or not the two doctors' joint recommendation of a third was beyond the scope of their delegated authority, the reason given by the Union at the time for not following that recommendation was that it was "another stalling tactic." The reason assigned at the hearing, i.e., that the named third physician was partial to the Company, was not asserted until two months after the joint recommendation had been turned down and after the case had been appealed to arbitration. Thus, if the Union rejected the joint suggestion of grievant's and the Company's physician that grievant be examined by a third doctor, because it felt that the third physician was not impartial, it is difficult to understand why its letter formally declining the joint suggestion was put on grounds of "stalling tactics" rather than the later asserted partiality.

At the hearing, the Union sought to support its suspicion of Management bad faith by noting the Company's initial refusal, on grounds of privilege, to supply to the Union photostatic copies of Dr. McLane's work papers of physical examinations of grievant for the period 1960 through 1962. Ultimately these were furnished, following submission of a written request by grievant himself.

Without attempting in any way to rule on the now moot evidentiary question, the most that the record discloses on this score is the possibility of some overzealous stiffness by both parties. At any rate, it does not indicate that Management refused to assign grievant to a pool job for some reasons other than medical ones.

On the whole, therefore, to the extent that the Union case rests upon a charge of bad faith by the Company, the charge simply has not been proved.

The Union suggests that it was improper for the two doctors at their conference in June to confine their considerations to the Janitor and Tag Maker jobs, since the parties' letter referring the problem to them requested them to review
physic的要求 of jobs in the pool and to make a recom-
mendation relative to grievant's fitness for any pool jobs.
But, as Dr. McLane testified, he and Dr. Rongaus agreed that
the Janitor and Tag Maker jobs probably would require the least
expenditure of physical effort and strain. Indeed, in so doing,
the doctors appear to have recognized the sensible approach
adopted by the parties themselves as early as Step 3 where they
said that "A review of pool jobs showed that the least strenu-
ous job assignments would be those classified as Janitor."

The reasonableness of that technique is shown by the
Union argument arising from Section 13-L-3, which provides in
part that

"The Company shall have the right to designate
the specific job in any pool to which an em-
ployee shall be assigned and to change such
assignments where necessary to provide jobs
for longer-service employees."

In light of that provision and the length of grievant's continu-
ous service, if there had been a job in the pool which he had
been physically fit to perform, he would have been entitled to
it. Thus, rather than make an independent comparison of griev-
ant's physical fitness with each of the other jobs, obviously
requiring greater physical exertion, it was quite sound for the
doctors, as had the parties earlier, to isolate the jobs which
were least strenuous and to make the comparison with them. If
grievant was not physically fit to perform the jobs requiring
least exertion, it followed that he was not qualified for any
other pool jobs.

That grievant drew unemployment compensation after
Management's refusal to assign him to the pool is not conclu-
sive in the Union's favor, in light of the manner in which the
standard of the statute apparently differs from that of the
Basic Agreement which the Board must apply here.

The Union fought this case as if it were a battle of
records, i.e., as if it turned entirely on whether Management's
records and Dr. McLane's notes would withstand all attacks.
But, the real war involved the question of whether grievant was
physically fit for any pool job, and on that point the Company presented Dr. McLane as a witness, and his extensive direct testimony and even more detailed explanation on cross-examination, supports Management's decision, completely aside from whether the records and notes are as full and precise as the Union might prefer.

In final analysis, the question is a medical one, to be decided by sound advice of informed physicians, or, in the words of the Union's spokesman, "Of course, only a physician can give reliable advice as to whether or not a worker with a heart disease should work or not." Applying that concept to this record, there is no alternative but to deny the grievance, for the only reasoned medical evidence is that of the Company's plant physician, since the Union presented no medical testimony. By vigorous cross-examination, it did indicate its disapproval of the manner in which Dr. McLane makes notes, but it did not supply any cogent reason for the Board to disregard the basic medical findings which led him to conclude that grievant was not physically fit to perform any pool job. Therefore, absent any reasons for believing that the Company physician was incompetent or, because of bias and prejudice, based his conclusion on other than medical findings, the record warrants denial of this grievance since it contains no countervailing medical testimony or any other reason for discounting Dr. McLane's conclusion.

It should be stressed that this Award decides only that at times relevant here Management was justified in concluding, on the basis of the only reasoned medical judgment in the record, that grievant did not have the physical fitness required by any pool job. It does not preclude him from raising the question later should he present pertinent medical evidence in support of his claim.

In this regard it is worth noting that the Board long ago made clear that the technique of impartial medical examination at the Board's direction is not an automatic remedy in every physical fitness dispute. In CI-232 it was said that:
"Such an impartial medical examination, where a difference of opinion exists between the parties as to the physical capacity of an employee to perform his job, is not to be lightly invoked. Rather it should first be established that reasonable basis for difference of opinion between the parties exists as a condition to requirement of a special examination.

"On the record in this case no such basis for difference of opinion appears. Management has sufficient ground for its decision not to return grievant to his former position."

Sufficient grounds for Management's decision appear also in this case, entirely apart from the fact that the Union here has not requested the Board to order an impartial medical examination but, on the contrary, insists that grievant be assigned to a pool job on the record as it now stands.

Further refinements of the impartial medical examination device are discussed in USC-878. As in that case, the proper decision here appears to be that this grievance be denied, but without prejudice to grievant's right later to raise the question of his physical fitness for Pool A jobs and to support his claim by cogent medical evidence, in which proceeding the parties, of course, could resort with profit to the impartial medical examination technique.

AWARD

The grievance is denied.

Findings and Award recommended pursuant to Section 7-J of the Agreement, by Clare B. McDermott, Assistant to the Chairman

Approved by the Board of Arbitration

Sylvester Garrett, Chairman