Award No. 932
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEEL WORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
November 25, 1997
OPINION AND AWARD
Introduction
This case concerns the discharge of grievant Armando Escobedo for allegedly violating his last chance agreement. 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
For the union:
M. Mezo -- President, Local 1010
A. Jacque -- Chrm., Grievance Comm.
D. Shattuck -- Secy., Grievance Comm.
L. Aguilar -- V. Chrm., Grievance Comm.
J. Cadwalader -- EAP
A. Escobedo -- Grievant
R. Jurich -- Griever
Background
Grievant was originally suspended preliminary to discharge on April 14, 1997, for absenteeism. Grievant alleged that his absenteeism was the result of alcoholism and, on June 18, 1997, the company, the union and grievant agreed to grievant's reinstatement pursuant to a last chance agreement, pertinent provisions of which read as follows:
3. Mr. Escobedo will not use or permit himself to be exposed to any mood altering substances (alcohol, illicit drugs, or any drug not prescribed by a physician). The detection of the aforementioned substances, regardless of the amount, will be grounds for immediate suspension preliminary to discharge.
4. During a 2 (two) year period following Mr. Escobedo's return to work . . . the company may test him at any time for the presence of mood altering substances as indicated in item 3. above. . . .
12. This arrangement represents a final chance at employment for Mr. Escobedo. Failure to meet any of the conditions set forth above . . . or any violation of any rule or regulation may be cause for immediate suspension of Mr. Escobedo subject to discharge. (Emphasis in the original)
There is no dispute that, on July 18, 1997, grievant tested positive for marijuana in connection with a random drug test administered pursuant to the above agreement. On July 22, 1997, the company notified grievant that he was being suspended for five days preliminary to discharge and, on August 7, 1997, informed him that the suspension had been converted to discharge. It was the grievance over that action that led to this arbitration.
The company says the case is straightforward: grievant agreed in his last chance agreement that he had been suspended for cause and he was able to gain reinstatement only by agreeing to several conditions. Paragraph 3 of the agreement says expressly that grievant would not use any illicit drugs and that he could be discharged for a failure to abide by the conditions of the agreement. The positive drug test, the company says, is ample evidence that grievant used marijuana after agreeing that he would abstain. Since this is a clear violation of the terms of the agreement, the company says that I have no choice but to uphold the discharge and deny the grievance.
The union does not deny that grievant tested positive for marijuana. However, the union says that the positive drug test does not establish that grievant smoked marijuana after he signed the last chance

agreement. The union submitted an excerpt from a book about drug testing<FN 1> which says "heavy, chronic marijuana users" can test positive consistently for nearly seven weeks from their last use of the drug, though the average is only four weeks. The same book says that "it can take as long as eleven weeks for the test to drop below the cutoff" and that some people can have negative tests followed by positive tests, even though they have not used the drug in the interim.

Grievant denied that he had used marijuana after he signed the last chance agreement. In fact, grievant said that he did not use marijuana after May 15, 1997, which was about two months prior to his positive test. At the third step hearing, grievant said that he was formerly a heavy user, but that he began tapering off in April, 1997 and that his only use in May was to smoke "part of a joint" two or three times a week to help him sleep.

The union says that grievant's positive drug test on July 18 was the result of his drug use prior to signing the last chance agreement on June 18. The union also points to the fact that there is at least some history of base line testing employees for drugs or alcohol prior to reinstating them. Had that been done here, the union says, grievant's test would have been positive and he would not have been allowed to return to work until his urine sample was free of marijuana metabolites. Although the union says that the last chance agreement system typically works, it failed in this case and grievant should not suffer for the parties' failure to give him a base line test. The union also points out that, other than the drug test, the company has no evidence that grievant violated his last chance agreement by using drugs.

Discussion

It is true that the company has no evidence of drug use other than the positive marijuana test of July 18, 1997. However, in most cases, it is not reasonable to believe that the company could have such evidence. There was no allegation here that grievant used marijuana at work, where one of his supervisors might have observed him. And there was no reason to suspect that the company would shadow grievant's movements away from work. The company's principal method of detecting improper drug use was the random testing process that grievant agreed to as part of his last chance agreement. Absent problems with the test itself, it is not unreasonable for the company to rely on the test results. That does not necessarily mean that the test is conclusive on the issue. But it does shift to the grievant the obligation of explaining the positive test.

In this case, the union and the grievant proffered two related explanations. First, they say that grievant has not used drugs since before June 18, 1997 and that the positive test is a result of heavy, prior use; second, they say that this fact would have been clear to the company if it had ordered grievant to take a base line test, as it has done in other cases. However, despite the union's argument, there is no evidence that the company has used base line testing on a frequent basis, at least in recent years. The union produced an affidavit from Staff Representative Jim Robinson, who referred to a case that he settled with a former Inland employee in 1991 or earlier<FN 2> by agreeing to test the employee to establish a base line. The affidavit then relates Robinson's understanding that this became the "standard approach" to employees with a history of drug problems.

Two witnesses supported Robinson's affidavit. Alexander Jacque said that employees are "typically" tested before they return to work in order to establish a base line and he named five employees who, he believed, had been base line tested. Jerry Cadwalader testified that base line tests happened frequently when the company started reinstating employees with a history of drug use "eight or nine years ago." However, he said the number of such tests has decreased in recent years.

Cadwalader's memory seems to be accurate. Thus, the company's Coordinator of the Employee Assistance Program, John Bean, testified that he reviewed the records of 20 employees now on last chance agreements and that only four of them were base line tested. In addition, he said that only one of the five employees mentioned by Jacque had been base line tested. Bean also testified that there was nothing in grievant's background that the company knew of which would have identified him as a candidate for a base line test. Although grievant testified that he once told a counselor prior to his reinstatement that he was using marijuana, the company offered documentary evidence which questioned that assertion.

Company Exhibit 1 is a series of attendance records from monthly counseling sessions held with individuals who have already completed the three month intensive portion of the rehabilitation program. Bean said that at the beginning of each session, the employees is asked "how long have you been clean and sober." On June 6, 1997, twelve days before grievant signed his last chance agreement, grievant reported that he had been clean and sober for three months. This was grievant's first such monthly counseling session, since he had just completed the intensive portion of the program. Thus, he had been in the program for three months and he said that he had been clean and sober for three months. On July 3, 1997, fifteen days before his positive drug test, grievant said that he had been clean and sober for four months. During

his testimony, grievant acknowledged that he knew the meaning of clean and sober. Obviously, the claims he made at these times differed from his claim at the hearing that he had not only been using marijuana until mid May, but that he had reported that fact to a counselor.<FN 3>

Bean also relied on other evidence to justify the company's decision not to base line test grievant. Union Exhibit 1 is a "Substance Abuse Subtle Screening Inventory" which was given to grievant on March 21, 1997, during the intensive part of his recovery program. The inventory asks various questions about drug and alcohol use and then translates the results into the likelihood that the person taking the test was chemically dependent. Grievant was literally off the chart on the alcohol portion of the Profile, which identified him as alcohol dependent, something grievant acknowledged when he entered the recovery program. However, his answers to the drug questions placed him significantly below the level which would indicate drug dependency. Bean said that these test results, combined with grievant's "cooperative and compliant" attitude in the program and his "clean and sober" responses in follow-up counseling were the reasons the company did not give him a base line test. There was no evidence that grievant used marijuana and there was no reason to think that it was necessary to establish a base line.

I credited the company's testimony that, though not rare, base line testing is not ordinarily performed and that it is only done when circumstances indicate a need for it. The bulk of the evidence about grievant's prior drug use amply justified the company's determination that no such test was needed for grievant. His Profile indicated no particular problem (though it did, as the union points out, indicate that grievant had used drugs) and his answers in the counseling sessions reinforced this perception.

I have difficulty believing grievant's claim that he told a counselor that he was using drugs. In the first place, there is no such notation in the attendance sheets where notes concerning performance were kept. Moreover, it seems unlikely that the company would have offered grievant a last chance agreement if it knew he had been using marijuana. Both sides elicited testimony that alcohol problems often indicate a problem with some other substance, as well. If, as grievant claims, he substituted a marijuana problem for an alcohol problem, the company would have been alert for any such signs.

My views about the credibility of grievant's testimony also influence my finding that he made no such admission to a counselor. Grievant's story about his marijuana use does not ring true. Grievant tested at twice the cut off level for a positive test (30 ng/ml). I understand the union's exhibit which says that employees can test positive for nearly seven weeks and, occasionally, longer. I do not, however, find it persuasive. In the first place, the book itself says this is true for "heavy, chronic marijuana smokers." Grievant claims that he was a heavy user in March, 1997, but that he had tapered off during April. According to his own testimony, he was not a heavy or chronic user in May, since he smoked only about half a joint two or three times per week. And, he says, he quit entirely in mid May, two months before the drug test. Nothing in the union's evidence convinces me that such a usage pattern would result in a positive drug test.

The more reasonable explanation for the positive test is that grievant smoked marijuana after he signed the last chance agreement. There is no direct evidence that he did so, though I note a curious inconsistency in the interview notes from grievant's monthly counseling sessions. The June 6 meeting was exactly three months after grievant entered the recovery program and he claimed to have been clean and sober for three months. The next month, July 1997, he claimed four months sobriety. But in August, 1997, after his discharge, grievant said he had been clean and sober for only three months. This suggests that he may have used drugs in June, which would be consistent with the results of the drug test.

In any event, it is not necessary to determine exactly when grievant's drug use occurred. Following the positive drug test, it was his responsibility to furnish some credible explanation for the results. I reject the union's claim that the positive test was the effect of drug use as early as Mid May, 1997. There is, then, no credible explanation for the positive test, leaving me with no option but to find that grievant used marijuana after he agreed in his last chance agreement that he would not do so. As that agreement provides, such usage is grounds for suspension preliminary to discharge. Grievant testified that he understood this provision of the agreement. Under these circumstances, I must deny the grievance.

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

November 25, 1997

<FN 1>Robert P. DeCrease, et.al, Drug Testing in the Workplace (1989).

<FN 2>That employee, Robert Castle, left Inland in 1991.

<FN 3>The union claims that the answers recorded on the counseling notes may simply have been a response to the question, "How long have you been in the program?" I am satisfied from Bean's testimony, however, that participants, including grievant, were asked, "How long have you been clean and sober?" In addition, I note that grievant's response in August, 1997 was "three months," when he had been in the program for five months. Thus, grievant must have been responding to some question other than, "How long have you been in the program?"