Award No. 890
In the Matter of Arbitration Between
Inland Steel Company
and
United Steelworkers of America,
Local No. 1010.
Grievance No. 20-V-03
Appeal No. 1501
Arbitrator: Jeanne M. Vonhof
April 27, 1994
REGULAR ARBITRATION
INTRODUCTION
The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Friday, March 25, 1994 at the Company's offices in East Chicago, Indiana. The Company and Union filed pre-hearing briefs in the case.
UNION
Advocate for the Union:
J. Robinson, Staff Representative, Subdistrict 2, USWA
Witness:
J. Herring, Grievant
APPEARANCES
Also Present:
L. Aguilar, Vice Chairman, Grievance Committee
T. Steagall, Griever, Area 20
H. Goldon
COMPANY
Advocate for the Company:
R. V. Cayia, Manager, Union Relations
Witness:
M. Krcmaric, Section Manager, Shop Services
RELEVANT CONTRACT PROVISIONS:
ARTICLE 3
PLANT MANAGEMENT
Section 1. Except as limited by the provisions of the Agreement, the Management of the plant and the direction of the working forces, including the right to direct, plan and control plant operations, to hire, recall, transfer, promote, demote, suspend for cause, discipline and discharge employees for cause, . . . and to manage the properties in the traditional manner are vested exclusively in the Company . . . .
BACKGROUND:
This is a case in which a Grievant was discharged for sleeping in the plant, for violating several other plant rules, and for violating a Last Chance Agreement entered in 1990. The Grievant was working as a machinist and had been employed by the Company for about fourteen (14) years at the time of the discharge giving rise to this dispute.
The Grievant's disciplinary record indicates that in September, 1990 the Grievant was suspended preliminary to discharge for violating the following Company rules:
1) 132-b, which prohibits reporting for work under the influence of drugs or possessing or using drugs on Company property;
2) 132-d, which prohibits reporting for work under the influence of alcohol, or possessing or using same on Company property; and
3) 132-i, which prohibits sleeping in the plant.
The Grievant presented uncontradicted testimony regarding the incident which led to his original discharge. He testified that he came to work, went to his work area, talked to the hourly foreman, and immediately went to find a place to sleep. He was awakened by the hourly foreman, but fell asleep again. He was then taken to the Inland Clinic, where he underwent drug and alcohol testing. The Clinic discovered that he was intoxicated; he tested positive for drugs as well and was suspended preliminary to discharge.
The Grievant was returned to work on a last chance basis via an agreement dated October 11, 1990 in which the Union acknowledged that there was cause for his suspension preliminary to discharge. The Last

Chance Agreement (LCA) set out certain requirements for the Grievant's reinstatement, including two-year random drug and alcohol testing, immediate suspension preliminary to discharge for the detection of any mood-altering substance, participation in the Company's drug and alcohol treatment program, and regular contact with the Union's Alcohol and Drug Committee.

The Grievant completed the time-limited requirements of the Last Chance Agreement. The Grievant had some attendance problems in 1992-1993, resulting in a warning on May 28, 1993 and a reprimand letter on November 18, 1993.

On November 30, 1993, an incident occurred which gave rise to the instant dispute. The Grievant was scheduled to begin work at 11:30 p.m. that day. He testified that he came home that morning after working the previous night and got into a serious argument with his wife. According to the Grievant his wife kicked him out of the house and he spent the day driving around, and not sleeping. He testified that he went to his grandmother's house for dinner, and then drove to the plant.

The Grievant's time card indicates that he "swiped in," i.e. clocked in as he entered the plant with his truck, at about 10:17 p.m. He parked in the parking lot immediately adjacent to the machine shop, and, while waiting for his turn to begin, fell asleep in his truck. He was scheduled to begin work at 11:30 p.m. At about 12:40 a.m. two supervisors found the Grievant in his truck and woke him up. The Grievant testified that he said something like "I'll be right there," and, after the supervisors left, he proceeded to the locker room. He testified that when he saw the time, about 1:00 a.m., he realized he was very tardy and decided to leave. The Company's time card system shows that the Grievant swiped out at 1:12 a.m., leaving the plant premises in his truck.

There is no dispute that the Grievant failed to tell his supervisors or anyone else that he was leaving when he did so. The evidence indicates that one supervisor, who came looking for the Grievant a second time, saw the Grievant's truck driving out of the parking lot.

The Grievant was discharged for violating three Company rules and his Last Chance Agreement. The Company rules included:

1) sleeping in the plant;

2) leaving the employee's working place or visiting around the plant away from his usual place of business, or his assigned place of duty at any time, without permission of his supervisor; and

3) entering or leaving the plant without compliance with plant rules.

The Grievant also was discharged for violating the terms of his Last Chance Agreement. The final paragraph of that Agreement states,

This arrangement represents a final chance at employment for you. Failure to meet any of the conditions set forth above or any repetition of the conduct which led to your most recent suspension action or violation of any other rules or regulations will be cause for your immediate suspension preliminary to discharge.

The Union filed a grievance over the discharge. The Parties were unable to resolve the dispute and it proceeded to arbitration.

THE COMPANY'S POSITION:

The Company contends that the facts regarding what occurred on November 30, 1993 are not in dispute. Furthermore, according to the Company, the Grievant's conduct on that date was a repetition of the same conduct which led to his original suspension action in 1990.

In support of this position the Company argues that both incidents involved a violation of the sleeping rule, and therefore a violation of the Last Chance Agreement. In the LCA the Parties agreed as to what would constitute just cause for this employee, the Company argues, and his recent conduct constituted a repetition of the conduct covered by the LCA.

The Company disputes the Union's contention that this sleeping incident was qualitatively different from the first incident. The Company argues that the rule prohibits sleeping "in the plant" without reference to location. The Grievant was sleeping in the plant on Company time the Company argues, and therefore violated the no sleeping rule. According to the Company any other ruling would water down the clear language of the rule.

Furthermore, the Company argues that the Grievant's actions cannot be explained away, or put in a good light. The Company urges that the Grievant's explanation of why he left the plant was not a good explanation, and also suggests that he did not account for about twenty (20) minutes of time after he was discovered and before he left the plant. The Company suggests that the Grievant may have left the plant at that time, after some thought, because he was under the influence of alcohol or drugs and was afraid of being tested. The Grievant did not act responsibly on the night in question, the Company contends, and

therefore violated the Last Chance Agreement's language giving him one final opportunity to become a responsible employee.
Because the Grievant violated the Last Chance Agreement, the Company contends, overturning the discharge would harm the integrity and usefulness of last chance agreements. The Company contends therefore that the grievance should be denied and the discharge sustained.
THE UNION'S POSITION
The Union contends that the grievance should be sustained and the discharge overturned. In response to the Company's suggestion about the time sequence of the events on the night in question, the Union argues that all of the times are approximate. According to the Union neither the supervisor (at the third step) nor the Grievant could recall exactly what times the incidents occurred, and therefore the Company's inference that the Grievant left the plant after a lapse of time in order to avoid a fitness to work evaluation is unfounded.
The Union argues further that this is not a case involving repetition of the conduct for which the Grievant was originally placed under a Last Chance Agreement. In the original case, the Union asserts, the Grievant was sent to the Clinic to undergo a fitness test, and the Grievant was determined to have both alcohol and drugs in his system. The Union argues that there is no evidence here that the Grievant was under the influence.
The Union also argues that in the 1990 incident the Grievant was found sleeping while working on the clock; in contrast, the Grievant had not yet begun to work at the time of the 1993 incident.
The Union argues that the Grievant would not have been paid for his work in this case. Therefore the Union argues that the purposes underlying the no sleeping rule, i.e. safety concerns and paying an employee for time spent not working, were not violated in this case.
The Union argues that the other two rules involved in this case were not repetitions of conduct leading to the Last Chance Agreement. The Union argues finally that neither the Grievant's conduct on the night in question nor his overall record are sufficiently serious to merit discharge. Therefore the Union requests that the Grievant be reinstated with backpay.
OPINION
This is a case involving the discharge of the Grievant for violating certain Company rules and the terms of a Last Chance Agreement entered into about three years prior to the current discharge. There is little dispute over the facts giving rise to this discharge; the dispute here centers around whether these facts are sufficiently serious to justify the discharge, given the Grievant's past record.
The Union concedes that the Last Chance Agreement is a "fact on the employee's disciplinary record" for a period of five (5) years from its effective date. Thus the Grievant stands in a different position than an employee who has never had a Last Chance Agreement or one who has completed the five-year period. However, he also stands in a different position than an employee who is unable to complete the strict time-limited requirements of a Last Chance Agreement. The Grievant in the instant case did successfully comply with these requirements.
The Company discharged the Grievant for violating three Company rules and his Last Chance Agreement. The Parties agree that the applicable section of the Last Chance Agreement is the language stating that any repetition of the conduct which gave rise to the LCA will subject the Grievant to discharge. The Union concedes that if the Arbitrator finds that the Grievant was guilty of a repetition of the same conduct, discharge is appropriate. The Last Chance Agreement defines what is proper cause in such a case.
The details of the Grievant's conduct on November 30 are not really in dispute, and are described in the "Background" section above. The threshold issue for the Arbitrator is whether this conduct constitutes a repetition of the conduct for which the Grievant was originally suspended in 1990, and therefore a per se violation of the Last Chance Agreement.
The most significant difference between the Grievant's conduct on November 30, 1993 and the conduct which led to his Last Chance Agreement is that in the earlier case he clearly had begun to work under the influence of alcohol and possibly drugs. Under this influence he had purposefully looked for a place to sleep, and had fallen asleep twice on one turn, once after his foreman had awakened him.
The Company has suggested that the Grievant may have been under the influence of alcohol or drugs on the night of November 30, 1993 as well. In support of this theory the Company argues that there was about a half hour period between the time when the Grievant was awakened and the time when he left the plant; the Company suggests that he spent this period considering whether he should stay and risk subjecting himself to a fitness to work test which he could not pass. The Company offers this as the reason why the Grievant left the plant instead of going to work.

The Arbitrator has considered this theory as a possible explanation for the Grievant's unusual behavior in leaving the plant as he did. However, there was no evidence that the supervisors who spoke to him considered there to be reasonable cause for him to be tested and presumably they knew his history. Assuming that the time lapse was about a half hour, which the Union contests, this fact standing alone is not enough for the Arbitrator to conclude that the Grievant was under the influence on that date.

The Company argues that the Grievant violated the rule which prohibits "sleeping in the plant," and that the rule is clear on its face and should not be watered down. The Company argues further that a violation of any one of the rules which led to the Grievant's original Last Chance Agreement is sufficient to trigger the language regarding repetition of the conduct leading to the LCA.

The record indicates, however, that the Grievant was placed under the Last Chance Agreement originally for falling asleep on the job while under the influence of alcohol and possibly drugs. The Arbitrator is not convinced that the Company would have placed him under a Last Chance Agreement for a violation of only the no sleeping rule.

In the instant case there is not sufficient evidence to conclude that the Grievant was under the influence of alcohol. Furthermore, there is some merit to the Union's argument that the same safety concerns are not present when an employee falls asleep before rather than after he has begun to work. If the Grievant had fallen asleep in his truck parked outside the plant, before "swiping in," his sleeping would have been considered a "failure to report off," rather than "sleeping in the plant."

Therefore, even if the Arbitrator were to conclude the Grievant had violated the no sleeping rule, <FN 1> she is not convinced that the Grievant's conduct on November 30 would constitute a repetition of the conduct for which he originally was placed under a Last Chance Agreement. Thus, the Arbitrator concludes that there was not a per se violation of the Last Chance Agreement. However, the issue remains whether the Grievant's actions are sufficiently serious to warrant discharge, even if they do not directly violate the Last Chance Agreement.

There is no question that the Grievant acted irresponsibly in not coming to his work station on time and in leaving as he did. The Company has not argued, however, that discharge would have been an appropriate penalty for the violation of either one of the other two rules, regarding visiting around the plant or leaving the plant without complying with Company rules. The Arbitrator concludes that discharge is too severe a penalty for a first violation of these two rules, even given the Grievant's disciplinary history.

The Arbitrator also notes that the Grievant has had a warning and a written reprimand regarding absenteeism within the year prior to his most recent discharge. However, there is no mention of absenteeism in the Company's discharge letter, or in the original Last Chance Agreement. The Arbitrator has given the issue some consideration in terms of her overall assessment of the Grievant's record, his prospects for rehabilitation, and in formulating the remedy.

Based upon the entire record here, the Arbitrator concludes that there was not sufficient grounds for the Grievant's discharge. However, there were grounds for serious discipline of the Grievant for the following reasons.

First, even if the sleeping incident here is not as serious as the last incident, it is a violation of some consequence, given the Grievant's past record. The Grievant's conduct left the Employer without an employee to perform his job, for a very long period that night. If the supervisor had not actually seen the Grievant's truck leaving at 1:15 a.m., after looking for him a second time, that period might have been even longer.

Second, although the Union dismisses the safety issue here, the Grievant was missing when his supervisors had some reasonable expectation that he would be working. The supervisors spent some time looking for the Grievant twice that night and whatever his reasons for not being present, there is a safety concern when an employee is missing in a steel mill.

In addition, several factors here suggest that the Grievant may still be having trouble with alcohol, drugs, or family problems which are interfering with his job, even though there is not enough evidence to conclude that he was under the influence on the night in question. The fact that he mentioned his drinking in relation to the fight he had with his wife that day, and his absenteeism record for the months leading up to his discharge suggest such problems.

Furthermore, leaving the mill in order to avoid drug or alcohol testing is different than leaving for other reasons. While there is not enough evidence for the Arbitrator to conclude that this was the Grievant's motivation here, his unusual departure does give the Arbitrator cause for concern, given his past record.

Therefore, on the basis of all this evidence, the Arbitrator concludes that the Grievant should not be awarded any backpay. In addition, the Grievant's reinstatement will be conditioned upon compliance with

all the terms of his Last Chance Agreement, including participation in the alcohol and drug treatment program, and random testing, for a period of one year. The Company and the Grievant's fellow employees have a right to ensure, as much as is possible, that his conduct will not endanger his own or anyone else's safety. Given the Grievant's behavior here, the possibility that he may still be suffering from substance abuse or family problems, and the life-threatening dangers in a steel mill, the Arbitrator concludes that the extension of the Last Chance Agreement negotiated between the Parties is reasonable.

AWARD

The grievance is sustained in part. The Grievant is to be reinstated, without backpay, and subject to compliance with all the terms of his Last Chance Agreement, for a period of one year from the date of his reinstatement. The effectiveness of the final paragraph of the Last Chance Agreement will also be extended for an additional year beyond when it would normally expire.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof

Labor Arbitrator

Acting Under Umpire Terry A. Bethel

Decided this 27th day of April, 1994.

<FN 1> There was not sufficient evidence for the Arbitrator to determine whether the Grievant was paid for working on the day in question. Therefore the Arbitrator has not addressed this issue in relation to the no sleeping rule.