Award No. 861
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
May 6, 1992
OPINION AND AWARD
Introduction
This case involves an interpretation of Article 12, section 2 and concerns the vacation eligibility of grievant, Tom Conner. There is no dispute about the facts. Accordingly, the parties submitted prehearing briefs and then argued the case on April 23, 1992. Jim Robinson represented the union and Brad Smith represented the company.
Appearances
For the company:
Brad Smith -- Union Relations
Pat Parker -- Union Relations
Tim Kinach -- Union Relations
For the union:
Jim Robinson -- Chrm., Grievance committee
Alexander Jacque -- 1st Vice Chrm., Gr. Comm.
Earl Neal -- Griever
Tom Conner -- Grievant
Dorine Godinez -- Griever
Background
The dispute concerns whether grievant is eligible for vacation in the current calendar year. The pertinent contractual provision is Article 12, section 2, which reads in relevant part:
Section 2. Eligibility. To be eligible for a vacation in any calendar year during the term of this agreement, an employee must:
a. Have one (1) year or more of continuous service; and
b. Not have been absent from work for six (6) consecutive months or more in the preceding calendar year. . . .
Grievant satisfies the one year requirement of section 2(a); the issue is whether he satisfied the provisions of section 2(b), which is mp 12.4.
Grievant was laid off beginning March 17, 1991 and was recalled to begin work on Monday, September 16, 1991. The layoff spanned a period of 183 days. The parties agree that, for purposes of mp 12.4, the six month period is calculated as 183 days. That is, an employee who is laid off (or otherwise off work) for 183 or more consecutive days is not eligible for vacation. In this case, however, the union asserts that grievant should be credited with only 182 days of absence. The union asserts that because the work week begins on Sunday, then Sunday should be counted as the first day back off layoff. In this case, for example, grievant did not actually begin working until Monday. His failure to work on Sunday, however, was not due to the layoff, since it ended at the end of the previous week. Rather, he did not work on Sunday because that was a scheduled day off. But because he could have been scheduled on Sunday, and because he actually worked during that week, the union claims that the period of absence should end on Sunday, not Monday.
The union buttresses its case by noting that the policy it contends for determines when a period of absence begins. There is no rational reason, the union argues, to treat determination of the end of the absence in a different manner. In this case, for example, grievant's period of absence began on Sunday, March 17, 1991. The record does not disclose grievant's last actual day of work prior to the layoff. It may be, however, that grievant was scheduled to work from March 11 to March 15, with Saturday, March 16 scheduled as a day off. Even if grievant did not work on Saturday, March 16, his period of absence for purposes of mp 12.4 would not begin until March 17. As Arbitrator Ruth Kahn noted in connection with a similar issue in US Steel Case No. 17,547, it does not seem "equitable" to charge grievant with an absence on a day he was not scheduled to work.
The union argues that this same policy should apply at both ends of the period of absence. An employee who is laid off on March 17 has his period of absence begin that day, even if he was not scheduled to work

on March 16. He was scheduled during the week that included March 16 and, therefore, could have been scheduled on March 16. That same vulnerability to scheduling applies at the end of the leave, the union asserts. Although grievant did not actually report to work until September 16, he could have been scheduled on the 15th, which was the first work day of that week. Echoing Kahn, the union asserts that it is not "equitable" to charge grievant with an absence for a day on which he was not scheduled to work.

If resolution of this matter were to be left solely to logic, I would find it difficult to reject the union's argument. Indeed, while he does not concede the reasonableness of how the beginning of the period of absence is determined, Mr. Smith did not tarry long in his argument in trying to distinguish the policy that applies to the beginning from the policy that applies to the end. Rather, the company's assertion that the period of absence should end on the day an employee actually reports to work is based principally on the opinions of other arbitrators who have considered the same issue.

Article 12, section 2 is what the parties refer to as boilerplate, which in this context identifies language common to the steel companies that formerly bargained with the union on a coordinated basis. As such, there have been other cases in which arbitrators have had occasion to consider similar facts. One such case is Bethlehem Decision No. 693, decided on September 11, 1961, in which Arbitrator Rolf Valtin considered almost identical facts. There, the grievant returned to work on Tuesday, October 28. The union, as here, contended that the period of absence should be deemed to have ended the previous Saturday, October 25. Like here, the union asserted that the Sunday of the week during which the grievant returned to work should have been considered the first day back. Had the arbitrator accepted that argument, the period of consecutive absence would have been only 182 days and the grievant would have been eligible for a vacation. Arbitrator Valtin rejected the union's position:

There are two fatal weaknesses in [the union's] argument. In the first place, the language clearly refers to the actual period of absence by the particular employee. The union, in urging the payroll week application, is asking that a constructive period of absence be applied. The union, thus, is not merely arguing that the language should be interpreted in terms of what might reasonably be implied by it. It is asking for the application of a criterion other than the one given in the clause. In the second place -- and aside from this substitution pitfall -- the union is injecting a novel concept, for the application of which it has given no justification whatever. (emphasis in original)

This case was not the last word on the matter, even at Bethlehem. Twelve years later, Arbitrator Reel, in an opinion approved by Seymour Strongin, addressed the question of when the period of absence begins for purposes of Article 12, section 2 in Bethlehem Decision No. 2194. The principal holding of the case accepted the union's contention that, in the case of a layoff, an absence does not begin until an employee misses work he would otherwise have performed. In that case, the employees were scheduled to worked early in the week, but were not scheduled on Friday and Saturday. The arbitrator held that the layoff actually began on Sunday, the first day of the following week.

The arbitrator then went on to consider whether Bethlehem Decision No. 693 was distinguishable, even though the question of when the leave ended was not actually part of the dispute. Nevertheless, the arbitrator deemed it appropriate to put the parties on notice about how such issues would be resolved in the future:

The Umpire deems it appropriate to note, however, that it is the present view of the Office of the Impartial Umpire that where the company recalls employees from layoff their period of absence from work . . . terminates with the first shift of the work week on which the company could have scheduled them following their return from layoff. An employee's rights to vacation pay under Article IX do not depend on whether the company elected to schedule him on the last day before or the first day following his layoff.

The parties devoted some energy at the hearing to debating whether this pronouncement actually overruled Arbitrator Valtin's award in Bethlehem Decision No. 693. Although there was no evidence about how the Bethlehem parties have interpreted it, the dicta of Bethlehem Decision No. 2194 did not prove persuasive to Arbitrator Alfred Dybeck when, in 1984, he decided a similar issue in US Steel Case No. 19,581.

As in the instant case, the issue in Case No. 19,581 was the date on which the employees returned to work. The first actual day of work for most of the grievants was Tuesday, November 2. Accordingly, the company counted the previous Sunday and Monday as part of the absence, a determination that put each of the employees over the six month limit. The arbitrator agreed that the period of absence did not begin until the end of the work week prior to the layoff. The employees who were scheduled off the last two days were vulnerable to work, and some of them actually were called out: "[vacation entitlement] should not be determined solely by the vagaries of an employee's weekly schedule or when that employee's scheduled

days off fall in such weekly schedule." Nevertheless, that same policy did not determine when the period of absence ended.

Arbitrator Dybeck recognized the dicta in Bethlehem Case No. 2194, but was not impressed by it:

That statement of contract interpretation was not necessary to that particular case and if applied as stated would leave serious factual questions as to the first shift on which the company could have scheduled employees following their return from layoff. The Board believes that in interpreting the "absent from work" provisions . . . the parties are better served to establish a more objective basis for determining when an employee's absence from work ceases. Unlike the situation when an actively employed employee commences an absence from work, once an employee is absent from work for reasons such as layoff . . . and becomes inactive, such period of absence should not be viewed as ending until such date as the employee actually returns to work.

In short, Arbitrator Dybeck did just what the union argues against here -- he did not count as absences scheduled days off in the week before the layoff, but he did count scheduled days off as part of the absence in the week the employees returned.

As the above quote indicates, Dybeck's reason for treating these situations differently is based on the difference in status between an active and an inactive employee. Employees are "active" for weeks in which they work, even if they happened to be scheduled off the day before a layoff begins. But, according to Dybeck, having become inactive, an employee stays in that status until he actually gets back inside the workplace. Essentially, he held that an employee cannot be reactivated until he actually starts working.<FN 1>

The union's argument tried to minimize the effect of Dybeck's opinion by asserting that it was in response to a narrower factual issue than that presented by the instant case. Although the Dybeck opinion does not address the matter directly, the fair inference is that the plant was shut down and that the November 2 return to work date was actually the first day of resumption of operations. The union argues, then, that Dybeck did not use Sunday, October 31, as the day the employees returned to work (as it would have me do in this case) because, unlike the instant case, the employees could not actually have been assigned on Sunday or Monday. Since the plant was shut down there was no work available for them until Tuesday, so it would make no sense to deem them as being available on Sunday.

Mr. Smith's responded to this argument by pointing out that the department to which grievant was recalled did not work on Sunday, September 15. He argued, therefore, that if US Steel Case No. 19,581 is to be read as narrowly as the union reads it, the same policy should apply here. Although grievant returned to work in the week that began on September 15, the company argues, given the position to which his seniority entitled him, he could not have been assigned to work that day. While this argument has some merit, I need not address it directly because I disagree with the union's reading of Dybeck's opinion.

Dybeck is an experienced and able arbitrator. He knows how to limit his decisions to particular facts, should that be his intent. There is nothing in the language he chose to indicate that he expected his decision to have a limited effect. To the contrary, he spoke of the need for "a more objective basis" for determining when absences end. The fair inference to draw from that language is that he was trying to establish -- or, perhaps, more accurately, follow -- a general rule. Moreover, the treatment of the individual grievants is instructive.

It is true, as the union argues, that some of the grievants returned on November 2 and, as I have already said, that appears to have been the resumption of operations. But one of the employees -- Wylie -- did not return with the others on November 2. He returned, instead, on November 8. Nevertheless, Dybeck's opinion makes it clear that he applied the same rule to Wylie that he applied to the other employees. That is, Wylie's absence ceased as of the day he actually started working. I find this to be a strong indication that Dybeck's opinion was not influenced by the possibility that no work was available until November 2. Rather, I read his opinion to mean just what it says -- that once employees become inactive, their period of absence does not end until they return to work.

Discussion

Most of the argument involves what I am to make of the previous opinions. Although arbitrators are fond of saying that arbitration awards are of no precedential value, that clearly overstates the case in the steel industry. Because of the history of coordinated bargaining, there is much common language to be found in the agreements between the Steelworkers Union and the various steel companies. Moreover, the parties understand that interpretations of such language by steel industry arbitrators are of more than merely persuasive value. Although perhaps not absolutely binding, it is at least clear that interpretations are

thought to be authoritative and are frequently relied on by other than the parties to the actual case. One of the difficulties here is that there appears to be more than one interpretation.

As a matter of precedent, I cannot place much reliance on Bethlehem Decision No. 2194. It may be, as Mr. Robinson argued, that the umpire intended his announcement to place the parties on notice that he would not follow Arbitrator Valtin's opinion in Bethlehem Decision No. 693. Moreover, it could be that the opinion actually had that effect. Despite the conflicting messages of these two cases, there was no evidence at the hearing about what Bethlehem actually does. Nevertheless, whether he intended it to be authoritative or not, the fact is that the declaration in Bethlehem Decision No. 2194 about when the absence ends was dicta and, as such, does not carry the weight of precedent.

The mere fact that an observation made by a court or other decision maker is dicta does not necessarily mean that it is not persuasive. In the labor area, for example, the Supreme Court's opinion in NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333 (1938), is generally understood to stand for the proposition that management is free to permanently replace economic strikers. In fact, however, no such issue was before the Court and the matter was not even argued in the briefs. Similarly, labor and management advocates typically understand the Supreme Court's opinion in Boys Market v. Retail Clerks Union, 398 U.S. 235 (1970), to mean that in order to sue an employer for breach of a collective bargaining agreement, the employee must first prove a breach of the duty of fair representation by the union. In fact, however, there was no such issue in the case. Indeed, the plaintiff had not even sued his employer. In both of these cases the Supreme Court authored what has proven to be very powerful and influential dicta.

Although the stature of the decision maker is certainly a factor in whether dicta becomes influential, stature alone is not enough. Everyone has opinions about how he or she would react in a given situation. Hypothetical responses and actual reactions are two different things, however. I have no reason to doubt the declaration of Arbitrators Reel and Strongin that, should the issue ever be presented to them, they were prepared to hold that an absence ends on the first day of the week when an employee is scheduled back. The problem is that, as far as I can tell, the problem never was presented to them. But it was presented to Rolf Valtin In Bethlehem Decision No. 693 and it was presented to Alfred Dybeck in US Steel Decision No. 19,581. I find it significant that, when presented with the task of actually deciding the issue, both of these men did the same thing -- they both said the absence does not end until the employee returns to work. And Dybeck did so by expressly rejecting the dicta of Bethlehem Decision No. 2194.

I recognize that I am not bound absolutely to follow the opinions of Valtin and Dybeck. Moreover, as I have already observed, if this were a case of first impression, I would find the union's argument tempting. But the slate is not blank. The unambiguous decisions of Valtin and Dybeck are entitled to considerable deference and, I think, cannot be ignored, at least if there is a rational basis for explaining them. I think there is. Dybeck's decision spoke of the need to find an objective rule for determining when a period of absence ends. There is not necessarily only one rule that will do. The union's proposal is certainly not irrational, though, as Mr. Smith argued at the hearing, it would have to be accompanied by certain exceptions.<FN 2>

But the point is that Valtin and Dybeck have applied such a rule under a collective bargaining agreement that contains language identical to the one under review here, and under a system of arbitration that creates expectations that arbitrators will respect the interpretations of their peers. The rule at issue is a rational response to a difficult problem. Moreover, as the company contended in its brief, using the date of actual return is consistent with the manner in which the company determines eligibility for certain other entitlements. In summary, although the rule might not be the one I would have adopted, I am not persuaded that it is wrong. Nor am I persuaded that the rule had been undermined by other arbitrators. I therefore feel obliged to follow it.

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

May 6, 1992

<FN 1>Although the union relies on US Steel Case No. 17,547, I think that is another case in which the arbitrator did just what the union now claims I should not do. The issue she addressed in her opinion was when the absence began. Ultimately, she decided that it was improper to consider grievant as being absent on days when he was not scheduled to work. The result is that she was able to deduct two days from his period of absence and thereby make him eligible for vacation. This exercise would have been unnecessary, however, if the arbitrator had accepted the union's argument about when the absence ends. Her opinion

indicates that the grievant returned to work on November 30 and that she counted that day as the end of the absence. But that was a Friday. Presumably, if she had shared the union's view about when the leave ended, she could have said the grievant's ended the preceding Sunday, thus obviating the need to worry about the two days at the beginning.

It is also possible, of course, that grievant was not able to work until November 30, so that he could not have been scheduled earlier in the week. The point is that the opinion does not say anything about this. It would, therefore, be dangerous to infer too much from the arbitrator's opinion, since we would not have the benefit of all the facts. But, as I will discuss below, this is just the problem with relying too much on Bethlehem Decision 2194. The arbitrator's pronouncement was made without reference to a particular set of facts.

<FN 2>For example, in this case, there would be the factual issue, hinted at by Valtin in Bethlehem Decision 693, of whether grievant actually could have been scheduled on Sunday, since the department he was able to bump into did not operate on Sunday.