Award No. 863
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
October 20, 1992
OPINION AND AWARD
Introduction
This case concerns the company's decision to discharge grievant James Novotny for violation of a last chance agreement. The case was tried in the company's offices in East Chicago, Indiana on September 17, 1992. Brad Smith represented the company and Jim Robinson presented the company's case. Grievant was present throughout the hearing and testified in his own behalf. Both sides filed pre-hearing memoranda.
Appearances
For the company:
B. Smith -- Senior Rep., Union Relations
J. Bean -- Employee Assistance Program
S. Nelson -- Project Rep., Union Relations
L. Leonard -- Section Mgr., Quality Department
For the union:
J. Robinson -- Grievance Comm. Chairman
D. Lutes -- Grievance Secretary
J. Novotny -- Grievant
A. Mosely -- Griever
B. Hasck -- Assistant Griever
R. Novotny -- Witness
Background
Grievant has been employed by Inland Steel for about 25 years. In 1990 or 1991, he experienced marital problems that ultimately led to a custody battle, as well as certain other legal proceedings. An apparent result of these problems was a record of poor work performance and failures to report off. On January 2, 1991, grievant was suspended preliminary to discharge for failure to report off and overall work performance. The company converted the suspension to discharge on January 7, 1991.
At the time of his discharge, company officials apparently told grievant that if he could get control of the problems in his life, he might be a candidate for a last chance agreement. John Bean, coordinator of the company's employee assistance program, testified that grievant stopped by to see him in March of 1991. Grievant was upset over the discharge and apparently asked Bean for advice. Bean referred him to the union's drug and alcohol committee.
There was no evidence at the hearing that grievant's work related difficulties were caused by drugs or alcohol or that usage of any such substances contributed to his discharge. Rather, the evidence indicated that grievant was depressed and upset over occurrences in his personal life. Bean testified that the drug and alcohol committee does not confine its activities to employees with substance abuse problems but also offers services to individuals with problems like those that troubled grievant.
Bean said grievant came to see him again in May and brought with him an intake form from Southlake Mental Hospital, which indicated that grievant was in some sort of treatment program there. Bean said he was supportive of grievant's efforts to win back his job. He told grievant to see him again when he thought he was able to return to work. Grievant did not return until December 5, 1991, nearly a full year after his discharge. At that point, he told Bean that he thought his problems were behind him. He had obtained a divorce, he had progressed in his therapy, and he was ready to go back to work. He also expressed concern to Bean about needing money for child support and the custody proceeding.
Bean said he contacted both the union drug and alcohol committee and the company's union relations department. He said he thought grievant wanted to return to work and that he had a "willingness to follow rules" that he had not had at the time of his discharge. Although he testified that grievant's recovery had taken an unusually long time, Bean said he thought grievant was a candidate for a last chance agreement.
Bean spoke with grievant again on January 9. Grievant again voiced a concern about needing money and asked what was taking so long to get him back to work. The record does not indicate what transpired

between December 5, 1991 and January 9, 1992. Bean did say, however, that he had some concern about grievant's fitness to return to work. Although he knew that grievant had been in therapy at Southlake Hospital, he did not know exactly what progress grievant had made. Thus, he referred grievant to the company's psychologist, Dr. Madsen. Apparently, this referral came after grievant had already signed the last chance agreement dated January 31, 1992.

The last chance agreement did not return grievant to work immediately. Especially important is the second paragraph of the agreement, which reads as follows:

Mr. Novotny will not return to work until he is released for work by J. Bean, Coordinator, Medical Assistance Program, Medical Department. Mr. Novotny will participate fully in any program and comply with any recommendations as set forth by Mr. Bean, until released from such program by Mr. Bean.

One such requirement of Bean was that grievant see Dr. Madsen. Although grievant complied, Bean said he was not particularly cooperative. He described grievant as "contrary and difficult to work with." As a result of grievant's attitude, the tests administered by Dr. Madsen took a month longer than they should have.

After Bean got the test results, he discussed them with Dr. Madsen and the union's drug and alcohol committee. He then contacted grievant on April 9 and told him to come to a meeting in his (Bean's) office on April 10. Ultimately, Bean met with grievant along with members of the drug and alcohol committee. Bean said he thought the nature of the case demanded that he tell grievant exactly what was expected of him. Bean testified that he was inclined to accept Dr. Madsen's recommendation that grievant be allowed to return to work, but only after certain things were done. He told grievant he would have to follow through on his psychotherapy, that he would have to maintain contact with the drug and alcohol committee, and that he would have to develop a personal action plan.

Bean testified that the personal action plan was the main focus of the meeting. He told grievant that in the plan he would have to identify the problems he faced and indicate how he planned to solve them. Bean said such plans are commonly required of employees in grievant's situation. Bean said that he told grievant in the presence of the committee that he was to have the personal action plan to him by Monday, April 13. He testified that he also told grievant that if he needed additional time to work on the plan he was to call Bean. Bean also said that once he had the plan, he could make arrangements for grievant to return to work quickly. Up until that point, grievant had wanted to return to work as soon as possible.

Bean heard nothing from grievant on Monday, April 13. Bean said it is not uncommon for employees to miss such deadlines, so he tried not to overreact to it. He waited about two weeks, but still had heard nothing from grievant. Thus, Bean said he called the drug and alcohol committee and asked about grievant, but got no information. At this point, Bean called union relations for the first time to inform them that grievant had not submitted his personal action plan.

Ultimately, grievant gave Bean a copy of his plan in mid-May. The one page plan is quite brief and, Bean said, would not have been sufficient if grievant had submitted it in April. It did not reflect what he and grievant had discussed at the meeting of April 10. Bean acknowledged, however, that employees sometimes take more than one draft to produce an acceptable plan. Bean said he asked grievant why he had not submitted the plan earlier. Grievant replied that he didn't think it was that important. He told Bean that he thought he had the time he needed to produce it.

Steve Nelson of the union relations department also testified for the company. He said that after getting the call from Bean about grievant's failure to submit his plan, he called Louis Aguilar of the drug and alcohol committee. Aguilar asked for a few days. Nelson called back about five days later and Aguilar told him he had nothing to offer about grievant. At that point, the company initiated the discharge action that led to this proceeding.

Grievant testified in his own behalf. He acknowledged meeting with Bean about his return to work on April 10. However, his recollection of the meeting differs from Bean's. Grievant does not necessarily assert that Bean's testimony was untrue. Rather, he attributed the lack of understanding to his upset mental condition at the time. Grievant said that he had a court date on April 10 which apparently stemmed from delinquent support payments. He said his ex-wife wanted to put him in jail and he was very nervous. He said he mentioned this to Bean on several occasions. Grievant said he left the meeting thinking that he was supposed to do the action plan but that he could turn it in when he was finished with it. He did not understand it to be due on April 13.

Grievant said that after the court hearing on April 13 he was "a complete basket case." He said he was having a nervous breakdown. All he could do was talk to his family about his fragile state of mind. He said he finally got the action plan made up and went to see Bean. He said he had worked on the plan for several weeks. When he gave it to Bean he learned for the first time that there was to be a suspension hearing.

Grievant also said that his medical and legal problems are now behind him and he is able to report to work regularly and be a productive employee.

On cross examination grievant said his marital problems were what led to his initial discharge in 1991. He said that his head "was swimming" on the morning of April 10 and that he understood Bean to say that he should turn in the personal action plan when it was completed and to "take more time" if he needed it. He said that although he had thought his condition was improved he knew after the court hearing on April 10 that he wasn't ready to go back to work. He thought he was having a nervous breakdown. Mr. Smith got to him acknowledge, however, that he sought no medical help and that he did not call Dr. Madsen or Bean or the drug and alcohol committee. Grievant said he did nothing because he "knew I was going to get therapy," which I understood to refer to his obligation to seek counseling upon his reinstatement. He also told Smith that he worked on the action plan for several weeks, some of which was spent in thought about it. He said he didn't really know what he was supposed to do with the plan. He did not recall receiving instructions from Bean. Obviously, he sought no further assistance from Bean either. Grievant said his "brains were pretty well scrambled." He said he has met a woman who has helped him turn his life around.

Raymond Novotny, grievant's brother, testified on his behalf and supported grievant's claims about his mental state during the period from prior to his discharge to the present. Don Lutes, secretary of the grievance committee, testified that he was not aware that either Bean or Nelson had called the drug and alcohol committee about grievant's failure to appear on April 13. Lutes said Aguilar, in particular, would most likely have told him of any such call because of his involvement in drug and alcohol cases. Lutes acknowledged, however, that he is not on the committee and could not say whether the calls were made. Aguilar was on grand jury duty and unavailable to testify.

Although the focus of the dispute in this case is paragraph 2 of the last chance agreement, quoted above, that paragraph is by no means the only relevant provision. As is typical of such agreements, the parties began by acknowledging that "cause existed for [grievant's] suspension and discharge." The preamble of the agreement then goes on to say that it was to provide grievant with "one final chance to prove that he can be a responsible employee" and states that grievant is held to "strict observance" of its terms. There is similar language in the last paragraph of the agreement: "Failure to meet any of the conditions . . . will be cause for [grievant's] immediate suspension preliminary to discharge."

The union asserts that the only issue in the case is whether grievant violated any terms of the last chance agreement and its principal argument is he did not. It asserts that the purpose of paragraph two was to assure that grievant possessed the mental state that would allow him to return to work as a productive employee. The union acknowledges that grievant did not submit a personal action plan on April 13, but notes that the last chance agreement itself contains no such requirement. Rather, paragraph two requires that grievant comply with the recommendations and programs set forth by Bean.

Although the union does not assess blame against either party, it notes that Bean did not communicate his instructions to grievant in writing and, for whatever reason, grievant misunderstood what he was supposed to do. In that regard, the union points to the mental distress suffered by grievant which may have contributed to his misunderstanding of Bean's instructions and urges that, given those circumstances, a reasonable man standard is not appropriate.

Discussion

Every arbitrator would acknowledge that the discharge of an employee with twenty five years service presents difficult issues, especially when the discharge is not for active misconduct. One does not need to read many arbitration awards to recognize that arbitrators often resolve doubts in favor of long service employees or otherwise use long service as an equitable factor in mitigation. I have done that myself in the collective bargaining relationship between these parties. See, Inland Award 858. Despite the beneficence sometimes shown long service employees, length of service itself does not shield employees who have crossed the line between acceptable and unacceptable behavior or performance. It may have some influence on just where the line is drawn, but there is no question that the company has the right to discharge employees for cause, long service or not.

Although there is a constant tension between management and arbitrators about who establishes the just cause line and about the arbitrator's obligation to respect lines drawn by management, arbitrators do much to influence the meaning of the just cause concept. That does not mean, however, that they have complete freedom of action. In this case in particular, my ability to review the propriety of the company's action is bounded by limits established by the parties in the last chance agreement.

The question before me is not whether grievant was properly discharged in January of 1991. That matter has already been resolved. Both the union and grievant agreed that the discharge was for cause when they

signed the last chance agreement on January 31, 1992. By signing that document, grievant not only agreed that he had given the company grounds to discharge him, he also agreed that in order to get his job back, he would accomplish certain things. The only issue before me is whether he satisfied that condition. The parties, indeed, agree that the issue is whether grievant violated paragraph two of the last chance agreement.

The union urges that this question cannot be answered only by asking whether grievant turned in the action plan on April 13. Rather, it says I must take into account the particular circumstances of this case to determine whether grievant understood that the plan was due on that date. It also urges that I should consider the purpose of the last chance agreement, which was to determine whether grievant possessed the mental capacity to return to work. In that vein, it notes that there had already been a reinstatement agreement. The only sticking point was the date on which grievant would be able to return.

I have considerable sympathy for grievant and for the personal difficulties that cost him his job. I have no doubt that grievant's problems with depression are real and that he has suffered immensely in the past few years. I cannot conclude, however, that he complied with the requirements of paragraph two of the last chance agreement. Accordingly, I will deny the grievance.

The union urges that given grievant's mental state it is not fair to apply an objective reasonable man standard to his actions. While the hypothetical "reasonable man" might have acted differently from grievant, the union argues that I should take into account the difficulties in grievant's personal life which prevented grievant from reaching that standard. I agree that grievant should not be held to a standard that he is not able to achieve. But grievant is not permitted to define unilaterally the level of performance expected of him. Although his personal circumstances are relevant, I am not willing merely to accept his conclusions about what he thought was required. And, when what he says is evaluated in the context of what he did, serious questions emerge.

Although the union was careful not to frame this as a credibility dispute, I cannot ignore that as an issue. The union does not claim that Bean's testimony misrepresented the instructions he gave grievant or even that Bean's instructions were ambiguous or confusing. It asserts only that, due to his mental state, grievant misunderstood the oral instructions he received at the April 10 meeting. It is not entirely clear to me that such a misunderstanding would necessarily give grievant a defense, at least absent some difficulty with the instructions. I have some doubt, however, about whether he misunderstood Bean.

Grievant's state of mind after the April 10 meeting is, obviously, a subjective matter that I cannot fully understand. All I can do is observe his actions following that day and draw conclusions from them. Neither grievant nor any other witness cast any doubt on Bean's testimony that he explained the personal action plan requirement to grievant in detail. Grievant said that he left the meeting believing he had as much time as he needed to complete the plan, a declaration that is inconsistent with his other assertion that Bean said he could take "more time" if he needed it. If grievant had an unlimited amount of time to do the plan, then "more time" would be unnecessary.

I don't doubt grievant's claim that he was upset by the court proceedings of April 10. I have some question, however, about why his condition would have been appreciably worse after the hearing than it was before. Prior to the hearing grievant believed he might go to jail, a possibility that could cause fear in anyone. But not only did he not go to jail, the court records introduced at the hearing seem to indicate that most of the disputes between grievant and his wife were settled on that day. I don't mean to suggest that the April 10 hearing was a cause for celebration, or that it was not upsetting to grievant. But he was unable to explain why it left him virtually unable to function, which is what he claimed in his testimony.

The seriousness of his mental condition after April 10 is also questioned by grievant's failure to seek any medical or counseling assistance, even though he claims he suffered a nervous breakdown. He explained this at the hearing by claiming that he knew he was going to go into therapy anyway. This, however, does not make sense. Grievant was to receive therapy once he got back to work. But he couldn't go to work until he finished the action plan and otherwise convinced the company of his sound mental state. If his condition was too serious to do even that, then one would have expected him to seek help.

I cannot say what prompted grievant to ignore the April 13 deadline. I did not believe his claim that he misunderstood Bean's directions and there was no testimony that the directions were ambiguous. I also note that, though grievant told Bean he was anxious to return to work, there have been other delays. Thus, grievant waited a year before seeking reinstatement and even after he did so, his uncooperative attitude slowed the report from Dr. Madsen.

Perhaps grievant is not as anxious to resume working as he thought. Or, maybe more likely, perhaps grievant needed more time before he was ready to accept the responsibility of the work place. That issue,

however, is not before me. Grievant did not approach the company and ask for an extension for the action plan and he did not request that the return to work plan in the last chance agreement be suspended. Moreover, grievant has not attacked the last chance agreement itself. The fact is that grievant did not do what Bean requested, and now has no adequate excuse. This is almost the same pattern of conduct that got him discharged in the first place.

I recognize, as Mr. Robinson stressed during the hearing, that April 13 was not the deadline for the final plan and that grievant might have had to submit further drafts before Bean accepted it. That isn't the point. Rather, the issue here is whether grievant was willing -- or able -- to follow the reasonable directions of Bean, as he agreed to do in paragraph two of the last chance agreement. In order to establish that he could, he either had to submit the plan or, at the very least, contact Bean and offer an explanation for the delay. Since he did neither, I must conclude that he did not company with paragraph two of the last chance agreement.

There was some question during the hearing about whether Bean and Nelson contacted the drug and alcohol committee about grievant's failure to respond on April 13. I thought the testimony of both Bean and Nelson was credible. I believed Lutes' claim that the committee usually contacts him about drug and alcohol disciplinary cases, but there was no evidence here that either drugs or alcohol contributed to grievant's problems. Moreover, I did not understand the company to be raising an issue of the propriety of the union's action. It was grievant's responsibility to work on his action plan. Although no member of the drug and alcohol committee testified (and, indeed, their conduct was not at issue in the hearing) they had apparently been of considerable assistance to grievant. I do not see how they can be held responsible for his difficulties.

Cases like this one produce difficult issues. No one accuses grievant of active misconduct and his discharge should not be understood to cast doubt on his character or his abilities. He has struggled with difficult problems and they have taken their toll. Grievant testified that he is now engaged to be married and that he thinks his life has turned around. I hope the next few years prove better for him than have the last few.

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

October 20, 1992