Arbitration Award No. 796
IN THE MATTER OF ARBITRATION
Between
INLAND STEEL COMPANY
Indiana Harbor Works
and
UNITED STEELWORKERS OF AMERICA
Local Union No. 1010
Grievance No. 20-S-51
Arbitrator: Clare B. McDermott
Opinion and Award
February 2, 1989
Subject: Untimely Filing of Grievance.
Statement of the Grievance: "Management violated the C.B.A. when it disciplined the grievant with a loss of 14% workdays, for the alleged violation of rule 127-J of the General Rules of Safety and Personal Conduct.
"…
"Pay all monies lost due to the violation and apologize to the grievant for calling him a 'X?l*ing liar'. Remove all letters pertaining to this grievance from the grievants personnel file."
Agreement Provisions Involved: Articles 6, Section 4, and 8, Section 1, of the August 1, 1986 Agreement.
Statement of the Award: The grievance is dismissed as untimely.
Chronology
Grievance Filed: 12-1-87
Step 3 Hearing: 1-19-88
Step 3 Minutes: 2-4-88
Step 4 Appeal: 2-15-88
Step 4 Hearings: 10-7-88, 11-11-88
Appealed to Arbitration: 12-22-88
Arbitration Hearing: 1-18-89
Appearances
Company
Robert B. Castle, Section Manager, Union Relations
Rene Vela, Section Manager, Union Relations
Union
Mike Mezo, President
J. Robinson, Arb. Coordinator
L. Aguilar, Griever
R. Daniel
K. Lidster
BACKGROUND
On October 2, 1987 grievant was notified by certified mail, return receipt requested, that he was suspended for five days and at the end of that period would be subject to discharge, for violating Rule 127-J (theft or attempted theft) of the General Rules of Safety and Personal Conduct. That letter was issued under Management's substantive authority in Article 3 and the procedure of Article 8, paragraph 8.1 of the August 1, 1986 Agreement.
Grievant requested a hearing on this matter, as he was entitled to do by paragraph 8.1, and his five-day hearing took place on October 8.
After that hearing Management decided not to discharge grievant but to modify the suspension to the time he already had lost between the initial suspension and the October 15 date of the modification letter (certified mail, return receipt requested), which time off was to be considered as his disciplinary suspension. That amounted to fourteen and one-half days of suspension.
The Union submitted a Step 1 Oral Complaint on November 3, 1987 in its challenge of grievant's modified suspension.
From the beginning, the Company rejected this grievance as improperly filed in Step 1 and untimely filed in any event, and it would not respond on the merits, contending that the grievance was not arbitrable. It

insisted that under the second sentence of paragraph 8.3 a grievance protesting modification of a five-day suspension had to be filed in Step 3 within five days of the Company's modification decision.
The pertinent language of Article 8 reads as follows:
"ARTICLE 8
"Discharges and Disciplines
8.1 "Section 1. In the exercise of its right to discharge employees for cause, as set forth in Article 3, the Company agrees that an employee shall not be peremptorily discharged, but in all instances in which the Company may conclude that discharge is warranted, he shall first be suspended for five (5) days and notified in writing that he is subject to discharge at the end of such period. A copy of such notice shall be furnished to such employee's grievance committeeman promptly. During such five-day period, if the employee believes that he has been unjustly dealt with, he may request and shall be granted during this period a hearing and statement of his offense before the Manager of Union Relations, or his designated representative, with the employee's grievance committeeman and officers of Union present if the employee so chooses. At such hearing, facts and circumstances shall be disclosed to and by both parties.
8.2 "If a hearing is requested, the Company shall, within five (5) days after such hearing, decide whether such suspension shall culminate in discharge, or whether it shall be modified, extended or revoked, and the employee and the Union shall be notified in writing of such decision. If no hearing is requested within the five-day period, the discharge shall become final at the end of such period without further notice or action by the Company, unless the Company shall modify, extend or revoke the suspension or discharge.
8.3 "If the action taken is revoked, the employee shall be returned to his regular occupation and be compensated on the basis of an equitable lump sum payment mutually agreed to by the parties or, in the absence of agreement, made whole for the period of his suspension or discharge, which shall include providing him such earnings and other benefits as he would have received except for such suspension or discharge, and offsetting such earnings or other amounts as he would not have received except for such suspension or discharge. In the event a hearing is requested and the disposition shall result in the discharge of the employee or the modification or extension of the suspension, a written grievance may be filed, under the grievance procedure of Article 6 hereof, beginning with Step 3 within five (5) days after such decision, contending that the action taken was unwarranted in light of the circumstances. Such grievance shall be signed by the employee and his grievance committeeman, or in his absence, the assistant grievance committeeman, and shall be considered at a Step 3 meeting during the week following the filing of such grievance."
The grievance thereafter proceeded through the successive Steps, with the Union seeking all lost pay, an apology to grievant, and removal of all letters from his file pertinent to this grievance. The Company continued to insist that the grievance was improperly filed in Step 1 and was untimely, in any event, because not filed within five days of the modification decision, and that it thus was not arbitrable.
As to the arbitrability point, the Union notes use of the word "may" in paragraph 8.3's statement that "...a written grievance may be filed...beginning with Step 3 within five (5) days...." after such decision. The argument is that the word "may" ordinarily is the way to state a permissive procedure, as opposed to the usual mandatory meaning of the word "shall." The Union thus urges that "may" is sufficient to demonstrate existence of an option in these circumstances to file either (1) a Step 3 grievance within five days of the modification decision under Article 8, paragraph 8.3, or (2) a Step 1 complaint within thirty days from the cause of the complaint under Article 6, Section 4, paragraph 6.14. It says it opted here for the Step 1 route.
Provisions of Article 6 relied upon by the Union read as follows:
6.14 "Section 4. Except as otherwise specifically provided in this Agreement, complaints shall be presented promptly and, in all events, the Step 1 discussion of complaints must be held within thirty (30) days from the date the cause of the complaint occurred, or within thirty (30) calendar days from the time the employee should have known of the occurrence of the event upon which the complaint is based.
6.15 "In the event that a Company representative does not answer a complaint or grievance in any of the steps of the grievance procedure set forth in Section 3 above within the time limit for answer therein specified, the complaint or grievance may be presented to the next succeeding step within seven (7) days from the expiration of such time limit for answer. In the event that a complaint is not filed within the time limits specified in this Section 4 or in the event a complaint or grievance is filed and an appeal is not taken in any of the steps of the grievance procedure set forth in Section 3 above within the time limits therein specified, neither it nor the same subject matter shall be further considered or made the subject of a further complaint or grievance without the consent of the Company...."
The Union stresses that paragraph 6.15 says that,

"In the event a complaint is not filed within the time limits specified in this Section 4...neither it nor the same subject matter shall be further considered or made the subject of a further complaint or grievance without the consent of the Company...."

It notes that provision does not say that a grievance not filed as required by Article 8, Section 1, shall not be considered further, and that nothing in Article 8 says that filing after five days renders the grievance not arbitrable. The Union thus urges that grievant's not exercising his claimed privilege of filing a grievance within five days in Step 3 did not forfeit his right to challenge his discipline in the regular grievance procedure in Step 1 within thirty days under Article 6.

The Company denies existence of any such option in the Union. It stresses that the permissive meaning of the word "may" in paragraph 8.3 gives the Union an option to file a grievance or not to file a grievance, but that it does not create a right to file in Step 3 within five days or in Step 1 within thirty days. The Company argues that the word "may" simply had to be used there because the parties obviously did not intend to compel the Union to file a grievance. Instead it left it the option of filing a grievance or not filing one but, if the choice made were to file, the language then says the grievance may be filed beginning with Step 3 within five days of the modification decision, meaning that it must be filed within that time. Since this grievance was not filed in Step 3 within five days of that decision, the Company insists it is improperly in the procedure and that it has no duty to treat it further.

The Company says also that the negotiators of this Agreement knew very well how to create an option when they meant to do so, pointing to the option of taking a contracting-out matter to the regular grievance and arbitration procedure or to submit it to the Expedited Procedure, under Article II, Section 3-F, and to the option of a laid-off employee in paragraph 13.88.9.

Management notes that the command of paragraph 8.3 to file a grievance in Step 3 within five days when challenging a modified five-day suspension is stated in the same sentence as is the requirement to challenge a five-day suspension converted to discharge by the same procedure and time.

The Union castigates the Company position as one which would look only to a single provision of the Agreement, contrary to the canon of construction to the effect that all provisions of an agreement should be given some room to operate, whereas the Union's position allegedly requires the Arbitrator to construe the Agreement as a whole, giving proper significance to Article 6, as well as to Article 8.

The Union then notes that the Company's view would result in forfeiture of grievant's right to arbitration of the merits of his substantial suspension, whereas the Union's position would not harm the Company but would result only in a less expeditious resolution of the merits

The Union stresses that a forfeiture is to be avoided, and that, if an agreement be susceptible of two constructions, one of which would work a forfeiture and the other of which would not, the Arbitrator should adopt the interpretation that would prevent the forfeiture. It cites an arbitration text and arbitration decisions in other bargaining relationships in support of those views.

The Union stresses also the language of the Company's October 15 "modification" letter, saying that grievant would be returned to work and that the "...time you have lost will be considered disciplinary time off." It argues that language caused grievant and his representatives to view his situation as one of ordinary discipline, to be challenged as all such disciplines are, in Step 1 within sixty days.

The Union notes that, upon the filing of the written grievance on December 1, Management "accepted" it by signing all copies and returning them to the Union, in contrast to its usual approach in cases of procedural deficiency, in which the Company ordinarily returns the documents to the Union unsigned.

The Company denies that its modification of this five-day suspension changed it into a typical discipline case. It notes that those cases are initiated by a disciplinary letter on a form headed "Discipline Statement." It points out that no such statement was issued here, but that a letter was sent by certified mail, return receipt requested, modifying the five-day suspension. The procedure for challenging that is said to be clearly stated in paragraph 8.3 as filing a grievance in Step 3 within five days of the decision. Management denies it always sends back the documents unsigned in a case of procedural deficiency. It says it usually does that, but not always and, in any event, that such treatment cannot revive an untimely grievance. It says here that, returned signed or not, the Company made it perfectly clear to the Union from the beginning that it considered this grievance to be untimely.

The Company has not responded on the merits. It says that, if the grievance should be found to be timely and thus arbitrable, it is not yet ripe for merits treatment and should be remanded to the grievance procedure so that the parties may develop a complete record on the merits, citing paragraphs 6.11 and 6.20 of the Agreement.

The Company's final point is that, if the grievance should be held to be arbitrable and to be ripe for consideration on the merits, it then should be remanded to the parties for resolution in the Expedited Arbitration of Appendix 6 of the Agreement.
A Company witness said he thought there had been modified five-day suspension cases in the past which had been challenged in Step 3, but he could not recall any specific situations.
The Union was surprised at the Company's lack of particular information on this point, saying it was very significant, because it thought this situation never had occurred before and, therefore, past treatment of these circumstances would be enlightening.
A Company witness said its computer system did not key modified, five-day suspension cases to this point of refinement and, therefore, that it could not retrieve them.
The Union stated its position on the merits in the grievance proceedings and sought to do that in arbitration. The Company insisted the arbitrability point should be decided first, however, and, therefore, the parties presented only the procedural issue at this arbitration hearing.
The Union insists this is not a case about requirements for timely filing of this grievance. If it had filed in Step 3 within six days or in Step 1 within thirty-one days, the Union would agree those situations would have raised timeliness questions. It did neither. It filed in Step 1 within thirty days, and, therefore, this is said to be a question of the proper step in which this kind of grievance must be filed.
The Union stresses that, upon his return to work, grievant had a "record review" with his Supervisor on October 23. It says he waited until that full process had been completed, before he challenged it.
The Company replies that a later "record review" cannot resurrect an already untimely grievance, noting that a "record review" can be challenged independently of what might have gone on before it but cannot revive a stale problem.
FINDINGS
Several ingenious arguments were made here, but the facts of events and dates that are obvious and not disputed, when matched against the straightforward language of the applicable provisions of Articles 6 and 8, demonstrate that this grievance improperly was filed in Step 1 and was untimely. The clearly applicable words of paragraph 8.3 required that it be filed in Step 3 within five days after the October 15 modification decision. It was not filed until November 3, and thus it need not be decided whether the five days begin to run on the date of the decision or the date grievant or his representative receives it.
Filing this grievance within thirty days in Step 1 was an attempt to exercise a nonexistent option. The word "may" surely gives an option, but it is an option to file or not to file, and creates no option to file in Step 3 within five days or in Step 1 within thirty days. The contractual scheme seems clear enough. Whatever may be the proper procedural path for lesser disciplines under Article 6, the much more serious ones beginning as five-day suspensions, subject to discharge, whether later converted or modified, have been put in a separate category and are to be challenged, if they are, by the different procedure (time and arena) of paragraph 8.3.
Paragraph 6.14 makes filing this kind of grievance, as required by paragraph 8.3, a situation that is "...otherwise specifically provided in the Agreement." It is accurate that Article 8 does not expressly put untimely grievances beyond further consideration, as Article 6 does in paragraph 6.15. The sufficient and conclusive answer to that is, however, that the command to file a grievance within five days in Step 3 against this modified five-day suspension situation is stated in the same sentence in paragraph 8.3 as is the requirement to file a grievance within five days in Step 3 against a five-day suspension converted to discharge, and the parties are clear to the effect that grievances against discharge situations must be filed in Step 3 within five days. No unfairness can be seen, therefore, in reading paragraph 8.3 in the same way as to both five-day suspensions, converted to discharge, and five-day suspensions, modified. No persuasive reason has been suggested that would support construing that language as giving the luxury of greater procedural alternatives to an employee whose five-day suspension has been modified than admittedly are possessed by the much more disadvantaged person whose five-day suspension has been converted to discharge. That would go beyond "interpreting" the language and would violate the absence of arbitrable power to add to, detract from, or alter the provisions of the Agreement, stated in paragraph 7.4. The Arbitrator is reminded constantly and in forceful and sometimes colorful language that he should read and apply the Agreement and not inject into it his personal predilections of what might be fair, just, and reasonable.
The Union's argument about an arbitral bias against forfeiture is accurate in the abstract, but it may be applied only where the language or the facts or both are unclear, thus affording the Arbitrator a choice, both supported by persuasive evidence, of deciding in the direction that will cause a forfeiture or in the direction

that will not. In such a case, the Arbitrator probably would so decide as to avoid the forfeiture. But that is not this case. There is nothing unclear about the meaning of the directly applicable language of paragraph 8.3. Thus, there is no contractual or factual basis for decision the other way. The Agreement requires this result.

Accordingly, since this grievance was filed in untimely fashion, its merits are not open for consideration, and it will be dismissed.

AWARD

The grievance is dismissed as untimely.

/s/ Clare B. McDermott

Clare B. McDermott

Arbitrator