IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Award No. 927

OPINION AND AWARD

Introduction

This case concerns the temporary demotion of grievant Dale Blankman from his position as mechanical technician. The case was tried in the company's offices in East Chicago, Indiana on March 11, 1997. Pat Parker represented the company and Mike Mezo presented the union's case. The parties submitted the case on final argument.

Appearances

For the company:
P. Parker Arb. Coord., Union Rel.
N. Shebish Section Mgr., 2A/21" Mill
T. Kinach Section Mgr., Union Rel.
R. Vela Sen. Staff HR Gen., ISBC
J. Bean Sen. EAP Rep., Med. Dept.

For the union:
M. Mezo President, Local Union 1010
A. Jacque Chrm., Grievance Committee
A. Dunlap, Jr. Asst. Griever
J. Smith Griever
D. Blankman Grievant
T. Niemiec Mechanic

Background

The company asserts that it had the right to demote grievant temporarily from his position as a mechanical technician because it determined that he was unable to fulfill the leadership responsibilities of the job. The parties agree that a mechanical technician typically works with a crew of mechanics and welders, sometimes directing their work and other times insuring that the work is performed properly. In either case, the company looks to the mechanical technician to provide leadership and to exercise judgment.

The events that gave rise to grievant's temporary demotion began on July 11, 1995, when grievant was called to the office of section manager Norb Shebish for an absenteeism interview. Shebish explained that the computer had kicked out grievant as being slightly above the 6% guideline, and Shebish wanted to give him a chance to explain any unusual or mitigating circumstances. According to Shebish, grievant was "belligerent and argumentative" and complained that he was being treated differently from other, similarly situated employees. Shebish said he tried to get the conversation "under control," but that grievant persisted in arguing and "talking over" him so that, ultimately, Shebish abandoned the meeting and decided to give grievant a reprimand. Shebish said he asked grievant whether he had problems with drugs or alcohol (a routine question in such meetings) but grievant refused to answer without union representation.

Grievant's version of the meeting is different. He said that he was only over the 6% guideline because he had an FRO, which counted the same as three absences. He thought that was unfair and complained about it to Shebish. He acknowledged that he was loud, but denied that he was threatening or abusive. The union asserts that being argumentative is not an issue, since the purpose of the meeting was for grievant to raise arguments in his behalf. The procedure is necessarily argumentative and adversary, the union says.

On August 3, 1995, grievant asked for, and was granted, emergency vacation in order to attend alcoholics anonymous meetings. The company acknowledges that seeking help is not, by itself, reason to question an employee's competence. However, the company cites this request merely as evidence that grievant had a problem with alcohol. The company clearly believes that grievant's problem influenced his conduct in the disciplinary meeting on July 11, as well as similar conduct in a subsequent meeting on November 14, 1996.

On that day, Shebish said grievant came to his office upset about a work order to construct some racks on the bloom deck. Shebish's notes from the encounter say that grievant questioned the safety and logistics of the assignment, though he refused to talk specifically about either problem. Shebish said his impression was that grievant was creating problems and that he was not interested in resolving any real difficulties with the assignment, assuming that any existed. Shebish testified that it was a "straight-forward" job,

though it had a relatively short time line. When Shebish mentioned the importance of finishing the job on time, he said grievant responded that it would take as long as he (grievant) needed to take.
The testimony is somewhat confusing, but it appears that grievant left the office at this time (though grievant claims that he was never there the first time and that the conversation occurred over the telephone.) Shebish said that he then went to the job site to visit with the other employees, none of whom questioned the assignment. The union denies that Shebish visited the site, though there was no direct testimony from any of the employees (other than grievant, who was not there) about this. In any event, the parties agree that grievant later came to Shebish's office, where the two again discussed the job. Shebish said it became clear to him that grievant was not interested in discussing any problems with the job, so he directed him to go and lead the crew. Grievant replied, "I'm not afraid of you." He said grievant was belligerent and argumentative, as well as agitated and animated. At that point, Shebish decided to send grievant to the clinic for a fitness to work evaluation.
Apparently, grievant took a test to determine whether he was under the influence of alcohol, which turned out to be negative. Shebish did not discipline grievant over this encounter (or, if he did, there is no such indication in the record). Nor, as far as the record shows, did he discuss the matter further with grievant at all. He did put a note in grievant's file about the incident, but he did not give a copy of it to grievant.
The final item relied on by the company stemmed from an incident that occurred on April 19, 1996, when grievant got into an altercation with another mechanical technician. Ultimately, grievant was assessed a five day suspension for violations of rules 132a (fighting) and 132d (reporting for work under the influence of intoxicating beverages.) Shebish testified that the fight itself did not influence the company's decision to demote grievant. However, after the fight a supervisor reported to Shebish that he smelled alcohol on grievant's breath, so grievant was sent for a fitness to work evaluation. Grievant tested at over .06, slightly above the company's cut off of .05.
Shebish said that the fight was the triggering event for the demotion, apparently because it led to the alcohol test, which he described as the "main factor" influencing the demotion. It is clear from the company's case that it describes the alcohol test as the "main factor" because the evidence of alcohol use, the company says, explains grievant's unusual behavior at the disciplinary meeting in July and during the work order controversy in November. These incidents, combined with the request for vacation to go to AA meetings and grievant's failure of a fitness to work evaluation, indicate that all of grievant's problems were "likely caused by alcohol." The company says that given the nature of grievant's job, it should not have to wait until someone gets hurt of until a job does not get finished in order to take action. Rather, it says that it had cause to act to insure that grievant got his alcohol problem under control. That is what the temporary demotion was for and, the company notes, it reinstated grievant to his permanent position as soon as he furnished evidence that he was seeking help.
The union stresses that this is not a disciplinary action, so that the "cause" mentioned by the company is not what is ordinarily required to discipline an employee. Rather, the union says -- and the company did not disagree <FN 1> -- that this case is controlled by Article 13. Thus, the union says that the company was concerned about grievant's "ability to perform the work," as that term is used in Article 13, section 1. Article 13, section 2 says, in relevant part:
"...records of the employee's individual performance have much influence on the "ability to perform the work"... but in no case will the company contend inability to perform the work when the procedure as outlined in this section has not been strictly complied with.
The reference to the outlined procedure is that contained in the first paragraph of Section 2 of Article 13, which deals with personnel records:
Records as to each employee's service with the company shall be maintained in the department ... and such records shall include matter relative to an employee's work performance.... [I]n case of those employees whose departmental record indicates unsatisfactory workmanship, the manager of the department ... will call the employee in and acquaint him/her with the reasons for the unsatisfactory rating.
The managers of the department will, when necessary, continue the program of acquainting the employee with written notices of discipline or warnings to stop practices infringing on regulations or improper workmanship.
The union says that the company's actions in this case did not meet these standards. There was no contention that the company ever called in grievant and expressed concern about "unsatisfactory workmanship" and there was little evidence of disciplinary notices or warnings. Rather, Shebish merely suspected that grievant's alcohol problem was having an impact on his work performance and, as a result, he demoted grievant and put the burden on him to demonstrate that he was qualified to return.

Discussion

The union cited three cases dealing with the substantial burden an employer faces when it demotes an employee from his position because of an inability to perform the work. The company countered that those cases all concerned permanent demotions, while the action at issue here was just a temporary demotion. The company characterized this as a good faith effort by Shebish to encourage grievant to come to terms with his alcohol problem. Presumably, the company believes that the restrictions accompanying a permanent demotion under Article 13 apply less onerously when the demotion is only temporary. The company did not cite any authority in support of this contention, and I am aware of none. Obviously, Inland Award 887 does not support the company's decision because that concerned only the issue of whether a temporary demotion could be an appropriate disciplinary action. Here, however, there is no question of discipline.

I fail to see how it matters whether the demotion is temporary or permanent. Grievant had qualified for the position of mechanical technician and, if he is to be removed because of an alleged inability to perform the work, the company must demonstrate that fact as required by the agreement. I do not question the company's assertion that Mr. Shebish acted in good faith. In fact, I have considerable sympathy for him and, despite the best efforts of the union representative, I am inclined to believe that grievant was hard to deal with. But that does not mean that the company enjoys the discretion to take him off the job that his ability and seniority have qualified him for until he undergoes some kind of transformation. Absent a showing that he is unable to perform -- or some other contingency not at issue in this case -- grievant is entitled to stay in his job.

The company's burden here is not an easy one, which is not surprising given the importance placed on seniority in claiming and holding a job. Article 13 requires that the company call in the employee and "acquaint him with the reasons for an unsatisfactory rating." In addition, the manager is to continue that process with "written notices of discipline or warning...." The record at issue here does not meet this standard. There is no evidence that the company ever called in grievant and told him his work was unsatisfactory, at least until the time it demoted him. Nor is there sufficient evidence of warnings and notices to support the company's decision. At base, there are only two. First was the meeting about absenteeism. I credited Shebish's testimony that grievant was hard to deal with in this meeting, but I question whether Shebish's response was adequate for purposes of Article 13. He did give grievant a discipline letter for absenteeism, but the company places no reliance on that fact for the demotion. Shebish wrote on the bottom of the letter that grievant was "belligerent and argumentative," but there is no evidence that he mentioned to grievant that this raised questions about his ability to perform his regular job. And, of course, this argument did not occur in the context of grievant's typical duties. That is, the fact that grievant argued with Shebish in a meeting concerning whether grievant should be disciplined does not necessarily mean that grievant had trouble doing his regular job. <FN 2>

The confrontation on November 14 did occur in the context of typical work duties, but there are problems counting this incident as part of the evidence required by Article 13. Shebish's account of the episode does raise questions about grievant's control over his emotions, but there is no evidence that Shebish ever discussed this concern with grievant or indicated to him that he thought his work was suffering. Equally important, the confrontation did not lead to disciplinary action or to other written evidence of a warning to grievant. Shebish prepared a written memorandum, but he did not share it with grievant. It is hard to understand, then, how this counted as notice to grievant that he was supposed to "stop practices infringing on regulations or improper workmanship," especially since the alcohol test was negative.

The company says it placed no reliance on the fact that grievant got into a fight with a coworker, maybe because evidence introduced at the hearing (where, admittedly, the fight was not an issue) indicated that grievant was not the aggressor and that he never threw a punch. It was the positive alcohol test, Shebish said, that influenced him. This incident would appear to conform to the requirements of Article 13, since it resulted in a written disciplinary action in grievant's personnel file. And, the company contends, this additional evidence of alcohol abuse helps put grievant's other actions and his abnormal conduct into perspective.

No one questions that grievant had a problem with alcohol or that the company had been aware of it at least since he requested time off for Alcoholic Anonymous meetings. And it may be that grievant's difficulties influenced his actions in July and November, when he was more aggressive than necessary with his supervisors. But more is required here than mere suspicion. The issue is whether the company has the right to take grievant out of a job that he has admittedly qualified for and which his seniority allows him to protect. In such case, Article 13 says that the company must "strictly compl[y]" with the requirements of

section 2, which specifies a meeting in which the employee is advised of unsatisfactory work, as well as further action intended to reinforce the problem. I find that the record here falls short of this standard.

I think the most that can be said is that the company had a suspicion -- not entirely unreasonable -- that grievant's alcohol was interfering with this ability to function. So the company simply took him out of his position and told him that the burden rested on him to get the job back. I understand the company's concern, but this was clearly improper. Once an employee qualifies for the job, the burden shifts to the company to demonstrate that he no longer has the ability to function. Article 13 may not mean that the company has to demonstrate conclusively that an employee is unable to perform his job. But it requires more than the fact of alcoholism coupled with two or three incidents of questionable conduct over a nine month period. And, of course, it requires positive action on the company's part to acquaint the employee with the problem and to reinforce its concern. I am satisfied that the company did not do that here.

Remedy

The company argues that even if its action violated the agreement, I should limit the remedy to three weeks back pay because the facts indicate that the company reinstated grievant only three weeks after he sought help for his alcohol problem. Standard contract doctrine requires a non-breaching party to take action necessary to minimize the effects of a breach. Thus, if grievant had merely done what the company had demanded sooner, he could have limited the harm.

This is not the place for an extended discussion of mitigation theory. It is sufficient to point out that contract doctrine sometimes limits an employee's obligation to avoid harm by accepting an offer from the breaching employer, and this case is a good example of why there is such a rule. Here, the company says that it demoted grievant as a way of forcing him to seek help for his problem. However, the fact that grievant ultimately sought help does not mean that the company had reason to demote him. The point is that the company never established the right to demote grievant at all. If I were to limit grievant's back pay, the remedy would effectively give the company what it wanted, even though it failed to establish that right under the contract. Under such circumstances, it is hard to see how the remedy would do much to discourage similar contract violations in the future.

I conclude that under the circumstances of this case, the company did not have the right to demote grievant temporarily and that it has an obligation to remedy its contract violation by making grievant whole.

AWARD

The grievance is sustained. The company will provide a make-whole remedy.

s/Terry A. Bethel

Terry A. Bethel

March 15, 1997

<FN 1>Although the company's representative agreed that this was not a disciplinary case, he did not expressly agree that Article 13 is the controlling provision; nor did he deny it. He repeatedly emphasized that the issue was whether there was "cause" for the discharge. I cannot, of course, understand this to mean the kind of cause required for discipline, since the company acknowledges that this is not a disciplinary case. The union's assertion that Article 13 applies seems justified not only by the language of that section, but also by other arbitration awards. Thus, in deciding this case, I have understood the company's issue of "cause" to refer to whether it satisfied the requirements of Article 13.

<FN 2> Shebish said there were such indications, though he was reluctant to elaborate because he made no written record of the incidents. I think this reaction was appropriate, given the requirements for written evidence in Article 13.)