

Award No. 942

IN THE MATTER OF THE ARBITRATION BETWEEN

INLAND STEEL COMPANY

and

UNITED STEELWORKERS OF AMERICA

LOCAL UNION 1010

Arbitrator: Terry A. Bethel

July 7, 1998

OPINION AND AWARD

Introduction

This case concerns the discharge of grievant Stan Weliczko. The case was tried in the company's offices on May 14, 1998. Pat Parker represented the company and Mike Mezo presented the case for grievant and the union. Grievant was present throughout the hearing. The parties submitted the case on final argument.

Appearances

For the company:

P. Parker -- Section Mgr., Arbitration and Advocacy

D. Schramm -- Section Mgr. Of Maintenance, No. 4 BOF

W. Boos -- Senior Rep. Union Relations

R. Allen -- Area HR Mgr., Iron & Steel Producing

For the union:

M. Mezo -- President and Step 4 Representative

L. Aguilar -- V. Chairman Grievance Committee

A. Jacque -- Chairman Grievance Committee

J. O'Donohue -- Griever

S. Strauch -- Assistant Griever

S. Weliczko -- Grievant

H. Golden -- Witness

Background

Most of the facts are not in dispute. In late November 1994, grievant was charged by Criminal Information with four criminal counts including dealing in cocaine, possession of a controlled substance (diazepam or Valium), maintaining a common nuisance by selling drugs from his home, and possession of cocaine. By a separate Criminal Information, though apparently as a result of the same investigation, grievant was charged with receiving stolen property because he knowingly accepted tools and other property stolen from the Hyre Electric Company in return for drugs. By agreement filed in court on January 8, 1997, grievant pled guilty to three felonies in connection with the first Criminal Information. Specifically, he pled guilty to possession of cocaine, possession of diazepam, and maintaining a common nuisance by selling drugs from his home. In return for those guilty pleas, the charge of dealing in cocaine was dropped. On March 21, 1997, the Superior Court of Lake County sentenced grievant to a two year term for each of his three felony convictions, with the sentences to run concurrently. The court then suspended one year from each sentence and, for the remaining year, committed grievant to the Lake County Sheriff's Work Release Program for one year. He was ordered to begin his sentence on March 31, 1997.

The court also disposed of grievant's charge of conversion at the same time. That matter, covered by the second Criminal Information and related to the stolen property received in return for drugs, was resolved when grievant pled guilty to the Class A Misdemeanor of conversion. He was sentenced to a term of one year, to run concurrently with the sentences imposed for his felony convictions.

Grievant apparently worked without incident under the work release program until July of 1997, at which time his placement in the program was revoked for cause and he was incarcerated. In early July, grievant had arrived back at the work release facility late, claiming that he worked overtime, a fact that was not confirmed, though that is not at issue here. Grievant was asked to submit to a drug screen and he complied. The drug screen was positive for cocaine and, according to documents filed with the court, grievant admitted using cocaine. He also allegedly told the investigators that he was taking 500 mg a day of Vicodin and that he had the medicine at work. Grievant was apparently removed from the work release program immediately, though his participation was not officially revoked until August 11, 1997, at which time he was remanded to the Lake County Jail.

Grievant was kept in jail until October 1, 1997. The company says, however, that it initially believed he was to be released on September 1. It is not entirely clear where the company got that information. In any

event, the company took no action against grievant until it learned that he would not be released from jail until October 1, at which time it instituted the proceedings that led to his discharge and, ultimately, this arbitration. The Company says it considered four points in its decision to discharge grievant. First, the cause of his incarceration and his control over it. Here, grievant was convicted of two felonies involving possession of drugs. Moreover, while the charge of selling cocaine was dismissed, he pled guilty to maintaining a common nuisance, meaning that he was selling drugs out of his house, which was also a felony.

In addition, grievant was convicted of crimes involving stolen property. The company says that as a mechanic in No. 4 BOF, grievant was largely unsupervised and had access to many areas of the mill. This would not only allow him to sell drugs, but would also give him access to property he might steal, a significant concern now that employees park inside the plant gates.

The company also points to the disruption caused by grievant's prolonged absence due to his incarceration. The company notes that grievant had only recently bid into No. 4 BOF and that he was still undergoing training. His absence interfered with that training and cost the company the benefit of his services during that time. The company says it gave due consideration to the fact that grievant was a long term employee with 24 years service. Finally, the company says it considered grievant's previous disciplinary record. The company characterizes grievant's work record over the past five years as "poor." His offenses include a 1992 discipline of 2 turns for falsification and a 1995 arbitration reinstatement that converted a discharge to a sixty day suspension. In the latter incident, Arbitrator Jeanne Vonhof found that grievant had knowingly been in a women's locker room with an unidentified woman. Finally, grievant had reached the one day discipline level under the company's attendance program.

The company also maintained, over strenuous union objection, that grievant's post discharge conduct was relevant in this case. It points out that even though grievant claims the right to reinstatement as of his release from jail on October 1, he was again incarcerated in January, 1998. This incident involved violation of the terms of his probation. Although the record does not reveal any specifics, the petition filed to revoke his probation alleges that grievant violated his probation by committing the crime of conversion, by driving while intoxicated, by driving while his license was suspended, by failing to stop after an accident, by having a false or fictitious registration, and by following too close. In addition, the petition says that grievant failed to report to his probation officer and submit the required monthly reports. Grievant was apparently incarcerated this time for about three months. Obviously, he did not miss any work in this period, though his arbitration hearing, originally set in January, had to be rescheduled.

The union argues that the company can establish just cause only from the information it had available at the time of grievant's discharge. This merely includes the fact that grievant had been incarcerated and would be released from jail on October 1, 1997. The union points out that the company took no action when it erroneously believed that grievant would be released from jail on September 1, which suggests that the company did not believe that an incarceration for a 60 day period would justify discharge. A period of 90 days also does not justify such action, the union says, especially since grievant was not a fully trained craftsman in his new department and because the company had been encouraging craftsmen around the plant to take voluntary layoffs. Moreover, the union presented evidence that grievant's absence did not appreciably increase overtime in the department and, further, that there was an experienced reservoir of craftsmen from which to draw, had assistance been needed. The union says that steel industry arbitrators have recognized that absence due to incarceration does not, of itself, necessarily justify discharge, especially when the absence is for a relatively short time period. Moreover, the union says that the only other relevant factors that should be considered are work record and length of service. Grievant has 24 years of service and his record for absenteeism, which the union says is the relevant consideration here, has progressed only through the one day discipline level. Thus, the union says that the company did not have sufficient cause to discharge grievant and that he should be reinstated, though obviously with no back pay for the period of time during which he was incarcerated after his discharge.

Discussion

Taken in segments, the union's case is persuasive. Thus, the union asks that I look principally to the fact that grievant's absence due to incarceration was not for an inordinately long period and that there is no real proof that his absence inconvenienced the company. Moreover, the union says that the only relevant work record to consider is grievant's absenteeism. His incarceration, after all, merely caused another absence and he had only progressed through the one day discipline level under the company's absenteeism program. And, finally, the union argues that anything that occurred after the discharge is irrelevant, urging the familiar principle that the company must be able to establish just cause from the facts known to it at the

time it made the discharge decision. The problem, however, is that it is not easy to view only these segments of the record. Rather, this case presents a composite of events that must be considered in determining whether it is appropriate to reinstate grievant to his former position.

As other arbitrators have recognized, the mere fact of grievant's incarceration is not necessarily sufficient to constitute just cause for discharge. That might be especially true in a case like this one where, as the union correctly points out, there was no significant impact on the company. Mr. Parker did his best to convince me that grievant's prolonged absence had an adverse impact on the department's ability to operate, but the facts do not support this claim. It is true that the department had received special permission to augment its maintenance forces, but grievant had only been in the department a short time and he was not fully trained on the equipment he was expected to repair. And as the union says, the company was trying hard to displace other craftsmen, including some who may have had considerably more experience in the BOF than grievant. The fact that the company apparently did not replace him and that overtime hardly budged is some evidence that his absence had no appreciable effect on the company.

This evidence, however, only goes so far. Perhaps it could save grievant from discharge, if it stood alone, but that does not mean that it is irrelevant or inconsequential. The fact is that grievant was absent for a prolonged period due to his own foolish conduct. It is one thing when an employee is absent for 90 days for an illness or injury or other matter beyond his control. This employee, however, deliberately engaged in criminal activity and, while it is no doubt true that he did not think much about the consequences, he had to know that he risked a prison term which would obviously affect his ability to work. The fact that it was possible for the company to fill in behind him does not mean that he was privileged to ignore his employment responsibilities. Whether he was needed is not a factor he is entitled to take into account when he takes unreasonable risks. And, of course, even though the company was encouraging layoffs in other departments, it did not do so in the BOF. Thus, had grievant not been incarcerated, he would have continued to work and, as the company says, would have engaged in some useful activity. His prolonged absence due to criminal activity, then, justified the company's decision to take disciplinary action against him.

I also am not able to accept the union's claim that the nature of grievant's criminal conduct is irrelevant. It is true, as the union claims, that there is no evidence that grievant engaged in criminal conduct at work. Nevertheless, grievant was convicted of three felonies, one of which resulted from receiving stolen property - including tools - from another employer. And it is also clear that grievant was dealing drugs, since all of his convictions were drug related. Standing alone, criminal convictions for these activities do not necessarily justify a decision to discharge grievant. But it is appropriate to consider them in the context of the entire case against grievant. This is especially true when, even after his initial release from incarceration, grievant is again charged with criminal conversion.

Compounding the problem is grievant's previous work record. I disagree with the union's claim that the only relevant disciplinary history is grievant's previous attendance record. Grievant's discharge in this case was not merely for absenteeism, but also for the circumstances that led to his absence, which was replete with criminal activity and poor judgment. This is not this grievant's first brush with discharge. He was reinstated two years before his current discharge because of imprudent action that Arbitrator Vonhof found justified a prolonged suspension. His judgment did not appear to improve appreciably in the interval between that reinstatement and his current discharge.

Nor do I agree with the union's claim that grievant's post discharge conduct is irrelevant. In numerous cases, I have allowed the union to introduce evidence of post discharge rehabilitation, usually over strong company objection. As the union's advocate recognized in his final argument, the rationale of those cases is to allow a discharged employee with a substance abuse problem to establish that he has been rehabilitated and that he can become and remain a valuable employee. But this strategy works for both sides. If the union is entitled to introduce evidence of rehabilitation in mitigation, then the company can submit aggravating circumstances that bear on grievant's right to reinstatement. Such evidence does not go to the questions of just cause, as the union rightly points out. But when an employee is guilty of misconduct, equitable factors sometimes influence his ability to gain reinstatement. This, essentially, was the holding of the United States Supreme Court in *McKennon v. Nashville Banner*, 513 U.S. 352 (1994). Although that was an age discrimination case, the same rationale applies here, especially given the previous practice of allowing the union to submit post discharge mitigation evidence. <FN 1>

Here, grievant's conduct after his discharge does little to inspire confidence that he could become a valuable employee if reinstated. After having violated the rules of his work release program -- including continued drug use -- he then engaged in similar conduct that violated the terms of his probation. In addition, he once

again apparently committed the offense of conversion, one of the original crimes lodged against him. There is also a notation in one of the reports that grievant kept drugs at the plant while he was in the work release program. The union suggests that grievant was taking a prescription drug and that keeping it at the company was an innocent act. But the report itself is ambiguous and it was not explained by grievant, who did not testify at the hearing. The fact that Vicodin is a prescription drug is not enough to conclude that it was prescribed for him by a physician. Vicodin is a narcotic pain killer and there is nothing in the record that indicates why grievant was taking it or why he would have to store it at the company. <FN 2> Grievant, after all, had already been convicted of selling Valium, which is also a prescription drug. The ambiguity about his continued drug use and his action in keeping a narcotic drug at the plant, when combined with his criminal record of drug use and drug sales, weigh heavily against his reinstatement. Although the incarceration itself may not have been enough to justify the discharge, the totality of the evidence in this case precludes an order of reinstatement, or any other remedy, for grievant. The first and subsequent incarcerations justify some concern about grievant's continuing ability to work. And the nature of the offenses, when combined with the previous disciplinary record, help compel a conclusion that the company has the right to terminate grievant's employment. Therefore, the grievance will be denied.

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

July 7, 1998

<FN 1> This is not to say that the company could discharge an employee and then embark on a fishing expedition in search of a cause. But that does not accurately describe the facts at issue here. Moreover, all of the information about grievant that the company introduced was related to his original incarceration.

<FN 2> Vicodin is the drug that Green Bay Packers quarterback Brett Favre reportedly was addicted to. See, Milwaukee Journal Sentinel, May 18, 1996.