Award No. 920
H. Rucker Grievance
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
USWA LOCAL UNION 1010
Gr. Case # 13-V-070
Arbitrator: Terry A. Bethel
September 24, 1996
OPINION AND AWARD
Introduction
This case concerns the discharge of grievant Henry Rucker. The case was tried in the company's offices on September 17, 1996. Pat Parker represented the company and Alexander Jacque presented the case for grievant and the union. Grievant was present throughout the hearing and testified in his own behalf. The parties submitted the case on final argument.
Appearances
For the company:
P. Parker -- Arbitration Coordinator
P. Berklich -- Project Rep., Union Rel.
K. Koch -- Project Analyst, HRIM, CPT
J. Bean -- CEAP, Sr. Rep., Medical
F. Tom -- Section Mgr., Business
For the union:
A. Jacque -- Chrm., Grievance Committee
D. Shattuck -- Secy., Grievance Committee
M. Vogel -- Griever
H. Rucker -- Grievant
E. Walters -- Members Assistance Comm.
Background
The company discharged grievant on September 14, 1995 for failing to work as scheduled. He continued to work under the Justice and Dignity provisions of the collective bargaining agreement until December 19, 1995, when he failed to appear for his third step grievance meeting.<FN 1> The company upheld its discharge decision at the third step on March 8, 1996 and the union appealed the case to arbitration.
Although the union correctly asserts that the bulk of grievant's attendance problems did not surface until 1994, it is also true that grievant had been reprimanded for attendance problems in January, 1991 and again in October, 1993. In addition, grievant was disciplined for reporting to work under the influence of alcohol in March, 1993, an event that is relevant given the cause of grievant's most recent attendance difficulties. From January 1994 until the date of his discharge in September, 1995, grievant experienced nine different disciplinary events (not counting his discharge) as a result of his attendance problems, including four suspensions and two record reviews. On the occasion of each reprimand or disciplinary suspension and again during his January 17, 1995 record review, grievant was asked whether he had a problem with drugs or alcohol. He denied any such problem until his record review on September 7, 1995, at which time he acknowledged his problem and also said that he had had the problem for some time and had failed to reveal it to the company.
The company cites grievant's poor attendance record and notes that, as a crane operator, grievant occupied a key position in the slab yard and could not easily be replaced when absent. The department had no labor pool and department manager Tom said he was not aware that he was entitled to use the core pool. The company also mentioned the possibility of harm should grievant attempt to operate a crane while under the influence of drugs or alcohol.
As it has done previously, the company questions my ability to consider post-discharge conduct in making a just cause determination. In particular, the company questions the relevance of grievant's claim that he has successfully rehabilitated himself since his discharge. However, even if I consider that evidence, the company argues that grievant has not shown sufficient proof of rehabilitation. In particular, the company points to grievant's continued absences while he worked under Justice and Dignity, to his failure to attend a scheduled grievance hearing, and to his acknowledgement to John Bean in March of 1996 that he could not pass a drug or alcohol test because he had been drinking and using marijuana and cocaine. The company

also points to notations in the notes from the union's member's assistance committee -- introduced as a union exhibit -- which said that grievant was drinking and not following the program as late as May 1996 and, from the committee's perspective, was not attending enough meetings to merit a last chance agreement as late as June 20, 1996.

Finally, the company argues that, though he worked at Inland for approximately 18 years, he is not a particularly long service employee. The company introduced evidence that an employee with grievant's years of service falls near the twentieth percentile, meaning that about 80% of the employees have more seniority. In fact, had grievant not been discharged he would be laid off.

Whatever grievant's relative standing in the work force may be, the union points out that he had worked at Inland since 1978 and was, therefore, a long service employee. The union also questions the company's claim that grievant's absences could have caused a particular hardship, since it says that there were employees available from the core pool to fill his job.<FN 2> And the union elicited testimony from the company's witness Fred Tom that grievant had never caused a safety hazard and that his work had been adequate. In his testimony, grievant denied that he had told John Bean in March that he would fail both a drug and an alcohol test. He said he was not drinking or using drugs at that time and that he must have misunderstood the question. In addition, grievant said the member's assistance committee notes are wrong if they suggest that he was still drinking or not committed to a rehabilitation program in the summer of 1996.

The union also argues that grievant's attendance record is not as bad as the records of employees who have been reinstated or given last chance agreements. It notes that many of grievant's absences are extended, which are generally less disruptive than one day absences. The union acknowledges that grievant consistently denied having a drug or alcohol problem, but it notes that such denial is common. The important fact, the union says, is that grievant is now rehabilitated. The union says that grievant should be given another chance to show the company that he can be a dependable employee. The union also notes that it does not seek back pay for grievant, since he would be laid off in any event. Instead, it merely wants his seniority status reinstated so that he can be eligible for contemplated recalls.

Discussion

Cases like this one are often difficult. Perhaps due in part to the relatively long service of all active employees, the company, in my experience, does not discharge employees for absenteeism unless their attendance records are genuinely bad. That is the case here. But, as in most such cases, the employee now has an explanation for his record and claims that he has conquered the problem that got him in trouble.

It is not sufficient to merely note grievant's numerous disciplinary actions; doing so might lead one to believe that grievant had only been absent 8 or 9 times. The fact is, though, that some of those disciplinary actions were prompted by a string of absences or tardies. The January 31, 1994 reprimand, for example, was the result of twenty-one different occurrences between mid November and early February, a period of about 15 weeks. And the June 9, 1994 discipline was the result of sixteen additional occurrences in the next four months. It is true, as the union claims, that many of the days grievant missed in 1995 were extended absences. But I find little evidence that extended absences were a significant part of grievant's record prior to that time. Indeed, the January 17, 1995 record review notes that much of grievant's attendance problem was due to tardies.

Arbitrators have sometimes recognized that extended absences are less disruptive than so-called casual or intermittent absences or tardies. No doubt one reason for this is the recognition that employees on long term absences are typically sick or disabled -- sometimes from industrial accidents -- and unable to work. And it is true that an extended absence gives the company an opportunity to plan for a replacement. I have difficulty, however, understanding how grievant's extended absences in 1995 deserve such consideration.

Grievant apparently first acknowledged his drug and alcohol problems to the company in a May 1995 conversation with John Bean, the company's employee assistance coordinator. At that time, grievant was actively using drugs and alcohol. Bean referred him to a program at St. Margaret Mercy hospital which apparently involves an in-patient detoxification phase followed by out-patient rehabilitation, which Bean described as partial hospitalization. I understood this to mean that the bulk of the patient's day is spent at the hospital, though they do not sleep there.

Grievant apparently entered the program near the end of May, 1995 and completed it in mid-June, 1995, a period that apparently included a relapse and a return to detox. According to the records introduced at the hearing, grievant should have returned to work on June 16, 1995. However, he did not and the company had no notice of his whereabouts. He finally reappeared on July 11, 1995. Bean asked where he had been and testified that grievant told him he had had family problems. Grievant testified that he did not remember

making this comment, but he offered no other explanation. Bean told grievant that he could not return to work without a medical drug clearance. Grievant left and did not return until August 21, 1995, at which time he presented a release concerning a head injury he had suffered in a mugging.

The release was not introduced into evidence. In cross examination, Mr. Jacque elicited testimony that the release was dated "around the 28th." I did not pursue the date further because I believed, mistakenly, that the release was included in the packet of information I had gotten as Company Exhibit 2. I can only assume, then, that the head laceration release was dated July 28, since grievant appeared with it on August 21. Grievant did not explain where he was between July 28 and August 21 or, for that matter, between July 11 and July 28. While he did say that he had been mugged, he did not offer testimony about when that occurred. Grievant apparently was not hospitalized from the attack and he filed no application for sickness and accident benefits, perhaps because he had not yet returned from work from his drug rehabilitation and, therefore, was not eligible for S&A.

In any event, grievant was absent from June 16 until August 21 without adequate notice to the company about where he was and without explaining his absence in arbitration. Moreover, according to Bean, grievant did not present a medical drug clearance as requested when he returned on August 21, something that Bean had asked for on July 11. I can accept grievant's claim that he was mugged and that he received a head injury. But I cannot understand where he was for two months. In short, it is not easy to regard this as the typical extended absence due to illness.

Whatever grievant had been doing during his absence, it apparently did not involve drug rehabilitation because his old problems resurfaced once he did return to work. Grievant had another record review on September 7, 1995, at which the company informed him that he had reached the discharge level under the company's attendance monitoring program.<FN 3> However, the company says it gave grievant another chance because of the efforts of his union representative and his commitment to try and control his addiction problem. Unfortunately, grievant experienced problems almost immediately. He was arrested and incarcerated for possession of drug paraphernalia on September 12. Grievant admitted at the hearing that he had relapsed and was smoking crack cocaine at the time.

The company was not aware of grievant's whereabouts so it discharged him on September 14, the third day of his incarceration, for failing to work as scheduled. There was some dispute at the hearing about whether the company made adequate efforts to locate grievant, though I find that to be of little significance. Grievant's incarceration due to his own misconduct hardly gave him an adequate excuse for not working. Grievant testified that he was sentenced to 90 days in jail. I do not know how much of that sentence he served, though he did testify that he was allowed to return to work under the Justice and Dignity provisions on a work release program.

Although it may be true, as Mr. Jacque claimed, that other employees have even worse records, I am unable to find that grievant's record at the time of his discharge warranted any more consideration from the company. He had missed numerous days, had repeatedly been tardy, and had been warned many many times. On September 7 the company notified grievant that it was giving him one last chance, a chance that grievant squandered by getting arrested and jailed. It is true, as Mr. Jacque argued, that grievant has never had a last chance agreement. But the company has no obligation to enter into such agreements. Instead, there must be some indication that the employee deserves a last chance, an indication that even the union assistance committee thought was lacking here. That brings up the only real issue in this case -- whether grievant's post-discharge rehabilitation efforts are sufficient to warrant a final effort to salvage his employment.

There are certainly factors in grievant's favor. Elnora Walters from the union's member's assistance committee testified that she had met with grievant and that she believes he now takes seriously his obligation to remain clean and sober. Moreover, grievant himself testified and avowed his willingness to take a drug or alcohol test on the spot and to take one at any time in the future. I was impressed by grievant's determination, though it is also fair to say that almost all employees voice similar intentions in arbitration. It is no easy matter to know which employees have made the commitment and which have not. In this case, the objective evidence causes more than a little concern. I have already mentioned Bean's testimony that grievant told him in March of 1996 that he was still drinking and using drugs. Although grievant denied having said this, I thought Bean was credible. I also note that the union's own exhibit questioned grievant's commitment to his rehabilitation program as recently as three months prior to the hearing. Grievant did produce a number of attendance sheets showing participation in Alcoholics Anonymous meetings. Although there was some question about how frequently grievant should attend, the attendance sheets do seem to show regular participation. I am troubled, however, by some of those exhibits.

Five of the sheets, covering September 95 through April 96, are all in the same handwriting and are obviously not photocopies of the actual attendance sheets. Grievant explained that by saying that the organization would not allow him to make copies of the actual attendance sheets. Yet the same exhibit includes seven photocopies of actual attendance sheets. I do not understand how grievant would be allowed to copy some sheets and not others. I also note some discrepancy between the hand-copied attendance sheets and the union's member's assistance committee notes. For example, grievant's hand-copied attendance sheets show that he attended AA meetings regularly from October 95 through April 20, 1996. Yet the Committee Notes show that grievant came for counseling on April 25, 1996 and told the committee member that he was ready to get "on the program." Only a week later a committee member wrote a note indicating that grievant was not following his program and that he had had a drink. Even in June the committee did not think grievant was attending enough meetings to justify asking the company for a last chance agreement.

These facts raise some question about whether grievant actually attended the meetings covered by the hand-copied sheets. Grievant claimed that he did not copy them himself. I am certainly no expert in handwriting analysis. Nevertheless, the handwriting on each sheet appears to me to be similar to grievant's signature on some of his disciplinary forms. In particular, I note that grievant writes the letter k in a peculiar manner and that there are k's on the hand-copied sheets that are almost identical. I feel comfortable in finding, then, that grievant copied the sheets himself, even though he denied doing so in arbitration. And, because grievant failed to produce actual photocopies of those sheets, I must find that he hand-copied them because the actual sheets did not show that he was in attendance. I am also influenced in this finding by grievant's untrue denial that he copied the sheets and by the discrepancy between the hand-copied sheets and the committee notes. The harm is not limited to grievant's false portrait of how many AA meetings he attended. Because this evidence was tainted, I also must doubt grievant's other claims about his rehabilitation.<FN 4>

As is true in other cases, the company vigorously asserts that arbitrators have no right to reinstate employees based on after-the-fact conduct. Although there is a significant disagreement about after-the-fact evidence, most arbitrators consider it in drug and alcohol cases, with some explaining that they are trying to determine whether a grievant's absences were caused by an illness that he later got under control. That is not to say, of course, that an arbitrator can force a company to take a substantial risk based on a mere suspicion of improvement. In any event, in this case I am unable to find that grievant has satisfied the burden of showing rehabilitation. Not only is some of his evidence of rehabilitation suspect, but even an assistance committee member questioned grievant's progress as recently as three months prior to the arbitration hearing.

I think that grievant was sober on the day of the hearing and that he probably has been sober for a period of several -- and maybe many -- weeks. But his failure to come to grips with this problem until the spring or summer of 1996 convinces me that he has not shown the degree of rehabilitation that would justify reinstatement. And it was a terrible mistake for him to induce the union to introduce fraudulent evidence at the arbitration hearing. Thus, I will deny the grievance.

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

September 24, 1996

<FN 1>Grievant claimed that the union had failed to notify him of the third step meeting. Although he did not actually testify, Mr. Jacque asserted that the union did, indeed, forget to notify grievant. Because in my judgment nothing turns on this fact, I need not resolve the difficulty of what weight to give to Mr. Jacque's unsworn assertion.

<FN 2> i am not able to resolve the dispute about whether the core pool was a viable alternative for Tom at the time in question here. I had not been aware of the core pool prior to this grievance and I did not receive enough information to make such a finding. I note that the company's representative did not necessarily deny the union's claim, although Tom was clearly not aware of his right, if any, to use the core pool. I also note that a union witness conceded that the core pool is not always able to provide qualified replacements for a one day absence.

<FN 3>The union has not agreed to this program and does not concede that the company has just cause to discharge an employee when the employee reaches a particular level in the program.

<FN 4>Although I think grievant manufactured some of the exhibits, I note that they were placed in the middle of the union's exhibit and I believed Mr. Jacque's statement that he had noticed that the five sheets

were in the same handwriting until after the hearing began. Thus, I have no reason to believe -- and in fact do not believe -- that the union knew the exhibits were false.