Award No. 931
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEEL WORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
December 7, 1997
OPINION AND AWARD
Introduction
This case concerns the discharge of grievant Delbert Browder based on his record and his failure to justify his absence in March of 1997. The case was tried in the company's offices in East Chicago, Indiana on October 20, 1997. Pat Parker represented the company and Mike Mezo 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
J. Bean -- Senior EAP Rep.
P. Berklich -- Project Rep., Union Rel.
G. DeArmond -- Contract Admin. Resource
F. Peterson -- Manager, C&HT, CR&CO, FRO
N. Vega -- Section Mgr., 3 CGL
For the union:
M. Mezo -- President, Local 1010
A. Jacque -- Chrm., Grievance Comm.
R. Guevara -- Grievance Committeeman
D. Browder -- Grievant
L. Wolendowski -- Insurance Rep.
Background
Prior to his discharge, grievant worked in the Plant 1 Galvanize, No. 3 Cold Strip Department. Although he was qualified to work higher rated jobs, grievant worked in a material transporter position as a result of a demotion which I will discuss below. Grievant reported off complaining of a back problem on January 28, 1997. On February 2, grievant began what was originally scheduled as a one week vacation. Subsequently, he asked for, and was granted, an additional three weeks of emergency vacation. Grievant was due to come back to work on March 4, 1997, but he did not report at his scheduled time for the beginning of day turn.
Nora Vega, grievant's section manager, testified that she overheard her clerk speaking to grievant on the telephone during the midmorning on March 4. The clerk was apparently trying to find out why grievant had not reported and, from the conversation, Vega understood that grievant said he was still sick. Vega instructed the clerk to tell grievant that he would have to provide medical documentation. Grievant responded that he could not because his physician had left the area and had taken grievant's medical records with him. Vega testified that she then took the telephone and told grievant to report to the company's clinic with medical documentation to prove his illness, which she assumed was still the back problem he had complained of in February.
Grievant denied speaking with Vega on March 4, and denied that anyone had told him to go to the clinic that day. He also said that no one from the company called him on March 4. Rather, he said he reported off sick that day prior to the start of his turn. He said that he did talk with Vega at other times while he was off, but that she never told him to go to the company's clinic. He said that during those conversations, he told Vega that his doctor had left town with his medical records. He said Vega merely asked when he was coming back to work and that he replied that he didn't know.
Vega said that after instructing grievant to go to the clinic on March 4, she did not hear from him again. Thus, on March 19 she sent him a seven day letter, directing him to report to the clinic not later than March 26 with a statement from his physician (which was the bottom part of the letter) justifying his absence. Grievant was warned that failure to report as directed could result in his discharge.
Grievant reported to the clinic on March 26, but did so after the medical staff had already left for the day and without having secured any documentation regarding his illness from a physician. The person on duty

at the clinic told him to return the following day. Grievant did so, but still without documentation of his illness. Thus, he was instructed to have the bottom portion of the letter filled out by his doctor. Apparently during the same visit, grievant spoke with John Bean, the Coordinator of the company's Employee Assistance Plan. Bean's notes from the meeting with grievant indicate that grievant told him he had not been under a doctor's care since his vacation ended in early March. Moreover, Bean concluded from grievant's comments that he had not contacted a doctor or a psychiatrist. Bean counseled him to follow through by having the form completed as soon as possible.

Larry Wolendowski, who handles insurance matters for the local union, testified that grievant first called Value Behavioral Health (VBH) on March 26. VBH is the "gatekeeper," which I understood to mean that, as part of the insurance program's managed care plan, employees in need of psychiatric help must go through that agency. Grievant finally spoke to someone in authority at VBH on March 27 and they advised him to see a psychiatrist named Dr. Hanna. Grievant saw Hanna on April 2 and again April 7. Dr. Hanna described grievant as having a major depressive disorder and prescribed medication. Grievant said he felt better after he began taking the medication.

Meanwhile, Vega did not know what grievant had been doing since she had not heard from him since sending the seven day letter on March 19. She called the clinic on April 2 and asked whether grievant had reported. She learned that he had, but without proper documentation, and that he had been told to secure it from his physician. Vega testified that she waited until April 8 to see if grievant would comply with that instruction. When she heard nothing from him she tried to call him, but discovered that his telephone had been disconnected. Thus, on the same day, she sent him a letter notifying him that he was suspended for five days preliminary to discharge. Following a hearing on April 15, 1997, grievant was notified of his discharge by letter of April 22. It is that action that is at issue in this arbitration.

The company acknowledges that grievant was guilty of no single action that warrants discharge. However, the company points to grievant's overall work record for the last five years, which includes three different record reviews (in which grievant was warned each time that his job was in jeopardy), four disciplinary suspensions for poor work performance, two suspensions for absenteeism, two reprimands for absenteeism, a suspension for failure to report off, a suspension for falsification and poor performance, and a suspension for insubordination. As part of this record, grievant was suspended preliminary to discharge in 1996, but was subsequently reinstated with the time off converted to a ten day discipline. As part of the reinstatement, grievant accepted a demotion to the material transporter position and agreed that he would seek a job in another sequence. If he failed to successfully bid out of the department within twelve months, he was to be demoted to the core pool.

Grievant was reinstated in July, 1996. Prior to his discharge the following April, he was disciplined twice for absenteeism, once for failure to report off, and twice for poor work performance. The company says that grievant's poor performance and his slack attitude have gone on long enough. The culminating incident, the company says, is similar to grievant's other difficulties. He simply disappeared after his vacation and made no effort to apprise the company of his status. Indeed, the company says, he failed to act even after being directed to do so by Vega and he waited until the last minute to respond to his seven day letter. Finally, the company questions grievant's claim that his prolonged absence -- and some of his other problems -- were caused by depression or some other psychiatric condition.

The union raises two different lines of defense. First, the union says that I must sustain the grievance and reinstate grievant because the company introduced stale discipline into evidence in direct violation of an express provision of the contract. I will deal with that issue in more detail below. Second, the union says that neither the culminating incident nor grievant's entire work record constitute just cause for discharge. At base, the union says the grievant's failure to come to work on March 4 and his subsequent absence until March 27 was merely an unauthorized absence. The union does not necessarily deny that some discipline might be warranted for the absence, but it points out that grievant was only at the three day discipline level under the attendance program. Thus, the union says the company points to other disciplinary action because it is unable to justify a discharge for the absence itself.

But, the union says, it is improper to lump together different kinds of disciplinary action in one disciplinary chain. In that regard, it notes the oft cited passage from Peter Seitz' opinion in Inland Award 313:

The straw that breaks the camel's back (to use the expression commonly employed in this type of case) must itself be related to the kind of straw that already overburdens the camel. The event which furnishes cause for discharge must be capable of standing on its own bottom; that is to say it must be of such a character, itself, which, when considered with the personnel record, justifies discharge.

The union urges that the company did not meet that standard in this case. The grievant's relevant disciplinary record shows several disciplines for poor work performance, as well as discipline for insubordination and fabrication. The union says, however, that these are not of the same kind of straw as the culminating incident, which was merely an unauthorized absence. Thus, the union says that if grievant merits any discipline at all, it should be a three day discipline.

The union also questions whether any discipline is warranted. It argues that Vega never ordered grievant to go to the clinic and that she never advised him that he could be discharged if he did not go. Moreover, grievant complied with the seven day letter, since he actually went to the clinic within the relevant time period. Implicit in the union's argument is its contention that grievant's absence -- and many of his other problems -- were caused by what his psychiatrist described as a severe depressive disorder and that, if grievant did not act as promptly as other employees might have, it was the fault of his illness and not his intent to disobey company orders or regulations.

Discussion

a. The Stale Discipline Issue

In the course of presenting its case, the company submitted documents involved in one of grievant's record reviews. Those documents referred to disciplinary incidents that occurred more than five years preceding the discipline at issue in this case. Specifically, the documents related that grievant had twice been discharged and reinstated though arbitration, though without make-whole relief in either case. In addition, during its final argument, the company submitted a copy of both arbitration awards, Inland Award 799, decided on March 13, 1989, and Inland Award 848, decided on July 29, 1991. The company did not refer to the substance of either award. Rather, it used them to remind me that I had expressed doubts about grievant's credibility in each arbitration. Thus, the company argued that because I had not believed grievant's stories in the past, I should also not believe the one tendered in this arbitration.

The union objected when the company introduced documents from the record review containing stale discipline. The union asked for a bench decision immediately granting the grievance, citing mp 8.5 of the Labor Agreement:

The company in arbitration proceedings will not make use of any personnel records of previous disciplinary action against the employee involved where the disciplinary action occurred five (5) or more years prior to the date of the event which is the subject of such arbitration.

I declined to enter a bench decision, but indicated that I would take the issue under advisement. The union reiterated its position in final argument, citing steel industry cases that have construed the above language quite strictly.

In USS-13,653, for example, the arbitrator admitted evidence of several disciplinary actions tendered by the company that grievant had previously been disciplined for threatening a foreman. In each instance, the previous discipline was more than five years old. As in this case, however, the company asserted that it had no interest in the substance of the previous incidents, but instead offered them to impeach grievant's credibility. Grievant had testified on cross examination that he had never previously been disciplined for threatening a foreman. Though he initially admitted the evidence for that limited purpose, the arbitrator subsequently changed his mind. In construing exactly the same language at issue here, Arbitrator Rakas noted that he had originally taken the evidence but:

Upon further reflection and consultation with the Chairman [Sylvester Garrett], however, it is now apparent that such an effort to inject stale discipline into the record here contravenes the prohibition set forth in [the agreement].

The arbitrator concluded that the grievance had to be sustained without consideration of the merits and without a credibility exception to the contract language: "To rule otherwise would permit, by indirection, evisceration of the policy of this provision."

There are also other awards reaching an equally strict result. For example, in USS-6610-S the Board of Arbitration described the contract provision as "quite broad" and said that when management had injected stale discipline into a case, the grievance had to be sustained without consideration of the merits. In addition, the union cited a case from the can industry, Continental Can Co., Inc., Case No. CBM-37 (McDermott, 1979), where arbitrator Clare McDermott, a former permanent arbitrator for these parties, strictly construed similar language. McDermott said that the parties' intent in negotiating the provision was clear: "They did not want the arbitrator to be influenced by what they considered to be stale disciplinary offenses. . . ." The only "practical way" to enforce that proscription, McDermott held, was to automatically sustain a grievance on the company's "mere mention" of stale discipline.

It is not clear that all of the steel industry has reacted accordingly to the "mere mention" of stale discipline. See e.g., USS-11390 and USS-11759. Nevertheless, the matter at issue in this case involves more than a "mere mention." Though it is true that one bit of evidence protested by the union was simply a listing of some stale discipline in the minutes from a record review, there is a more serious issue here. In addition to the record review minutes, the company also introduced two previous arbitration awards involving grievant, each of which was more than five years old. Although I agree, in general, with the company's assertion that previous arbitration awards can typically be used, it is important to note here that the company did not cite these awards for any relevant principle of contract construction. The sole motivation was to attack grievant's credibility in a stale disciplinary proceeding. Thus, it is clear that the company did "make use" of the prior disciplinary action, as those terms are employed in mp 8.5.

In the ordinary case, I am satisfied that such use would be improper and could result in the same action the USS-USWA Board of Arbitration has taken in similar cases. This, however, is not an ordinary case. The fact is that I issued both of the previous arbitration awards. Moreover -- and this is a matter of great significance -- I remembered grievant and the general circumstances surrounding each case, including my professed doubts about his credibility.

As I understand mp 8.5, the parties sought to protect two interests. First, they wanted to insure that there was a limit on the extent to which the company could rely on previous discipline. There is no evidence here, however, that the company breached that obligation. The only evidence discussed by the company's witnesses (who made the decision to discharge grievant) related to incidents that occurred within the five year window. No one mentioned the stale arbitration cases as a reason justifying grievant's discharge. The company, however, did refer to them in final argument for purposes of a credibility argument. That raises the second interest protected by mp 8.5. As McDermott observed in Continental Can, the parties wanted to insure that the arbitrator was not influenced by mention of stale discipline.

I agree with the USS-USWA Board's opinion that previous discipline cannot be entered through the back door of a credibility argument. Here, however, I find it inappropriate to summarily sustain the grievance, as the Board did in USS-13,653. Unlike the arbitrator in that case, I already knew about grievant's previous discipline; I wrote the arbitration awards that reinstated him, converting the discharges to disciplinary suspensions. That is not to say that it is always appropriate for the company to refer to stale discipline when more than one case is tried before the same arbitrator. I have heard discharge cases that I do not remember and I have not retained the name of many of the grievants who have appeared before me. But that was not true here. Grievant is the only employee I have ever reinstated twice. Probably for that reason, I recognized his name immediately when I read the third step minutes in preparation for this case. I do not mean to suggest that the company is privileged to use stale discipline in such a case. But its violation of mp 8.5 did not prejudice the grievant in this case and did not contravene the policies of that section. Therefore, I decline to sustain the grievance solely as a result of the use of the two previous arbitration awards.

b. The Merits

I was not impressed by grievant's excuse for failing to return from vacation on March 4 and for his subsequent delay in attempting to verify the reason for his absence. It may be that grievant actually has some psychiatric problems. He submitted a doctor's note indicating that he had been diagnosed with depression, and I have no reason to question that conclusion. But it is also true that the note offers nothing other than a diagnosis, that it is silent about the effect this condition might have had on grievant's ability to work, and that it does not even indicate when the condition may have begun. The only such information came from grievant, and his testimony was not credible.

Grievant initially reported off in January, and subsequently asked for three weeks of emergency vacation because, he said, his back hurt. He stayed with this story on cross examination, though he said that, even though it had troubled him through four weeks of vacation, he sought no medical attention. And, when he talked to Vega on the telephone on March 4 (as I find he did), he responded to her request for verification of his condition by saying that his doctor had left town with his medical records. Whether this is true or not, the important fact is that grievant admitted he was speaking about the doctor who treated his back. In short, as of March 4, grievant was still claiming to have back problems and he said nothing to anyone about any other problems.<FN 1> Nor did he do anything to justify his absence. It is important to note that this is not merely a case in which grievant returned from an unexplained absence and then delayed explaining his whereabouts; here, grievant did not come back and, after March 4, he did nothing to tell the company where he was, why he had not returned, or when he might reappear.

Grievant did respond to the seven day letter, though he waited until the seventh day and then reported to the clinic after first calling and being told that it was after hours and there was no one there to see him. Even

then, however, as well as the next day when he returned, grievant had done nothing to verify the reason his absence, as the letter instructed him to do. It is true, as Mr. Mezo claimed, that Vega did not tell grievant expressly that failure to justify his absence by going to the clinic could lead to discharge. But I find that requirement inapposite in this case. This grievance is not about insubordination. Rather, it concerns grievant's failure to return to work in a timely fashion and his failure or refusal to justify an extended absence. An employee doesn't have to be "warned" to appreciate that such conduct might jeopardize his employment. That is especially true with this grievant, who had been through three separate record reviews in the previous two years and who had been told each time that his job was in jeopardy.

I do not mean to suggest that grievant experienced no emotional problems. There was evidence that he saw John Bean, the director of the Employee Assistance Program, in late February and told him that he was having some family problems. Grievant also saw Bean in Late March, when it was becoming clear to him that he was in trouble.<FN 2> There was also credible testimony from Griever Robert Guevara, who said that grievant experienced stress because of difficulties both on and off the job. But grievant never sought help for this condition until late March, when his unauthorized absence had continued for more than three weeks. Moreover, grievant only saw the psychiatrist twice, both times in early April. He testified that he did not go back after that because he had lost his benefits when he was discharged. But that wasn't true. Grievant continued to work under the Justice and Dignity provisions of the agreement until June 26 and was covered by medical insurance and by the EAP until that time.

Grievant's failure to seek help in a prompt manner and the limited amount of treatment he sought convince me that his emotional condition was not serious enough to justify his absence. I understand the union's claim that employees with psychiatric conditions might not always act in their best interest. But there is a limit to that argument. It does not make sense to hold that employees can always protect themselves by claiming after-the-fact that their failure to seek help was even more evidence of their fragile emotional condition. At least in cases like this one, where the employee's claim is suspect, it is not too much to expect that the employee will haver done something to seek treatment prior to the time his employment is placed in jeopardy.<FN 3>

The union says, however, that even if grievant's conduct deserved discipline, there was no warrant for discharge because the culminating incident was not sufficiently related to grievant's other disciplinary problems. The union cites Seitz' oft quoted "last straw" analogy in support of grievant's claim. Despite the union's reading, however, I do not interpret Seitz' statement in that case to mean that an employee is entitled to a separate disciplinary chain for each conceivable type of misconduct. Indeed, I have considerable question about whether Seitz even thought the camel was overburdened, since he found that neither the employee's absenteeism record nor his FRO record would justify a discharge, and that there were extenuating circumstances that made the last FRO not "entirely and utterly inexcusable," circumstances that clearly do not exist here.

I think it is improper to read Seitz' comments to mean that different categories of offenses can never be taken into account. At base, the dilemma addressed by Seitz was whether grievant has previously been disciplined for offenses of the same character, or, as Seitz put it, offenses that are "related" to one another. In that way, there is some basis for predicting whether the employee is actually influenced by the corrective effects of progressive discipline. The more disparate the offenses, the less useful such an inquiry might be. There are different offenses, however, that bear some relationship to each other.

I agree with the union's claim that the company cannot use a bad personnel record to convert a garden variety absence into a dischargeable offense, when the attendance program itself would not do so. But, as I have already explained, I have difficulty seeing this as a garden variety absence. For the previous five years, grievant has been disciplined repeatedly for poor work performance. Indeed, his work was so bad that he was reinstated to his job only with the understanding that he take a demotion and that get out of the department within a year.<FN 4> He had also been disciplined for insubordination and for falsification, both of which were related to a lax attitude toward his job. And he had been warned of his perilous situation in three record reviews over a two year period.

In this context, I cannot find that the company was required to view the culminating incident in isolation or as just another absence. Grievant's work history had been marked by carelessness and indifference. Then, on March 4, 1997, he failed to return from vacation and only belatedly took action to explain his whereabouts. This is, I find, conduct that was related to his previous disciplinary history. Because I believe that both the disciplinary history and the culminating incident can be considered by the company, I conclude that the company had just cause to discharge grievant and I will deny the grievance.

AWARD

The grievance is denied.
/s/ Terry A. Bethel
Terry A. Bethel
December 7, 1997
<FN 1>Grievant testified, unconvincingly, that he never told Vega he had back problems, but only that he was "sick." Of course, the doctor who allegedly left town -- which is supposedly the reason he had no medical verification -- was the one who treated his back. Moreover, even if grievant suffered from some other ailment, Vega had a right to require that grievant justify his absence.
<FN 2>I did not believe grievant's claim that Bean merely told him to go back to work and that everything would be all right. Bean denied having said that and his testimony was more credible.
<FN 3>I recognize that I have sometimes given credence to after-the-fact claims of alcohol or drug abuse. However, in such cases, the employee has typically been able to establish a pattern of abuse prior to the discharge.
<FN 4>Grievant says the demotion was his idea, a contention questioned by management. But it doesn't matter whose idea it was. The fact is that grievant's work had been so bad that the company would take him back only if he was demoted and promised to look for a job elsewhere.