Award No. 788
OPINION AND AWARD
In the Matter of Arbitration Between
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 2-S-43
Appeal No. 1399
Arbitrator: Herbert Fishgold
September 27, 1988
Appearances:
For the Company
T. L. Kinach, Section Manager, Union Relations
R. B. Castle, Section Manager, Union Relations
R. J. Nanney, Investigator, Safety & Protective Services
S. Korthauer, Section Manager, Plant 2 Coke
For the Union
Bill Trella, Int'l Staff Representative
Mike Mezo, President
Jim Robinson, Arbitration Coordinator
Melvin Adams, Griever
Ignacio Aranda, Chairman, Alcohol Drug Committee
Don Lutes, Section Grievance Coordinator
Mike Pezel, Grievant
LuAnne Pezel, Witness
Ernie Barrientez, Griever Steward
Tom Witham, Witness
Tim Wilson, Witness
Dewitt Walton, Witness
Statement of the Grievance: The aggrieved, Michael Pezel, Check No. 23498, contends the action taken by the Company, when on March 3, 1988, his suspension culminated in discharge is unjust and unwarranted in light of the circumstances.
Relief Sought: The aggrieved requests that he be reinstated with all seniority rights. [The original grievance also requested all monies lost, but that request was dropped at arbitration].
Contract provisions cited: The Union cites the Company with alleged violation of Article 3, Section 1. Article 8, Section 1; and Article 14, Section 8 of the Collective Bargaining Agreement.
Statement of the Award: The grievance is sustained. The Grievant shall be reinstated subject to the conditions and limitations set forth in the body of this Award.
CHRONOLOGY
Grievance No. 2-S-43
Grievance filed: March 7, 1988
Step 3 hearing: March 22, 1988
Step 3 minutes: April 25, 1988
Step 4 appeal: April 28, 1988
Step 4 hearing(s): June 28 and July 13, 1988
Step 4 minutes: August 1, 1988
Appeal to Arbitration: August 12, 1988
Arbitration hearing: August 25, 1988
Award issued: September 27, 1988
Facts:
The Grievant, M. Pezel, Check 23498, was hired by the Company on November 8, 1978. The Grievant was established in the No. 2 Coke Plant Department as a Mechanic.
On the 7 a.m. - 3 p.m. shift on Wednesday, January 20, 1988, the Grievant and W. Caldwell were assigned to the mechanical crew in the Coal Handling section of the No. 2 Coke Plant Department by the Hourly Supervisor, J. Michelin. Between noon and 1 p.m., J. Michelin was unable to locate the Grievant. At this

point, Michelin contacted Jim Curto, Supervisor, and both began a search for the Grievant. Curto found the Grievant at approximately 1 p.m. and instructed him to resume working with Caldwell. Michelin noticed, at the end of the day, that the Grievant was not in the coal handling shop. Michelin and Curto again searched for the Grievant and found him in the main mechanical shop standing by the workbench. Curto asked the Grievant where he had been, and the Grievant gave an unintelligible explanation and was also unable to walk properly. The Grievant was then sent to the Medical Department for a Fitness to Work Evaluation. The Grievant's behavior during the evaluation was abnormal and the Grievant failed the breathalyzer test and refused the urine drug screen test. The Grievant was suspended on January 21, 1988 for violation of the General Rules for Safety and Personal Conduct, Rules 127b and d. These rules state that an employee may be disciplined up to and including suspension preliminary to discharge for:

b. Reporting for work under the influence of drugs not prescribed by a licensed physician for personal use while at work; being in possession of, or use of, such drugs while on company property, or bringing such drugs onto company property.

d. Reporting for work under the influence of intoxicating beverages; being in possession of, while on Plant property or bringing onto Plant property intoxicating beverages.

The Grievant was admitted to Victory Memorial Hospital on January 23, 1988 and treated for addiction to alcohol and drugs. During the Grievant's hospitalization, the Company and Union agreed to an extension of the suspension hearing decision time limits. He was discharged from the Hospital on February 20, 1988. When he was released from the hospital, the Grievant requested a suspension, hearing, which was held on February 25, 1988. At this hearing, the Grievant admitted that, on the night prior to the January 20 turn, he consumed approximately one pint of vodka, six to eight beers and two joints of marijuana. The Grievant also admitted that during the January 20 turn, he consumed vodka while on Company property. The Grievant stated that he had blanked out during the turn and could not recall it entirely.

The Grievant acknowledged that he had been warned that his refusal to submit to the urine test resulted in the presumption that he had failed the test. However, the Grievant stated that he had undergone similar testing in the military and therefore knew he would fail and thus refused.

On March 3, 1988, the Grievant was discharged for the above-quoted rule violations. The instant grievance was filed on March 7, 1988 challenging the discharge action.

Issue:

The issue in this case is whether the Grievant's post suspension/discharge rehabilitation complied with Article 14, Section 8 of the Collective Bargaining Agreement mitigates the Company's discharge action.

Discussion:

The facts in this case are not in dispute. At both the suspension and the Step 3 Hearing, the Grievant admitted that he had consumed an excessive amount of alcohol and marijuana the evening before his shift, and that he had also consumed alcohol during his scheduled shift. The Company argues that its policy with respect to an employee who reports to work impaired has been consistently applied, particularly in cases where the use of drugs is involved. According to the Company, when an employee is under the influence of unprescribed drugs or alcohol during work, safety of both the employee and fellow workers has been seriously compromised.

Since there is no dispute between the parties that just cause otherwise existed for the Grievant's discharge, the sole issue in this case is whether the Company is required to reinstate the Grievant based upon the evidence presented by the Union both at the Step 3, Step 4 Hearings, and at the Arbitration hearing, that the Grievant has successfully rehabilitated himself. In this regard, the Company argues that there is no obligation to look to mitigating factors, including rehabilitation, when the employee's admission of alcohol and drug dependency occurs after discipline has been imposed.

On the other hand, the Union argues that, in light of the overall factors and circumstances at the time of the discharge, the Grievant should be given another chance. According to the Union, the Grievant has worked for nine years with the Company and, during that time, his work has been satisfactory. Moreover, according to the Union, Grievant did not cause damage to Company property or injury to himself or others on the date in question.

Article 14, Section 8 of the Collective Bargaining Agreement states:

Alcoholism and drug abuse are recognized by the parties to be treatable conditions. Without detracting from the existing rights and obligations of the parties recognized in other provisions of this Agreement, the Company and the Union agree to cooperate at the plant level in encouraging employees afflicted with alcoholism or drug abuse to undergo a coordinated program directed to the objective of their rehabilitation.

While the above provision does not abrogate the Company's right to dismiss for just cause, this provision does clearly indicate an intent by the parties to cooperate in assisting employees who abuse alcohol and drugs. Moreover, this provision does not make a distinction in terms of whether the Company's discovery of such abuse occurs prior to or after discipline is imposed. Therefore, the mere fact that the Grievant did not come forward admit to his problem beforehand does not ipso facto excuse the parties from cooperating to assist the Grievant. Indeed, as noted in an early case involving alcohol abuse, USS-8277 (Kerimar/Garrett 1971), "Every case of this sort turns on those facts peculiar to it."

Thus, the critical question here is whether, under the intent of Article 14, Section 8, the evidence of this case reveals a case of affliction of alcoholism/drug abuse with full potential for rehabilitation warranting the cooperative effort set forth in the Agreement, or whether, by timing or circumstances, the Grievant here seeks to take refuge from an otherwise justifiable discharge action of management. Arbitration precedent in the steel industry clearly preserves the right to discipline and discharge against the use of Article 14, Section 8, merely as an escape from warranted discipline.

The Arbitrator turns first to Pezel's substance abuse problem. Based on the record presented, it appears that his problem with marijuana was directly related to and a result of his problem with alcohol abuse. He testified that he was an alcoholic who also used marijuana. Similarly, other Union witnesses who were recovering alcoholics also testified that that was often the case with alcoholics. Further, it has been recognized that multiple addiction is often a problem from individuals with alcohol problems. Finally, it is clear that Pezel would not have been discharged if he had voluntarily sought assistance from the Company prior to the January 20 incident.

Arbitrators generally agree that alcoholism and possibly off-premises drug abuse, in and of itself is not a sufficient reason for an employer to discharge an employee. The critical question of whether the employee should be allowed to participate in an EAP and return to work or simply remain terminated arises after the employee has engaged in conduct that constitutes a dischargeable offense. As a general rule, employers who have EAPs must give alcohol- or drug-dependent employees the opportunity to undergo rehabilitation before discharging them. Moreover, consistency in the treatment of employees suffering from alcohol or drug abuse is also considered to be important.

In the instant case, the record shows that the Company treats alcohol and drug abuse differently. It was acknowledged that any trace of drugs as a result of testing, results in immediate termination, whereas any trace of alcohol as a result of testing does not result in automatic firing. In this regard, the Company has put back alcoholics (no drug involved), who have rehabilitated their lives, on "last chance" agreements. In support of that position, the Company notes that drugs are illegal and that it is more difficult to determine whether an employee is under the influence of drugs. Moreover, the Company contends that prior Inland Awards, support this position.

In addressing disparate treatment for alcohol as opposed to drug abuse, Arbitrator Seidman, in Mallinckrodt, Inc., 80 LA 1261, 1265-1267, observed, inter alia:

Alcoholism in industry, and as a social problem, is far more debilitating, costly, and destructive than marijuana. There is no rational or reasonable basis to treat them as distinct. Therefore to treat alcohol abuse with progressive discipline and treat drug abuse with immediate discharge is improper.

Moreover, contrary to the Company's argument, the Inland Awards cited do not, under the circumstances presented in the instant case, compel a different conclusion. All of the cases cited - Award Nos. 635, 641, 696 and 737 - involved the possession and/or use of drugs (marijuana) on Company premises, a fact not present in the case at hand. In that regard, Arbitrator Lushin clearly held, in both Award Nos. 641 and 737 that:

Article 14, Section 8 cannot serve to provide an employee with immunity from discharge for the breach of a rule against bringing drugs into the plant or using drugs in the plant.

. . . the Company had every right . . . to invoke its rule against possession or use of marijuana on plant premises and to terminate the employee from employment without being required as a condition precedent to termination to offer the employee the opportunity to undergo a coordinated program directed to the objective of his rehabilitation. [Emphasis added].

However, in these same Awards, Arbitrator Lushin noted that, in all other regards, alcohol and drug addiction were to be accorded the same treatment. Thus, in Award No. 641, he went on to note that "any employee who may have become addicted to drugs would be entitled to the same type of treatment under a coordinated program as would employees who had become alcoholics." He further clarified this view by noting that the introduction of the words "or drug abuse" to Section 8 "does not place employees who may have an addiction to a narcotic in a special category." Finally, he went on to indicate that the Company's

own actions recognized this, in that the Company's Medical Director testified that Inland's programs for alcoholism and for drug abuse are identical.

Herein, the Company imposed a period of suspension prior to discharge. Following the hearing of February 25, which occurred after Pezel's release from the in-patient treatment program, the Company noted that "An investigation . . . failed to disclose any circumstances that would justify our altering the decision of the department manager in this matter." Thus, it is apparent that the Company failed to give any consideration to the Grievant's rehabilitative efforts, prior to the effective date of the decision to discharge.

As cited in Denenberg and Denenberg, Alcohol and Drugs: Issues in the workplace, BNA, 1983, Arbitrator Markowitz, in an unpublished opinion, specifically addresses the effect of such an omission as warranting overturning a discharge:

The inclusion of a suspension period pending discharge is not unusual in labor-management contracts and often is used as cooling-off period to head off precipitous supervisors' judgments . . . [A]n admission of alcoholism by an employee often comes after the highly traumatic [experience] of actual or threatened discharge from employment. When such admission occurs prior to the termination and especially, when accompanied by solid rehabilitative efforts, it imposes a duty on management to . . . investigate . . . the genuineness of the Grievant's condition and his attempts to become rehabilitated. [Emphasis added].

As noted earlier, the Grievant has worked for nine years with the Company and, during that time, his work has been satisfactory, and he has experienced no attendance or attitude problems. Moreover, on the day in question, January 20, he reported for work in time, received his work assignment, and subsequently was seen by his supervisors at mid-day without any indication of any problem being mentioned about his ability to continue working. Moreover, based upon both the breathalyzer test on January 20 and his testimony at the February 25 discharge meeting, there is no indication that he possessed and/or used marijuana on Company premises.

Finally, probably the most important consideration in the instant matter is the Arbitrator's perception of Pezel's sincerity in seeking help for his problem. In those arbitration cases in which an employee was reinstated, the Arbitrators seemed to be impressed with the employee's efforts to obtain professional help, even when those efforts came at the point of discharge. Herein, the record demonstrates that immediately after the incident on January 20 and his suspension on January 21, Grievant recognized that his drinking required attention. On January 23 he checked himself into the hospital for rehabilitative treatment, and completed the in-patient program on February 20. In addition, Grievant has presented the Company with documentation regarding his frequent and continuing attendance at AA and NA meetings since his release from the hospital, which indicates attending three-four meetings a week. He further stated that he will do everything the Company requires in order to gain his reinstatement. He indicated that if this requires additional out-patient or in-patient treatment he would be willing to participate in such treatment. He intends to stay in AA and NA programs in which he is enrolled in the Inland program if reinstated. Finally, for the record presented, it appears that the Grievant has not had a drink or smoked marijuana since January 23, 1988, and according to the testimony of his sponsor at AA, his prognosis for recovery is very good.

A review of recent arbitration cases and literature points out that where employees have undertaken a rehabilitative approach, arbitrators have refused to sustain discharges where the employee has shown potential for rehabilitation. As Arbitrator McDermitt stated in St. Joe Mineral Corp., 73 LA 1193 (1979),

It [EAP] does not amend the Company's right to discipline employees, but where one objective of such a program is to seek to bring about the rehabilitation of such an employee, so that he can again become a reliable and productive person, the intent of such contract language is that consideration should be given to an employee, who seeks help under the program. As such, when an employe in such a program, be is entitled to be given a chance at rehabilitation, and that opportunity becomes a mitigating factor in the determination of the disciplined penalty to be assessed. Id. at 1196.

Denenberg and Denenberg, in Alcohol and Drugs: Issues in the workplace, BNA, 1983, recognized the implications of determining reinstatement for an employee who has or had a substance abuse problem:

What this means for the arbitrator is that a 'second chance,' to be effective ought to be viewed as part of the therapeutic crises in which the Grievant is lead to accept a treatment as the price of reinstatement. The alternative often is merely a grim series of arbitrations, extending over many years, in which the employee is reinstated several times before he is confronted with the hard choice of making progress toward recovery or loss of his job. Id. at 7.

In reviewing the Denenbergs' treatise, as well as published arbitration awards, the Arbitrator notes that an often cited remedy centers on conditional reinstatement where the Grievant maintains participation in a program acceptable to the Company. In General Dynamics Pomona Division, 79 LA 182 (Rule 1982), an

employee who had been discharged previously for alcohol related absenteeism was reinstated on the condition that he improve his attendance and sobriety together with the condition that he seek professional help for his alcoholism. Similarly, in Dahlstrom Mfg. Co., Inc., 78 LA 302 (Gootnick 1982), an employee had been discharged for alcoholism, but was returned to work, and given another "last chance" with probation, before being discharged again for conduct relating to alcoholism.

Indeed, arbitrators and employers are not the only ones concerned with conditional reinstatement. In Western Gear Corp., 74 LA 641, 647 (Sabo 1980), the arbitrator noted.

The Union is mindful of the need in cases involving alcoholism to ensure that conditions are attached to reinstatement to ensure not only that the employee pursues effective rehabilitation but also that the Company receives effective work on basis of regular attendance from the reinstated employee.

In light of all of the above, while the Grievant must bear much of the responsibility, the Arbitrator must conclude that just cause was lacking for the Company to discharge the Grievant without having first offered him an opportunity to demonstrate that he is rehabilitated or to afford him the opportunity to participate in a program designed, pursuant to Article 14, Section 8, to assist the Grievant in his rehabilitation.

The only remaining issue is what should be the appropriate remedy in the instant case. First, it is clear that the Grievant's misconduct is sufficiently serious so that it is reasonable to impose certain preconditions to the Grievant's reinstatement. Prior practice of the case of "last chance" agreements involving alcoholics returned to work indicates that the parties agreed to the use of innovative remedies to which should also be imposed here. Furthermore, from a review of other arbitration cases, it is also clear that this Arbitrator has the authority to impose conditions to reinstatement, and that reinstatement may be conditioned on further or more intensified rehabilitation, including rehabilitation directed to drugs as well as alcohol, or on participation in the Company's EAP. See, e.g. Merced Irrigation District, 86 LA 851, 854 (1986, Riker); Allegheny Ludlum Steel Corp., 84 LA 476, 480 (1985 Alexander); Caterpillar Tractor Co., 81 LA 1165, 1169 (1983, Traynor).

Based on all of the above, the Arbitrator concludes that the Grievant should be reinstated under the following terms and conditions.

The first set of conditions concern the continuing rehabilitation of the Grievant for his alcohol and substance abuse problems:

1. Prior to his return to work, the Grievant will be given a complete psychological evaluation by an appropriate professional of the Company's choice, which will include objective testing and indicate any necessary long-term treatment objectives. The Grievant must comply with all treatment recommendations and provide documentation on a quarterly basis to the Inland Medical Department attesting to his compliance with the treatment program. This evaluation will be scheduled as soon as possible but no later than within three (3) weeks of the date this Award is signed.
2. The Grievant will enroll and participate in the Company's Alcohol and Drug Program. A failure to comply with any course of recommended treatment under the Company's Alcohol and Drug Program will be cause for immediate suspension preliminary to discharge.
3. For a period of two (2) years following his return to work, the Grievant will maintain contact with the Union Alcohol and Drug Committee, a minimum of once per week.
4. The Grievant will not use alcohol or use or permit himself to be exposed to any illicit drugs or drugs not prescribed by a licensed physician. Detection of any of the aforementioned substances, regardless of the amount, will be grounds for immediate suspension preliminary to discharge.
5. For a period of two (2) years following his return to work, the Company may test the Grievant at any time for the presence of any mood altering substances. Testing may be by drawn blood, breath or urine testing.
6. As part of his rehabilitation treatment, the Grievant shall continue to attend AA meetings, and proof of attendance shall be submitted to the Company.
7. Any violation of the terms and conditions of the above-described treatment program may form the basis for immediate discharge, for which the Grievant may grieve only the issue of unjust application of the terms and conditions.
8. The Company must cooperate in the Grievant's efforts to complete rehabilitation. The Company shall not disclose Grievant's medical information to non-medical personnel within the Company except as necessary in order to cooperate with the Grievant's rehabilitation.

Having so conditioned Grievant's reinstatement on his continuing practice in an out-patient substance abuse treatment program, as detailed above, the Arbitrator next turns to the question of appropriate discipline and the Grievant's job and pay status.

The Company expressed its concern that to allow Pezel to return to work would not only gut the disciplinary policy of the Company, but would also remove a real incentive for any employee to seek the Company's assistance, and would encourage drug trafficking and theft. The Arbitrator appreciates this expressed concern and, having addressed the particular circumstances presented by the instant grievance, directs that dispositions of this case shall be non-precedent-setting. As Arbitrator Kupsinel stated in KLM Royal Dutch Airlines, 66 LA 547, 553 (1975), "[t]o allay the Company's fears that reinstatement of this Grievant will signal other employees that they need not worry about the possession of marijuana, we wish to emphasize that this award is limited to this Grievant, at this time and under the circumstances of this case."

Having so conditioned Grievant's reinstatement on his continuing participation in an after-care rehabilitation treatment program, the Arbitrator next turns to the question of Grievant's job status. As noted earlier, the Grievant was established in the No. 2 Coke Plant Department as a Mechanic prior to his discharge. This job entails working with heavy machinery, often at various heights above thee shop floor. The Company has expressed its reluctance to put Grievant back on that job in the absence of the Grievant adequately demonstrating that he has his substance abuse problem sufficiently under control. The Arbitrator agrees, and accordingly sets forth the following set of conditions in this regard:

1. Before returning to work, the Grievant will undergo a psychological evaluation to determine whether he should return to his prior occupation as Mechanic, or whether another occupation, consistent with his seniority rights under the Agreement, is more appropriate.

2. In the event that, pursuant to paragraph no. 1 above, Grievant is not initially returned to the Mechanic occupation in the No. 2 Coke Plant Department, upon expiration of one (1) year, the Grievant will be reevaluated to determine whether he should be given the opportunity to return to the Mechanic position. At whatever time, if any, that the Grievant is placed in the Mechanic occupation, the Grievant must requalify at each job level and then work for a minimum of six (6) months at that job level before he can promote to the next job level consistent with his seniority. Should the Grievant be unable to qualify at any job level in the Mechanic occupation, his status will be determined by application of the relevant provisions of the Collective Bargaining Agreement.

3. Prior to resuming work, the Grievant will meet with his department manager or his designated representative and his union representative, at which time his record will be reviewed and his duties and obligations as an employee of Inland Steel outlined.

Inasmuch as the Union, at the arbitration hearing, dropped any request for monies lost, the Arbitrator need not address the question of how the time between Grievant's discharge and reinstatement is to he treated for purposes of pay. However, notwithstanding that, Grievant should suffer no loss of seniority or other benefits attaching to his employment.

It should further be understood that this conditional reinstatement represents a final chance at employment. The Grievant's failure to meet any of the conditions set forth in this Award or any repetition of the conduct which led to the suspension and discharge will be cause for his immediate suspension preliminary to discharge.

The Arbitrator shall retain jurisdiction to clarify any questions concerning the implementation of the conditions for reinstatement.

AWARD

For the reasons set forth above, and to the extent so noted, the grievance is sustained. The Grievant shall be reinstated subject to the conditions and limitations set forth in the body of the Award.

/s/ Herbert Fishgold
Herbert Fishgold
Arbitrator
Washington, D.C.
September 27, 1988