Award No. 879
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America
Local Union No. 1010
Gr. No. 26-V-01
Appeal No. 1490
Arbitrator: Jeanne M. Vonhof
November 8, 1993

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Friday, October 8, 1993 at the Company's offices in East Chicago, Indiana.

APPEARANCES

UNION

Advocate for the Union:
J. Robinson, Chairman, Grievance Committee
Witnesses:
F. Torres, Grievant
M. Mayorga, Witness
J. Velasquez, Assistant Griever
Also Present:
L. Aguilar, Second Vice Chairman, Grievance Committee
J. Piru, Griever

COMPANY

Advocate for the Company:
B. A. Smith, Arbitration Coordinator, Union Relations
Witnesses:
D. Perez, Human Resources Generalist
K. Rosenbaum, Section Manager, Material Handling Services

BACKGROUND

The Grievant, F. Torres, had been employed by the Company for twenty (20) years at the time of his discharge. In 1991 he was discharged for excessive absenteeism. In a Last Chance Agreement dated September 24, 1991 the Company and Union agreed that cause existed for the Grievant's discharge, but the Company agreed to reinstate the Grievant "with one final chance to prove that he (could) become a responsible employee of the Company."

The Last Chance Agreement established certain conditions for the Grievant's reinstatement and continued employment with the Company. The Parties have identified two paragraphs of that Last Chance Agreement as particularly relevant to the dispute in issue here and they are as follows:

5. Should he, within a period of eighteen (18) months from the date of this agreement, accrue an absenteeism rate of 5% or greater, during any rolling ninety (90) day evaluation period or violate any other provision of the Company's Attendance Improvement Program or any other Company rules or regulations with respect to absenteeism, cause will also exist for his suspension preliminary to discharge.

6. This arrangement represents a final chance at employment for Mr. Torres. Failure to meet any of the conditions set forth above, or any repetition of the conduct which led to Mr. Torres' most recent suspension action will be cause for his immediate suspension preliminary to discharge.

The evidence indicates that the Grievant had some objections to the Last Chance Agreement when it was discussed, but that eventually an agreement was reached over its terms. The evidence further indicates that the Agreement was explained to the Grievant in both Spanish and English.

The Grievant returned to work and experienced the following record of absences over the next twenty months after the Last Chance Agreement went into effect:

01-29-92 - Sickness Self
05-13-92 - Sickness Self
08-27-92 - Failure to Report Off
10-12-92 - Personal

10-17-92 - Transportation
10-24-92 - Sickness
10-26-92 - Sickness
12-04-92 - Early Quit
03-15-93 - Transportation
03-29-93 - Sickness in Family
04-12-93 - Sickness
04-13-93 - Sickness
04-26-93 - Early Quit
04-30-93 - Failure to Report Off
05-09-93 - Sickness
05-11-93 - Failure to Report Off

The third-step minutes indicate that management interviewed the Grievant several times and gave him a reprimand letter about his attendance problems after the Last Chance Agreement was signed. The Grievant returned to the Material Handling Services Department from an assignment to the 12 inch Mill around June 1, 1993. Around ten days later the computer program of the Company's attendance program caused the Grievant's name to be "kicked out" as having an excessive absentee rate over the previous ninety day rolling period.

A meeting to discuss the Grievant's absences was scheduled and postponed twice and finally was held in mid-July. By that time the Grievant had at least two other days of absence, in addition to the ones listed above.

At the July meeting the Parties spent some time discussing the Grievant's last failure to report off, which occurred on June 21, 1993; he also was absent on June 22, 1993, and had a friend report off for him for that date. The Grievant testified that he told the Company that he had had car trouble in Michigan during that time period.

The Grievant allegedly was under the impression from the discussion at the July meeting that if he brought in documentation to show that he had had his car towed from Michigan, he would be excused for that absence, and given another chance. The Company Witnesses testified that the Grievant was told he could bring in documentation regarding that incident, but was not promised a second last chance. At the conclusion of the meeting the Grievant was suspended preliminary to discharge for excessive absenteeism and violation of his Last Chance Agreement.

The Grievant did provide the Company with documentation regarding his car being towed. By letter dated July 29, 1993 the Grievant was informed that his suspension was being transformed into a discharge. The Union filed a grievance on the Grievant's behalf. The Parties were unable to resolve the dispute and it proceeded to this forum for resolution.

THE COMPANY'S POSITION

The Company contends that the discharge should be upheld because the Grievant has violated the terms of his Last Chance Agreement (LCA), and the Parties have agreed to substitute the terms of that agreement for any other contractual definitions of just cause. According to the Company, the evidence indicates that the Grievant understood the terms of the LCA, and any violation of the Last Chance Agreement provides just cause for his discharge.

The Company notes that since the signing of the Last Chance Agreement the Grievant has reported off fourteen times, had two early outs, and three (3) failures to report off. According to the Company this record clearly violates Paragraph 6 of the Last Chance Agreement, and under at least one interpretation, Paragraph 5 as well. It is beyond the Arbitrator's discretion to override the terms of the Last Chance Agreement, the Company contends, relying upon both judicial precedent and prior arbitration awards between the Parties to support its position.

According to the Company, the Union has not disputed the Grievant's record or that it violated the Last Chance Agreement. The Company contends that the only argument raised by the Union is the suggestion that a management official promised to give the Grievant a second last chance, over the final failure to report off. The company contends that its witnesses are more credible than the Union's witnesses in regard to what was said at the July meeting. The Company argues further that Mr. Perez did not have the authority to offer a second last chance agreement. Furthermore, the Company asserts, even if the Arbitrator were to exclude the final absence, the Grievant was still in violation of the attendance improvement program, and the Last Chance Agreement.

For all of the above reasons the Company asserts that the discharge should be upheld and the grievance denied.

THE UNION'S POSITION

The Union concedes that the issue in this dispute is whether cause existed for the discharge and further that the Last Chance Agreement does redefine cause. Further, the Union does not challenge that Last Chance Agreements are to be honored and, if clearly violated, discharge is appropriate.

The Union disputes, however, whether the LCA in this case was clearly violated. According to the Union Paragraph 5 should be interpreted to apply only to the eighteen (18) - month period following its signing. The Union notes that that period expired in March, 1993, and argues that something is different after the eighteen-month period. The Union suggests that a violation of Paragraph 6 of the LCA is very different from a violation of Paragraph 5, which involves a per se violation.

The Union also argues that the management representative made a verbal commitment to give the Grievant a pass on the discharge if he provided proper documentation regarding his last absence. The Union argues that its witnesses are not inherently less credible than management's witnesses, because the Grievant's interest in retaining his job is matched by the management witnesses' interest in justifying their actions after the fact.

The Union argues that the Company ought to honor the commitments made by its representatives, and on that basis, the discharge should be overturned and the grievance sustained.

OPINION

The instant dispute involves the discharge of a long-term employee for excessive absenteeism and violation of a Last Chance Agreement (LCA). The Grievant had been employed by the Company for twenty (20) years at the time of his discharge. The Parties agreed that there was cause to discharge him in September, 1991 for excessive absenteeism, but he was reinstated under the terms of a Last Chance Agreement (LCA).

At the outset, the Parties concur that in cases where the Parties have agreed to a Last Chance Agreement, the LCA redefines the meaning of "cause" for discharge. The Union also concedes that where there is a clear violation of the terms of the LCA, discharge is appropriate.

The Union has not argued in this case that the LCA no longer applied at all to the Grievant. However, the Union contends that there has been no clear violation of the Last Chance Agreement, as would exist, for example, if Paragraph 5, which expired after eighteen months, still applied.

The Company contends, however, that the second clause of the sentence comprising Paragraph 5, which begins with "or violate any other provision of the Company's Attendance Improvement Program. . . ." is independent of the language earlier in the sentence which limits application to an eighteen-month period. Basically the Company is arguing that this portion of Paragraph 5 makes any violation of the Company's rules in regards to absenteeism a basis for discharge, even if they occurred outside the eighteen-month period. The Union suggests that all of Paragraph 5 is subject to the eighteen-month limitation.

Paragraph 6 of the LCA does not contain any time limitations, and states that "any repetition of the conduct which led to (the Grievant's) most recent suspension action will be cause for his immediate suspension preliminary to discharge." Excessive absenteeism led to the Grievant's original discharge and the Company has alleged that the same problem recurred after the LCA went into effect.

The Arbitrator concurs with the Union that once the 5% prohibition of Paragraph 5 no longer applies, the question of whether the Grievant has an excessive rate of absenteeism becomes more complicated. Even if the Arbitrator were to accept the argument that the second half of Paragraph 5 still applies, the Company has not necessarily established that the Grievant has violated conclusively the LCA when his name is kicked out of the computer for violating the attendance policy, because the policy itself is not a no-fault program.

The Arbitrator also concurs with the observation that there is a difference between an employee who does not make it through a defined period of strict regulation under an LCA and one who does achieve that goal but is held sometime later to violate the more general language of the LCA. Even laying aside the question of how long the overall language of the LCA technically remains in effect, an issue which was not argued in this case, the Arbitrator must address the issue of defining excessive absenteeism for an employee after the strict provisions of an LCA regarding absenteeism have been met and expired.

During the twenty-one month period subsequent to the signing of the agreement the Grievant reported off at least <FN 1> fourteen (14) times, left early three (3) times, and failed to report off at least three (3) times (not including the instance of June 21, 1993). The Arbitrator notes that the Grievant's name was "kicked out" by the computer under the attendance program only three months after the expiration of the eighteen-month period in the Last Chance Agreement. The Company pointed out in the third step minutes that the

Grievant was laid off for a total of about five (5) months during this period, so the record really applies to about sixteen (16) months of work.
The third step minutes indicate that this attendance record represents an improvement over the Grievant's record prior to the LCA. This may be true. However, the question is whether the record constitutes excessive absenteeism for an employee working after being reinstated under a Last Chance Agreement. The Arbitrator finds the Grievant's failures to report off particularly serious. An employee working under a Last Chance Agreement should know how important it is to call into work on time when the employee cannot come into work.
On the basis of this evidence, the Arbitrator concludes that there was substantial evidence of excessive absenteeism after the Last Chance Agreement, absent some kind of mitigating circumstances. The Union has not really challenged the seriousness of the Grievant's post-LCA attendance record. The Union's primary argument in this case is that a representative of management told the Grievant in July, 1993 that he would not be discharged if he brought in documentation regarding his last absences, which occurred on June 21 - June 22, 1993, and the Union argues that the Company should be held to this promise.
The Arbitrator has considered the testimony of the witnesses in regard to what was said at the July meeting. The Arbitrator does not conclude that the testimony of the Union's witnesses, including the Grievant, is necessarily and inherently less credible than that of the Company's witnesses.
Acknowledging the obvious interest the Grievant has in his version of the events, the Arbitrator also notes that the Company's witnesses have some stake in their version of the events as well, once the meeting occurred and some statements were made.
The Grievant testified at the abitration hearing that Mr. Perez told him that as long as he got proof, Mr. Perez would not count the two days against him. Mr. Velasquez, the Assistant Griever, also was present at the meeting and testified that Mr. Perez told the Grievant something like "We'll let you pass for the days you didn't call off," if he brought in the proof (emphasis added). Mr. Velasquez also testified that at the meeting Mr. Perez followed up this statement about the June incident with another comment indicating that the Grievant had a pattern of calling off on Mondays.
This last comment supports the view which has been reached by the Arbitrator regarding this conversation, i.e. that Mr. Perez may have suggested that the Grievant could be excused for the last two-day absence, with proper documentation, <FN 2> but that he did not make the broader promise that by presenting this documentation the Grievant would therefore not be discharged, or would be granted another last chance. Looking carefully at the testimony of the Union's witnesses, the Arbitrator concludes that it does not support the conclusion that the Grievant was told that he would not be discharged if he brought in documentation regarding the June incident.
Several facts support this conclusion. First, neither the Grievant nor the Assistant Griever testified at the arbitration hearing that Mr. Perez specifically made any statements in regard to the discharge or to a second last chance; their testimony reflects discussion only about excusing the two days' absences. Second, these absences occurred after the Company already began scheduling the meeting which led to the Grievant's suspension preliminary to discharge. The meeting was triggered by the Grievant's record before the disputed last two days' absences, and this fact to support the Company's argument that it would have taken the same action even without the final two day's taken absences.
Third, the Company presented evidence that Mr. Perez did not have the authority to grant a second Last Chance Agreement or to waive the discharge. That fact alone might not persuade the Arbitrator, since management representatives sometimes do make promises that exceed the scope of their authority. However, in this case one of the persons who actually has that authority, the Section Manager, was present at the meeting. Under these circumstances it does not seem likely that Mr. Perez would have made that promise, and if he did, it seems likely that the Section Manager would have called him on exceeding his authority.
(Under cross-examination the Union raised a good question about how Mr. Perez could have the authority to impose the discipline, but not to waive it. The Arbitrator concludes from the evidence that Mr. Perez could exercise discretion over whether certain individual absences would be counted, but did not have sole discretion over the larger question of waiving the discipline entirely or granting another last chance. There was someone at the meeting who did have this discretion).
On the basis of this evidence the Arbitrator concludes that the Grievant was not promised that if he brought in the tow truck receipt he would not be discharged, or would be given another last chance. Furthermore, even if Paragraph 5 is not considered, the Arbitrator concludes that there was sufficient evidence for the Company to conclude that the Grievant had repeated his pattern of excessive absenteeism since entering

into the Last Chance Agreement. The Arbitrator concludes further that the record of absenteeism was sufficiently serious, in light of his past record, to sustain the discharge. Therefore the grievance is denied, and the discharge upheld.

AWARD

The grievance is denied.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof

Labor Arbitrator

Acting under Permanent Umpire

Terry Bethel

Decided this 8th day of November, 1993.

Chicago, Illinois

<FN 1> It is not clear to the Arbitrator how the last absence of June 21-22, 1993 ultimately was counted by the Company.

<FN 2> The Arbitrator notes, as the Company's witness did, that the Grievant could have called in to let the Company know what was happening with his car, and suggests therefore that even the towing receipts might not have excused the failure to report off. The evidence is not clear in regard to the Company's final action with regard to these absences.