Award No. 850
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 33-T-41
Appeal No. 1461
Arbitrator: Terry A. Bethel
August 24, 1991
OPINION AND AWARD
Introduction
This case involves the discharge of grievant John Anderson for violation of several company rules or policies, all of which are discussed below. The hearing took place in the company offices in East Chicago, Indiana on August 20, 1991. Brad Smith represented the company and Jim Robinson presented the union's case. Grievant was present throughout the hearing and testified in his own behalf. Both sides filed pre-hearing briefs.
Appearances
For the Company:
B.A. Smith -- Project Representative
James Cundiff -- Section Manager, No. 5 Galvanize
John Bean -- Employee Assistance Coordinator
For the Union:
Jim Robinson -- Chair, Grievance Committee
D. Reed -- Griever
John Anderson -- Grievant
Background
This case involves grievant's discharge for four separate violations any one of which, the company asserts, would support its action. Although there is some dispute about various actions taken by grievant -- particularly those of January 1, 1991 -- many of the essential facts are not contested. Grievant reported for work at about 10:00 p.m. on January 1, 1991, to work the turn that ended at 7:00 a.m. the following day. After observing him, grievant's supervisor sent him for a fitness to work evaluation.
The paramedic who performed the evaluation noted that grievant exhibited some slow hand gestures and that his speech was slow and somewhat slurred. Grievant also walked with an unsteady gait and smelled of alcohol. The paramedic administered a breathalyzer test which registered a .31, significantly above the company's allowable limit of .05. In addition to the alcohol test, the paramedic collected a urine specimen for a drug screen. Grievant was not allowed to return to work. Subsequently, the drug test revealed the presence of THC, a metabolite of marijuana. The GC/MS test detected a level of 156 ng/ml, a significant reading, as I will discuss below.
The company suspended grievant preliminary to discharge on January 2, 1991 asserting, among other things, a violation of rule 132-d, which provides, in relevant part:
The following offenses are among those which may be cause for discipline, up to and including suspension preliminary to discharge:
d. Reporting to work under the influence of intoxicating beverages. . . .
In addition, the company contends that grievant was in violation of rule 132b which, in pertinent part, subjects employees to discipline for "reporting to work under the influence of drugs not prescribed by a licensed physician for personal use while at work. . . ." Finally, the company asserts that its action was justified by grievant's attendance problems, which I will address below, and by his overall work record. The suspension was converted to discharge by letter dated January 16, 1991, prompting this grievance, which was filed on January 17.
The union does not contest the accuracy of grievant's alcohol test and, in fact, grievant admits that he was intoxicated when he reported for work on January 1. Throughout the investigation and the grievance procedure there has been some variation in grievant's account of his activities on January 1. There is no question, however, that he consumed a significant quantity of alcohol throughout the day. At the hearing, grievant testified that he began drinking early in the morning and continued throughout most of the day. He testified that he drank steadily until he went to visit his mother in the hospital at about 4:00 p.m. He began

drinking again after he left the hospital, which was at about 6:00 p.m. Grievant claims that he cannot remember exactly how much he drank, but he estimated that before visiting his mother he consumed a pint of wine, a six pack of malt liquor, and about a half pint of cognac. He said he had another six pack or maybe a twelve pack after leaving the hospital.

Grievant testified that he does not remember smoking marijuana on January 1. He claimed that he had not done so for more than 20 years. He acknowledged, however, that after leaving the hospital on January 1, he associated with friends who do use marijuana and he said he "apparently" did so too before reporting for work later that night.

The January 1 incident was not grievant's first problem with alcohol or drugs. In June of 1990, grievant was suspended for 3 days for a violation of rule 132e:

Any employee suspected of being under the influence of intoxicating beverages may be required to submit to a breathalyzer test to determine their fitness to work. Any employee failing to submit to such a test will be considered to be under the influence of intoxicating beverages.

As far as I can determine, grievant did not grieve his suspension for a violation of this rule. At the hearing, grievant claimed that he did not knowingly refuse the test. Rather, he said his foreman gave him the option of submitting to the test or going home, and he elected to go home. The third step minutes for the instant case, however, which were not challenged, report that grievant admitted refusing the test because he knew he would fail it.

The other principal violation urged by the company relates to grievant's attendance problems. Grievant's five year employment history reveals significant difficulty in this area. Grievant received a three day suspension for absenteeism in May of 1987 and, following repeated problems, was discharged in June of 1988. He was given a final chance reinstatement in December of the same year, but was again discharged, principally for attendance problems, in September 1989. Grievant, however, continued working under the justice and dignity provisions of the agreement. While so employed, grievant was suspended three different times in less than a month for failure to report off. He was discharged for an accumulation of those offenses and for his overall attendance record in November 1989. Grievant was again reinstated on a final chance agreement in March 1990. His attendance appears to have improved somewhat following his reinstatement, at least until October of 1990. He was tardy twice that month and once in November. He was then absent on December 28 and again on January 1, the turn before the one to which he reported intoxicated.

This record resulted in an absenteeism rate for the relevant 90 day period of 5.14%, which is above the 5% level allowed for persons with grievant's disciplinary history. In fact, section manager James Cundiff testified that there was no point in grievant's 5 year history at which he fell below the 5% level.

The company asserts that grievant's absences of December 23 and January 1, when combined with his tardies in October and November, justify discharge without regard to grievant's other problems on January 1. In that regard, the company points to the fact that grievant's most recent reinstatement was pursuant to an understanding that it represented his final chance to improve his attendance, something the company asserts he has not done. The company also points out that grievant has not adequately explained either of his two most recent absences. He claimed that his absence on the 23d was related to his mother's illness, but she apparently was not hospitalized until several days after that. Moreover, his story about his absence on January 1 has changed from time to time. At the hearing he claimed that his mother had surgery on that day and that he needed to be with her.

Grievant did not assert that this was emergency surgery. I cannot say that she didn't have surgery at that time, but it seems unlikely that any physician would schedule an operation for New Year's Day. I suspect, then, that grievant's failure to report to work at 11 p.m. on December 31 may have had something to do with his assertion at the hearing that he had been drinking all day.

Discussion

During his final argument, union representative Robinson asserted that the central issue in the case is whether two instances of reporting for work under the influence justify the conclusion that corrective discipline will no longer be effective. The union points out that this employee has 23 years service and it argues that, at least according to its characterization of the record, corrective discipline improved grievant's attendance record. The inference would be, then, that corrective discipline could have the same effect with grievant's other problems, especially since he has now acknowledged his need for assistance with alcoholism. I agree that this is the best argument that can be advanced on grievant's behalf. I don't agree, however, that it should result in grievant's reinstatement.

No one can be certain, of course, whether corrective discipline would have any effect on grievant. It is conceivable that a reinstatement tied to successful completion of an alcohol rehabilitation program would

salvage grievant's job. I think the fair inferences, however, are to the contrary. In addition, I am troubled by grievant's use of marijuana and by the effect it may have had on his condition on January 1.

As noted above, this is not grievant's first difficulty with alcohol and the work place. He was suspended for essentially the same offense only about six months before his discharge. Moreover, grievant apparently has a history of alcohol problems, evidenced by his participation in a company sponsored alcohol program five or six years ago. <FN 1> For the past five years, grievant has been asked whether he needs additional help on numerous occasions. That question is routinely put to employees who have significant absenteeism problems, which grievant had. He consistently denied that he needed help.

I understand that denial is part of the problems alcoholics face. I also understand that, whatever their contractual obligations, both the union and the company have expressed a commitment to assisting employees who need help with substance abuse. That commitment, however, does not prevent the company from taking disciplinary action against employees when such problems affect their ability to perform their jobs or when they expose other employees to harm. It is worth noting here that grievant did not just appear for work drunk. A breathalyzer reading of .31 indicates extreme intoxication. This was not, then, a case in which an employee's new year's exuberance caused him to report mildly intoxicated. Rather, this was an instance in which an employee with an apparently unacknowledged alcohol problem reported in an extreme state of intoxication, only six months after a similar offense.

I recognize that grievant now claims he has admitted his problem and has sought help. I need not resolve the company's claim that any such defense is precluded by the express terms of grievant's last chance agreement and the union's argument that such language applies only to absenteeism problems. Even if the last chance agreement does not preclude such mitigating evidence, grievant's claim comes too late. I might feel differently if grievant had sought help after his suspension in June or, for that matter, at any point before January 1. It is, after all, a reasonable inference that at least some of grievant's absenteeism problems were caused by his drinking. Grievant, however, did nothing until after he reported drunk for the second time in six months, and after he had turned down repeated offers for help. I'm hopeful that grievant's new found commitment will help him cope with his addiction to alcohol, but I think it comes too late to save his job.

My decision to deny the grievance is also influenced, in some part, by grievant's use of marijuana. Mr. Robinson is quite right in his assertion that no inference of impairment can be drawn from grievant's positive drug test. And, the union asserts, there is no other evidence of impairment that would establish a violation of rule 132b. The union, of course, does not articulate its entire argument, for obvious reasons. The most compelling evidence of impairment would be unusual or erratic behavior, including slurred speech, unsteady gait, etc. Here, however, grievant was so intoxicated from the level of alcohol in his body that it was not possible to discern any specific effects of other drug use.

I agree that there is not enough independent evidence of drug impairment, standing alone, to justify a discharge decision. That does not mean, however, that grievant's drug use is of no relevance in this case. I think there is at least some evidence of impairment. As noted above, grievant's drug test indicated a presence of THC in the amount of 156 ng/ml. Evidence submitted by the company established that such a high level was indicative of either previous regular use or recent use. Grievant denied previous regular use which, frankly, would have negated any inference of impairment. He said he "apparently" used the drug a few hours before reporting for work on January 1.

I have some difficulty believing that grievant doesn't remember whether or not he used marijuana on January 1. Although he did not report his exact alcohol consumption, he did remember what he drank and when he consumed it. For example, he remembered drinking wine, beer and cognac before 4:00 and drinking only beer after 6:00. He also remembered associating with people who regularly smoke marijuana after 6:00. I think grievant smoked it during that period and that his testimony essentially admits that fact. Thus, I think the evidence supports both a finding that grievant consumed a large amount of alcohol before reporting to work on January 1, and a finding that he smoked marijuana within a few hours of reporting.

No one, of course, can say exactly what effect this marijuana consumption had on grievant. There was some evidence that usage of both alcohol and marijuana together can exacerbate the effects or either or both. Although I can't say exactly what effect his drug use had, I think grievant is estopped from denying that it had no effect at all. Otherwise I would have to discount entirely the possible effects of any recent drug use simply because grievant was so drunk that the manifestations of drug and alcohol use could not be distinguished. As noted above, grievant's marijuana use a few hours before reporting for work would not, standing alone, support the company's discharge action, but it at least affects my willingness to find mitigating circumstances that would result in grievant's reinstatement.

Likewise, grievant's absenteeism problem affects my willingness to find mitigating circumstances. The company's absenteeism program, summarized in company exhibit 12, monitors employee absences over a rolling 90 day period. Employees who have a significant record of previous discipline, like grievant, incur further sanction when they amass an absenteeism rate in excess of 5%. The union points out that, while it has not attacked the company's plan in this arbitration, it also has not agreed that a review based on the previous 90 days necessarily reflects an accurate representation of an employee's overall record. In particular, the union asserts here that whatever grievant's absenteeism rate may have been in the 90 days preceding his discharge, his rate of absence for 1990 was only around 3%. In addition, the union argues that his previous discipline appeared to correct grievant's FRO occurrences.

I need not resolve in this case whether grievant's absenteeism record, standing alone, would warrant discharge. Overall, certainly, his record is not good, even though he appears to have improved somewhat in 1990.

Nevertheless, as Cundiff asserted, attendance has been a constant problem for grievant and his failure to explain adequately his absences of December 23 and January 1, when coupled with his overall attendance record, leave me with little incentive to mitigate his other serious violation on January 1.

Cases like this one are not easy. Grievant is a long service employee who had a good job. I recognize that upholding his discharge will increase his problems and that finding other comparable employment will be difficult, if possible at all. I hope grievant's most recent efforts at rehabilitation succeed. But the sympathy I feel for him cannot erase the past. Ultimately, he is responsible for his own actions. In both June 1990 and January 1991, grievant showed up for work drunk and. but for the suspicions of his supervisor, presumably would have gone to the job, thus jeopardizing his own safety and that of his coworkers. This offense is especially egregious in light of grievant's high level of inebriation on January 1. Given his two recent experiences in reporting drunk, his marijuana use on January 1, his failure to accept help when it was offered, and his poor attendance record, I have no alternative but to uphold the company's disciplinary decision.

AWARD

The grievance is denied.

/s/

Terry A. Bethel

August 24, 1991

<FN 1> Grievant's previous problems with alcohol (at least prior to June 1990) and his participation in a rehabilitation program play no part in my determination of whether the company had cause for discharge in this case. I mention his previous experience only to highlight grievant's awareness of such rehabilitation programs.