Award No. 905
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America
Local Union No. 1010
Gr. No. 4-T-77
Appeal No, 1516
Arbitrator: Jeanne M. Vonhof
September 20, 1995
REGULAR ARBITRATION
INTRODUCTION
The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Tuesday, August 8, 1995 at the Company's offices in East Chicago, Indiana.
APPEARANCES
Advocate for the Union:
M. Mezo, President, Local 1010
Witnesses:
J. Donohue, Griever
G. Perez, Grievant
COMPANY
Advocate for the CompanY:
B. A. Smith, Arbitration Coordinator, Union Relations
Witness:
V. Soto, Human Resources Generalist, MHS Department
BACKGROUND:
The facts giving rise to this case are not disputed. The Grievant, who had been employed by the Company since 1973, was established as a Tundishman Helper in the casting sequence of the No. 4 BOF.
The Grievant was arrested in late 1991 for stabbing his estranged wife and her lover, after finding them in bed together. He was placed in jail and missed about a month of work until he could post bond or bail. The Company treated his absence at that time as a twenty-seven (27) day suspension.
The third step minutes also indicate that the Grievant received a one-day discipline early in 1991 and several earlier reprimands for absenteeism. The discharge was based solely upon his unauthorized absence after August 20, 1992. On that date the Grievant was incarcerated to begin serving a sentence of six (6) years for aggravated battery and a concurrent sentence of four (4) years for battery.
On August 26, 1992 the Grievant was suspended preliminary to discharge for his unauthorized absence. On September 1, 1992 a suspension hearing was held which the Grievant did not attend. By letter dated September 2, 1992 the Grievant was notified that he was discharged.
The Union filed a grievance dated September 8, 1992. The grievance apparently was held in abeyance until the Grievant was released from prison on April 11, 1995. On April 27, 1995 a third step meeting was held in regards to the grievance, and the grievance was denied.
At the arbitration hearing the Company presented evidence regarding the filling of the Grievant's position in the casting sequence. According to the Company's evidence the Grievant was part of an eleven (11) person crew and when one person leaves the crew he or she must be replaced. The Company's witness testified that the Grievant's position was not filled initially because the Company wanted to see what might happen with the Grievant's jail term, because sometimes employees come back sooner than anticipated. During this interim the Grievant's position was filled with an "applicant," i.e. a temporary replacement. After about one year, however, the Company decided that the Grievant would not be returning within a reasonable period of time, the Company Witness testified, and therefore his position was filled on a permanent basis. The evidence indicates that the Grievant's position was filled by someone moving up from the next lower position in the casting sequence, that of Strand Helper. When people move up and a vacancy is created at the entry-level position, the Company's witness testified, about two (2) weeks' training is required for the new employee. The new employee receives additional training in the other higher jobs in the sequence after joining the sequence.

The Union also presented testimony that the Grievant's name remained on the seniority list up until the list posted in February, 1994. The Union also presented evidence that there was not a full complement of employees in the casting sequence until about two (2) years after the Grievant's departure. The Griever testified that he had filed a grievance over the Company's failure to fill the vacancies during this time period, and the Company and Union entered into negotiations over the qualifications for the entry-level position.

The Union also presented testimony that employees are frequently gone from the sequence, sometimes for extended periods of time due to illness. During these periods the Company fills the vacancies with temporary replacements, i.e. applicants. The Griever also testified that when the Parties concluded their negotiations regarding the filling of the vacancies in the sequence in 1994, most of the vacancies were filled by employees who had worked in the sequence before, and therefore did not need training. The Griever also testified that most of them had "employment security," prior to filling the vacancies in the casting sequence. <FN 1>

The Grievant testified that he had nineteen (19) years with the Company prior to the discharge. He testified that he made it clear to the Company that he wished to return to his job after his incarceration.

THE COMPANY'S POSITION

The Company notes that the facts surrounding the Grievant's discharge are not in dispute. The Company relies upon steel industry arbitration awards which have upheld discharges when employees have been absent for extended periods due to incarceration.

According to the Company, these cases show that the determination of just cause in such cases is a balancing of four major factors:

1) the underlying cause for the incarceration and the control of the employee over the incarceration;
2) the disruption caused by the incarceration, including the length of the incarceration;
3) the length of service of the employee; and
4) the grievant's prior disciplinary record.

In the instant case, the Company argues, the Grievant was incarcerated as a result of a violent crime over which he had control, and therefore it is as if the Grievant abandoned his job. This fact, standing alone, provides sufficient cause for the Grievant's discharge, the Company contends.

The Grievant was sentenced to six (6) years in prison, which the Company calls a very, very long time, longer than any of the jail terms appearing in any of the cases cited by the Parties. When he abandoned his job, the Company argues, he had to be replaced, and it does not matter whether that replacement was permanent or temporary: work had to be performed and the Company did not leave the Grievant's vacancy unfilled. Potentially the plant-wide number of employees increased by one, the Company contends, and if the Grievant is returned to work, someone will be displaced. In addition, the Company argues that money had to be spent to train a replacement, even if that replacement was in another seniority sequence.

As for the Grievant's length of service, the Company argues that there comes a time when, regardless of the employee's length of service, the Company need not keep him on the payroll. The Company argues that it considered the Grievant's length of service in this case and did not find it should mitigate the discharge. The Company contends that the Grievant had little regard for his length of service, based upon his actions in this case.

The Company argues that the Grievant's past record should be considered, because the Union raised the issue by claiming that the Grievant had a good record. The Company notes that it did not discharge the Grievant on the basis of this record, but argues that the past record should not serve as mitigation either. Characterizing the record as mediocre, the Company notes that it contains four disciplines for absenteeism.

The Company argues that the Grievant, by his own actions, left the Company no choice but to terminate him. The Company lost a trained employee when the Grievant was discharged, and had to train another to replace him, thereby suffering a loss. The Grievant voluntarily withheld his services from the Company when he committed the crime he did, according to the Company and the Employer should not be required to sit back for six (6) years while the Grievant is incarcerated.

Therefore the Company contends that the grievance should be denied and the discharge upheld.

THE UNION'S POSITON

The Union agrees with the Company that the facts concerning the reason for the Grievant's absence are not in dispute, and what is at issue in this case are the consequences of the Grievant's absence. As for the Grievant's responsibility for his own incarceration, the Union argues that the incarceration cases almost always involve people who have some control over the actions which lead them to prison.

However, employees have not abandoned their jobs when they do something which violates the law, the Union argues. This was the point made in the case decided by Arbitrator Seward, the Union argues, which was cited by both Parties. The Union argues that therefore imprisonment alone is not enough to justify discharge.

The Union argues that the factors which Seward said should be considered in these cases include length of service, prior record and dependability, which relates to prior record. Later cases added the factors of length of imprisonment and the effect of the employee's absence on the Company, the Union notes. The Union cites cases which suggest that an employee's length of service, past record and lack of disruption to the employer's business may argue for overturning a discharge even in cases involving prison sentences of up to two years.

The Union points out that the Grievant was not in jail for six years. According to the Union the Company knew that it was likely that the Grievant would serve less than his full term. The Grievant was absent only for two and one half years, the Union argues, and it is during that period that any consequences affected the Company.

The Union argues that there is no evidence that the Company incurred additional expense for overtime, or for training costs associated with the Grievant's absence. There is no evidence that the Company had to hire anyone, or that there is a single additional person in the mill as a result of the Grievant's actions, or that someone will be displaced if the Grievant returns, the Union contends.

The Union argues that the Griever testified that these vacancies are filled all the time, and there is no additional cost to the Company in doing so. The vacancies in the casting sequence were filled permanently primarily by employees within the department, who already were trained.

The only purpose for considering the length of the incarceration is to measure the impact on the Company, the Union argues. If the Arbitrator concludes that the impact of the Grievant's absence was minimal, then the Company cannot rely upon the length of the incarceration, according to the Union.

The Union acknowledges that there is reference to the Grievant's past record in the third step minutes, but the Company never relied upon it when they disciplined the Grievant. But even if the Arbitrator permitted the Company to rely belatedly upon the past record, it is not a bad one, the Union urges. The length of service factor deserves significant deference, the Union argues.

The Union argues that all of the factors considered together support its position that the Grievant should be returned to work. Therefore the Union requests that the grievance be upheld, the discharge overturned, and the Grievant made whole for all lost wages and benefits.

OPINION

In this case the Grievant, an employee with nineteen (19) years' service, was discharged due to an extended absence as a result of an incarceration. The issue in the case is whether the Company has met the requirements of just cause by discharging the Grievant for this offense.

Both Parties cite a case decided by Arbitrator Ralph Seward in 1959 as the seminal case in the steel industry regarding absences due to incarceration. In that case, the Arbitrator interpreted a provision of the Bethlehem Steel contract which stated that any employee absent for ten (10) days or more without reasonable cause shall be terminated. The Arbitrator discussed the reason behind the provision, i.e. the problem of employees who irresponsibly fail to show up for work for days at a time. Contrasting this with the situation of an incarcerated employee, Arbitrator Seward stated,

Employees who are sent to jail present a different problem. . .A jail sentence of ten days or more may be a sign that an employee has defaulted in his obligations to society. But it is not necessarily a sign that he has defaulted in his obligations to the Company. And though a prolonged jail sentence may properly raise a question as to an employee's continued usefulness to the Company -- may indeed, in many cases be proper grounds for termination -- still the mere fact that a jail sentence following trial and conviction cannot be considered "reasonable cause" for absence does not settle the issue. Other things, the Umpire believes, must also be considered: the employee's length of service, his prior disciplinary record, and above all his record for dependability. . . .

Bethlehem Steel Co. v. United Steelworkers of America. Local 2602, 32 LA 543 (Seward, Arb. 1959).

The Company here has argued that the Grievant should be terminated because he abandoned his job when he took the actions which led to his prison term. The Union argues that the Company's position contravenes the reasoning in the Bethlehem Steel case cited above, that the violation of one's obligations to society leading to imprisonment does not necessarily demonstrate an intent to abandon one's job.

I doubt whether thoughts about his job ever crossed the Grievant's mind when he was committing the crime which sent him to prison. It doesn't seem likely and there is no evidence to establish that he intended to abandon his job by that conduct.
However, if he had taken the time to think about it, the Grievant easily could have foreseen a long absence from the job resulting from his conduct; in fact he could have been absent for a far longer period of time if the stabbings had proved fatal. Even though the conduct which caused the Grievant's absence did not directly involve the employer-employee relationship, it did significantly affect that relationship by causing the Grievant's long absence.
In a similar Inland case cited by the Union here, Arbitrator Mittenthal stated,
The Union claims that Franz's jail sentence prevented him from working and hence should be regarded as "good cause" for the leave of absence he sought. I cannot agree. Franz set in motion a chain of circumstances that prevented his attendance at work. He committed an assault and battery which appears to have been his fault alone. He must be charged with knowledge that commission of a crime could result in his conviction, that conviction could result in his imprisonment, and that imprisonment could make him unavailable for work. His unavailability thus appears to flow directly from his own actions. His absence from work was not for "good cause."
(Inland Steel Co., Bristol Mine, Mittenthai, Arb. 1963).
The Grievant's incarceration alone does not justify discharge on the basis that it indicates an intention to abandon his job. However, the Grievant bears responsibility for causing his extended absence from work. The Company is entitled to consider how much control he had over the reason for his long absence, just as it does in other cases where an employee is absent for a long period of time.
Furthermore, employers may legitimately terminate employees who prove unable to perform their job responsibilities over a long time, even due to circumstances totally beyond their control, such as illness. There is no reason why absences due to incarceration should be treated more leniently than those due to incapacitating illness.
The Union probably would agree that an employer need not keep a job open indefinitely for an employee who is incarcerated. Arbitrator Seward noted in the case relied upon by the Union that a prolonged jail sentence raises questions of the employee's continued usefulness to the Company and may, in many cases, be proper grounds for termination. The question, of course, is how long a period is reasonable. At the time of his original discharge the Grievant was sentenced to a six-year term. It was reasonable for the Company to conclude that he would serve a substantial part of this sentence, and he was in fact gone for almost half that period, a total of two (2) years and seven (7) months.
The Union argued strongly that the length of incarceration is important only as it relates to whether the Employer's business was disrupted over that period by the Grievant's absence. The Union presented evidence that the casting sequence, of which the Grievant was a member, went for a period of almost two (2) years after the Grievant's departure without filling all the permanent vacancies in the sequence. In addition, the Union presented testimony that when the permanent vacancies were filled, they were filled primarily with people who did not need to be trained and who already had "employment security." The Union argues that the Company cannot point to a single individual who was hired to replace the Grievant, and that these facts demonstrate that the Grievant's absence did not in any respect harm the Company.
The evidence indicates that the Grievant held a position which required skill and training, several steps up in the casting sequence. There is no dispute that when he left, his job as Tundishman Helper was filled, first on a temporary basis and later on a permanent basis. There is no suggestion that the Grievant's position went for any length of time without being filled, whether on a permanent or temporary basis. <FN 2>
The Union's argument rests upon the Company's failure to fill permanent vacancies at the entry level in the casting sequence, to cover the succession of holes created when an employee moved up into the slot left by the Grievant's departure. The Griever's testimony indicates that the major reason for this failure, however, was an ongoing dispute between the Parties over how those vacancies should be filled, i.e. over the testing qualifications for the entry level position. Once that dispute was resolved, it appears that the permanent slots were filled quickly.
There was no suggestion that the casting sequence could or did run short-handed, i.e. without temporary employees filling in for vacancies. Under these circumstances the evidence does not support the view that the Grievant's absence was of little consequence to the Company.
The fact that the permanent vacancies in the casting sequence were filled primarily or even totally from within the mill -- or with employees already trained in the casting sequence -- does not mean that the Company did not hire someone somewhere else to replace the Grievant. In an enterprise as large as this

steel mill, it may not be possible to say with certainty that Person X was hired to replace Person Y, and it is not reasonable to require the Company to do so in this case. The evidence indicates that the Grievant was needed in the casting sequence and his position was not left open during the period he was incarcerated.
As the Company noted, in every case cited by the Parties, a shorter prison sentence and term was involved than in the Grievant's case. In the two cases cited by the Union where a discharge actually was overturned, fourteen (14) months' incarceration was involved in Bethlehem Steel, Decision No. 2163, and seventy-five (75) days were involved in the Inland Steel case. Here a total of 31 months of incarceration was involved.
Umpire Bethel also has ruled that the length of incarceration is a significant factor in these cases. In Inland Award No.892, he wrote,
Also of great significance is the length of the grievant's incarceration. At the time he was imprisoned, the company could not know whether grievant would qualify for the "good time" that would effectively cut his sentence in half. Even if he did, grievant would still remain in prison for one year. As arbitrator Seibel said in Jones and Laughlin Steel Corp. No. 10-545, the decision to discharge an employee who is incarcerated for that length of time is not unreasonable.
Umpire Bethel also noted that there was no evidence that the Company's action was discriminatory in that case. In the instant case there was no evidence that other employees with similar periods of absence and past records have not been discharged.
The Union also has argued that the Company may not rely upon the Grievant's past record in order to justify the discharge because it was never raised as a reason for the discharge. The record was included in the third step minutes, without objection, however, and the Union raised the Grievant's record in mitigation of his discharge at the arbitration hearing. In a discharge case it would be unusual for an arbitrator not to consider an employee's past record, at least in examining the severity of the penalty.
The Grievant here probably did not have a record as poor as those described by the arbitrators in the Bethlehem Steel Co. case discussed throughout this opinion, or in Bethlehem Steel Co., Decision No. 2010, or Bethlehem Steel Co.. Decision No. 2011, all cited in Union Exhibit No. 12, in which the arbitrators upheld the discharges. Nevertheless the Grievant's record prior to his incarceration is not "unblemished," as were the records of the grievants in Bethlehem Steel Co. Decision No. 2163 and Inland Steel Co., (Mittenthai, Arb. 1963), the two cases relied upon by the Union, in which employees discharged for absences due to incarceration were reinstated. The Grievant's prior record in this case does not call for mitigating the discharge penalty, given the other factors here.
In Inland Award 892, Umpire Bethel also considered the grievant's long service to the Company. He wrote,
I am aware that grievant is a long service employee and I recognize that length of service played an important -- perhaps decisive -- role in my decision to reinstate another grievant in Inland Award 858. No matter what rationalizations they may offer for their decisions, arbitrators often take extraordinary steps to protect long service employees from discharge, especially those whose age makes it unlikely they will find work elsewhere. As Mr. Smith argues in this case, however, and as other arbitrators have recognized, length of service does not immunize an employee from discipline. The company, after all, has interests to protect, too, and it did bargain for the right to discharge employees for just cause.
I have considered the Grievant's long tenure with the Company in this case. Like Umpire Bethel in the foregoing case, I conclude that under the circumstances of this case the Company did not violate just cause when it discharged the Grievant, even though he is a long-service employee. The Grievant was gone for a very long extended absence of more than two and a half years, caused by an incident over which he had significant control. His services were needed by the Company in the casting sequence of the No. 4 BOF. Although his prior record does not significantly aggravate the offense for which he was discharged, it is not so outstanding that it would mitigate the discharge for such a long absence. And there is no evidence that other employees were treated better under similar circumstances.
AWARD
The grievance is denied.
/s/ Jeanne M. Vonhof
Jeanne M. Vonhof
Labor Arbitrator
Acting under Umpire Terry A. Bethel
Decided this 20th day of September, 1995.
<FN 1> From the evidence the Arbitrator concludes that the "employment security" accord is an agreement to provide a certain amount of work per week to certain employees.

<FN 2> The Company's failure to fill the position on a permanent basis for about a year does not support the Union's position, since it was done to accommodate the Grievant, in case he came back from prison earlier than anticipated.