Award No. 828
Grievance No. 23-S-108
Appeal No. 1439
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
May 28, 1990

INTRODUCTION

The hearing in this case was held at the company offices in East Chicago, Indiana on May 14, 1990. Each party filed a prehearing brief. Grievant was present throughout the hearing and testified in his own behalf. The parties agreed that grievant's identity would not be revealed in this opinion.

APPEARANCES

For the Company
A.C. Kolasa, Representative, Union Relations
J.J. Ambre, Clinical Pharmacologist, Northwestern University
T.J. Bean, Coordinator, Employee Assistance Program
R.B. Castle, Manager, Union Relations
R.V. Cayia, Section Manager, Union Relations
D.L. DeMichael, MD, Director, Medical Department
J. Grubish, Section Manager, Maintenance, No. 3 Cold Strip
K.R. McKenna, Senior Representative, Union Relations
For the Union
J. Robinson, Arbitration Coordinator
T. Zaborski, Griever
Grievant
Grievant's wife

Background

This case involves the discharge of grievant following a positive drug test on February 22, 1989. That test, however, was not the sole reason for the company's action. On June 20, 1987 the company suspended grievant preliminary to discharge for reporting to work under the influence of alcohol and for sleeping in the plant. One month later, on July 20, 1987, the union, company, and grievant entered into a last chance agreement reinstating grievant. In pertinent part, that document provides as follows:

6. The employee 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 the employee's immediate suspension preliminary to discharge.

7. During a two year period following the employee's return to work, the company may test him at any time for the presence of mood altering substances . . . . This test may be drawn by blood, breath or urine analysis.

Following execution of this agreement, grievant returned to work and underwent a number of random drug tests without incident. On February 22, 1989, grievant was called in for another in this series of drug tests. This time, however, the test was positive, revealing the presence of 54 ng/ml of cannabinoids (THC). The presence of THC in the sample is consistent with the use of, or at least the exposure to marijuana. Following the determination of the test results, the company, on March 2, 1989, again suspended the grievant preliminary to discharge. Grievant requested a suspension hearing, which was held on March 6, 1989. The company informed grievant of its decision to discharge him by letter dated March 13, 1989. It is the legitimacy of that action that is the issue in this case. The parties agree that the issue is whether grievant's discharge was for proper cause. More to the point, both parties agreed that the question before me is whether grievant breached the terms of the last chance agreement, entered into on July 20, 1989. Indeed, the union agrees that the company has a consistent practice of discharging employees who violate last chance agreements. Grievant's compliance with the terms of his agreement, then, is the major issue in this case.

Discussion

Neither the union nor grievant challenge the company's action in administering the test. Moreover, there is no challenge to the procedures employed or to the chain of custody of the sample. Nevertheless, evidence at the hearing reviewed the procedures in some detail and revealed no cause for concern over the fairness or accuracy of the testing employed in this case. Grievant, then, does not question the company's claim that his urine tested positive for the presence of THC. Rather, grievant seeks to explain the presence of that metabolite as a result of circumstances that would not violate his last chance agreement. In short, grievant claims that his positive drug test was the result of inadvertent passive exposure to marijuana.

Grievant claims that this passive exposure occurred in the day or two immediately preceding the drug test and that it was the result of two separate occurrences. First, grievant claims that the day before the test he was at home fixing the dryer when he began to smell marijuana. Subsequently, he discovered that his wife was smoking marijuana on the back patio, a glassed in room of the house. Grievant was not in the same room as his wife. Indeed, it is not clear to me that he was even on the same floor. At the hearing, grievant testified only to this one occurrence of exposure as a result of his wife's use of marijuana. However, the third step minutes argue that her use was more pervasive and exposed grievant to the drug over a longer period of time. I need not resolve this apparent conflict or even its obvious effect on grievant's credibility since, as explained below, I don't believe the level of THC present in grievant's sample would be consistent with either sporadic or frequent passive exposure to his wife's home use of marijuana.

In addition to allegations about his wife's use of the drug, grievant also asserts that he was inadvertently exposed to marijuana by a fellow employee a day or two before the drug test. Grievant testified that after work he discovered a flat tire on his car and was walking from the parking lot when a coworker offered him a ride. Shortly after grievant entered the car, the driver lit a marijuana cigarette. Grievant said he realized that being in the car under those circumstance was a violation of his last chance agreement, so he asked the driver to let him out. There is some question, however, about how long grievant was in the car.

At the hearing, grievant claimed to have been in the car about 20 minutes. At his suspension hearing, grievant said he was in the car only 2 or 3 minutes. At the third step hearing, he had increased the time to 7 minutes. I agree with union representative Robinson's assertion that employees often misjudge the passage of time and frequently offer inaccurate estimates of elapsed time. That, however, isn't the point. The problem here is not grievant's inability to measure the passage of time, but his inability to tell the same story twice. If he had consistently maintained that he was in the car 20 minutes, I would not attribute too much to the apparent fact that the distance he claims to have covered should have taken a much shorter period of time. In this case, however, grievant's inability to remember what story he told the last time raises a question about whether the incident ever happened at all. Even if it did, it would not change the result in this case. I am convinced by the company's evidence that the amount of THC present in grievant's system was inconsistent with any level of passive inhalation.

Although the company called three witnesses, its most important testimony came from John J. Ambre, M.D., Ph.D., an associate professor of medicine at Northwestern University. I will not detail here all of Dr. Ambre's impressive credentials. It is sufficient to say that his Ph.D. is in pharmacology/toxicology and that he is clearly qualified, both by experience and by training, as an expert witness. Dr. Ambre's testimony was unambiguous -- he said that it was "impossible" for grievant to have reached a level of 54ng through passive inhalation.

The union was able to establish that some detectable level of THC may appear from passive inhalation of marijuana smoke. Dr. Ambre, however, discussed both of the scientific studies introduced by the union. One study involved intense exposure of two subjects who sat near six other individuals who were smoking marijuana. Their sample showed a level of under 7ng, as compared to grievant's level of 54ng. The other study was even more revealing. Individual test subjects were exposed to smoke from 4 marijuana cigarettes for one hour for six consecutive days. The subjects were confined to a phone booth sized room and the smoke was so intense they had to wear goggles. After the first day, none of the six test subjects produced a positive reading. After the second day, four of the subjects were still negative. Even after all six days of exposure had passed, the highest reading was only about 12ng, still significantly lower than grievant's 54ng. Moreover, even if grievant's testimony is true, his exposure was much less intense than that of the subjects in these two studies. Dr. Ambre testified that the only way to achieve a level of 54ng is to smoke a marijuana cigarette.

Finally, Dr. Ambre also testified about grievant's claim that his positive reading was an error produced by having taken advil the night before the test. Grievant offered no such testimony at the hearing, but had made that claim in earlier stages of the procedure. Dr. Ambre testified that at one time, the EMIT test could produce a false positive if a subject had taken advil. The formulation of the test was changed, however, to

avoid that result. More importantly, the company here did not rely on the results of the EMIT test. Rather, it confirmed that test through gas chromatography and mass spectrometry, a procedure which, according to Dr. Ambre, would not produce a positive reading because of exposure to advil.

In my view, the evidence is overwhelming that grievant violated the terms of his last chance agreement by use of, not mere exposure to, marijuana. To a large extent, then, disposition of this case turns on that finding, since the agreement itself provides that any violation is grounds for termination and since the union concedes that the company consistently discharges employees who violate such agreements.

I have no cause to question the penalty imposed in this case. In the first place, the company's action was not prompted solely by this one positive drug test. Rather, the parties agreed that the company had cause to discharge grievant in 1987, when he reported for work under the influence of alcohol (his third such offense in 18 months) and was found sleeping on the job. Grievant was reinstated as a way of affording him one last chance to mend his ways. The burden, however, was on him. He accepted the responsibility of abstaining from drug use for a period of two years. That was one of the prices he paid for the company's agreement to return him to work. Quite simply, grievant failed to live up to that agreement. His discharge, then, recognizes not only his current drug use, but also the 1987 conduct that produced the restriction in the first place.

Other arbitrators have recognized the utility of last chance agreements. They can be useful devices for salvaging employees who have the desire to reform. They cannot be effective, however, unless employees understand them to mean what they say -- that is, that they are, indeed, the last chance. The restrictions imposed on grievant here were not unreasonable. Quite clearly, grievant had a problem with alcohol that had led to three job related offenses in a short period of time. It was fair for the company to exact, as the price of reinstatement, an agreement that grievant would work for two years without use of alcohol or drugs. Unfortunately, grievant apparently could not keep that commitment.

I think the union did as much for grievant here as could be done. It marshalled the scientific evidence in its most favorable light and it told grievant's story with much force. The problem, however, is that the story just wasn't true. The union could represent grievant, but it could not abstain for him. That was grievant's responsibility and one that he failed.

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

Bloomington, IN

May 28, 1990