Award No. 953
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
October 9, 1998
OPINION AND AWARD
Introduction
These cases concern the discharge of grievant Timothy Gullickson for an alleged violation of his last chance agreement. The case were tried in the Company's offices on August 18, 1998. Patrick Parker represented the Company and Mike Mezo presented the case for grievant and the Union. Grievant was present throughout the hearing but did not testify. The parties submitted the case on final argument.
Appearances
For the Company:
P. Parker -- Sec. Mgr., Arb and Advocacy
W. Boos -- Sen. Representative, Labor Relations
G. De Armond -- Contract Admin. Resource
I. Bean -- EAP Counselor
T. Novak, M.D -- Medical Doctor, Medical Dept.
For the Union:
M. Mezo -- Staff Representative, USWA
D. Jones -- Griever
T. Gullickson -- Grievant
J. Cadwalader -- EAP
D. Kopsho -- Assistant Griever
Background
In Inland Award 903, rendered July 13, 1995, I ordered that grievant be reinstated without back pay following arbitration of his discharge for an unauthorized absence from work in order to participate in a drug rehabilitation program. In that case, as in this one, there was evidence that grievant has suffered from a long and recurring problem with drug addiction. The discharge at issue in Inland Award 903 was not related directly to grievant's dependence on drugs, though it stemmed from a prolonged absence grievant had taken to deal with his addiction. Ultimately, I found that there was some ambiguity in the circumstances under which grievant had taken leave, though I also recognized that it would do no good to reinstate grievant unless "the root cause of his troubles is under control." Thus, I held that the Company could condition grievant's reinstatement on a last change agreement, "which contains terms common to such instruments, including random drug and alcohol testing."
Grievant signed such an agreement on July 18, 1998 and was, thereafter, reinstated. The agreement provides, in relevant part:
Based on Inland Award 903, Mr. Gullickson will be returned to work on a last chance basis. This will provide him with one final chance to prove that he can become a responsible employee of the Company. This reinstatement is conditioned upon Mr. Gullickson's strict observance of the following terms: (emphasis in original)
1. For one (1) year following Mr. Gullickson's return to work, Mr. Gullickson will maintain contact with the Union Drug and Alcohol Committee ....
2. Mr. Gullickson will not use or permit himself to be exposed to any mood altering substances (alcohol, illicit drugs, or any drug not prescribed by a physician). The detection of the aforementioned substances, regardless of the amount, will be grounds for his immediate suspension preliminary to discharge.
3. During a two (2) year period following Mr. Gullickson's return to work ... the Company may test him at any time for the presence of mood altering substances as indicated in Item No 3 above....
6. Should Mr. Gullickson, within a period of twenty-four (24) months from the date of this agreement ... accrue an absenteeism rate of five percent (5%) or greater during any 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 exist for his immediate suspension preliminary to discharge.

7. Mr Gullickson will waive any right to the special Justice and Dignity Procedure outlined in the Collective Bargaining Agreement in the event of any subsequent suspension-discharge action taken against him within five (5) years from the date of this agreement.
8. Mr. Gullickson fully acknowledged an understanding of his basic employment responsibility to report on time for scheduled work, and to give timely notice when unable to do so.
9. By signing below, Mr. Gullickson authorizes the Inland Steel Medical Department to release and copy, as necessary, pertinent information from his medical file to ensure compliance with this agreement and/or prove noncompliance if required. The specific types of information released may include medical records, psychiatric records, and/or records dealing with drug/alcohol abuse.
10. This arrangement represents a final chance at employment for Mr. Gullickson. Failure to meet any of the condition set forth above, any future incidents similar to that which resulted in the discharge of Mr. Gullickson in this case, or any violation of any Company rule or regulation will be cause for immediate suspension of Mr. Gullickson subject to discharge. (Emphasis in original)

Grievant worked under this agreement until the time of his discharge, on May 19, 1998.

The process that led to the discharge began sometime in April, 1998, when the Company received a copy of claims grievant had filed under the Company's sickness and accident program. One of the forms was from a visit to the Southlake Hospital on February 14, 1998. The form indicates that grievant had gone to the hospital seeking treatment for chest pain which, according to the diagnosis written on the form, was "chest pain from cocaine abuse." On the same form, grievant was advised to "avoid cocaine." In addition, on March 4, 1998, grievant was hospitalized in the Southlake Center for Mental Health and filed a claim for treatment of conditions diagnosed as "major depressive disorder recurrent" and "polysubstance dependent." The latter condition is actually a recognized medical condition defined by the DSM IV to mean that during the same 12 month period, the patient has repeatedly used three different substances, though none predominated. Dr. Novak of the Company's medical department testified that the term "polysubstance dependent" is also sometimes used to indicate that an individual is using a variety of drugs at the time of the diagnosis, and not necessarily just within the previous 12 months.

Representatives of the Company met with grievant and his representative on April 24, 1998, at which time the Company asked for an explanation of the conduct leading to the claims and also asked that grievant furnish medical information that would substantiate his claim that he had not used drugs in violation of the last chance agreement. A Company witness said that at the April 24 meeting grievant denied recent use of cocaine, but refused the release of his records. On April 30, 1998, the Company wrote to grievant giving him "one final opportunity" to submit evidence that he had not used drugs on or about February 14. In particular, the Company was interested in any drug tests grievant may have had taken during his treatment. The Company further informed grievant that if he did not comply with the request, his suspension would be converted to discharge. Grievant did not release his medical records and he was discharged by letter dated May 19, 1998.

The Company argues that it had reasonable cause to conclude that grievant had used drugs and, further, that this conduct violated paragraph 2 of the last chance agreement. It notes not only the reports from the hospital, but also points out that in the grievance process, grievant never denied that he had used drugs. Moreover, the Company says that grievant's failure to testify in this case is telling, since there is no denial of drug use on the record. Under those circumstances, the Company says, it is fair to conclude that grievant was using drugs on or about February 14, 1998. Moreover, the hospitalization claim indicates that he may have been using as many as three mood altering substances. In addition to paragraph 2, the Company also points to violations of paragraphs 8 and 10 of the agreement. Paragraph 8 requires grievant to report for work and paragraph 10 recognizes that a repetition of the conduct that led to the discharge would be cause for suspension pending discharge. Both of those paragraphs apply here, the Company says, since grievant has missed about 90 work days in the past three years. In addition, his recent absences due to cocaine abuse were exactly like the conduct that originally got him discharged in 1995. Thus, the Company asks that I conclude that there is just cause for discharge.

The Union mounts a number of defenses. First, it argues that the Company had not raised any arguments under paragraphs 8 and 10 of the last chance agreement prior to the hearing, and it called a witness who testified without rebuttal that there was no such argument in the grievance meetings. The Company cannot, the Union says, raise those arguments for the first time at arbitration. <FN 1> Even if it could raise the argument under paragraph 8, the Union notes that grievant was not in violation of the Company's attendance program and, therefore, would not be subject to discipline. The Union's principal argument is that paragraph 2 of the last chance agreement does not apply because it was valid for only two years. As

support, the Union points to the fact that paragraph 3 allows random testing for a period of only two years and that paragraph 3 specifically mentions paragraph 2. Moreover, in Inland Award 912, which raised a similar issue, I observed the two paragraphs were "clearly tied ." Arbitrator Vonhof made a similar observation in a later case.

The thrust of the Union's argument is clear. It does not acknowledge or admit that grievant used any drugs at all. But, it says, even if he did, the portion of the last chance agreement that made any drug use a dischargeable offense had expired by February 14, 1998, since it was intended by the parties to apply for only two years. That does not necessarily mean that the last chance agreement itself expired after only two years. In fact, paragraph 7 expressly remains in effect for five years. But the mere use of drugs or alcohol as a grounds for discharge, the Union says, was in effect for only the same time as the random testing provisions of the last chance agreement.

Finally, should I determine that Paragraph 2 remained in effect, the Union says it is improper for the Company to invoke it in this case. It points out that grievant did not come to work under the influence and he was not found to have drugs in his system in a for-cause or random test. Instead, grievant sought help from a health care provider and it was only through the insurance forms associated with that effort that grievant's drug use - if, indeed, there was drug use - came to the Company's attention. The Union says there have been other employees on last chance agreements who have sought help through the Company's program and have not been discharged. The fact that grievant used an outside provider, the Union says, should not result in different treatment.

Discussion

This is not the first time the parties have disagreed about the duration of the restrictions placed on employees under last chance agreements. The Company typically argues, as it does here, that unless a particular provisions is limited to a shorter period, the agreement lasts five years. Five years is not a randomly chosen number. The Collective Bargaining Agreement makes it clear that a previous disciplinary action can be cited for only five years. Because a last chance agreement is ordinarily accompanied by an acknowledgment that the employee had originally been discharged for just cause, the Company argues that the reinstatement terms should last as long as that discipline is a relevant consideration in a subsequent disciplinary action. Actually, the Company's argument in this case is even broader than that. Thus, the Company says it reinstated grievant with the understanding that he could never use drugs again. However, it presumably concedes that if the drug use came more than five years from the previous discipline that led to the last chance agreement, that discipline could not be relied on to support its action. The practical limit, then, is five years.

Although it did not says so directly in this case, the Union has elsewhere pointed out that a five year limitation for citing previous discipline does not necessarily mean that all restrictions placed on a reinstated employee are intended to last all five years. That was the argument it advanced in Award 912, where I was able to decide the case without confronting the issue. I cannot do that here. Unlike Award 912, there is no contention that the grievant in this case used drugs within the two year period set forth for random testing. A significant issue, then, is whether the provision that says that drug use "will be grounds for his immediate suspension preliminary to discharge" survives the two year limit on random testing set forth in paragraph 3 of the last chance agreement. In this case, I could avoid that issue only if l were to find that there was insufficient evidence that grievant had used drugs. I cannot, however, make that finding.

I indicated to the parties at the hearing that I thought the medical records created a permissible inference that grievant had used drugs within the previous 12 months. In fact, the evidence seems clearly to indicate that he was suffering from the aftereffects of cocaine use on February 14. Under the Agreement, the Company had no right to call grievant to testify at the arbitration hearing. Nor is there any obligation for grievant to do so. But in light of the evidence against him, I find it significant that he did not deny that he had used cocaine on or about the time of his visit to the hospital on February 14. Nor, according to the Company's witness, did he do so during the grievance procedure. He apparently did deny using drugs during the investigation, though he also refused the Company's request for medical records substantiating his claim. As the Union rightly claims, grievant does not have any obligation to prove compliance with the last chance agreement. The burden is not on him to establish that he has not used drugs. But that does not mean he has no obligation at all. In this case, the Company did not just randomly charge that grievant had been using drugs. Rather, it based its request for information on medical forms that were filled out at grievant's urging and which clearly seem to indicate drug use. On those facts, it was grievant's responsibility to explain the reports, and he did not do so.

Nor can I find that it was improper for the Company to rely on grievant's hospital records. It may be that some sources of knowledge would be impermissible. But there was no misconduct by the Company in this case. It did not spy on grievant or gain access to records it was not entitled to see. Nor did it compromise any privacy interest. It merely noted information contained on a form grievant had caused to be forwarded to the Company. I appreciate the Union's argument that employees should not be punished for seeking help and its testimony that other employees on last chance agreements have not been when they sought help through Company channels. Perhaps this argument could have merit if the only evidence here was that grievant had entered a rehabilitation program, though I note that grievant has tried that numerous times in the past, obviously without success. Moreover, if those were the facts, then I would have to decide whether it made a difference that he used an outside as opposed to a Company sponsored program. But there are two problems with the Union's argument in this case.

First, there is no evidence that grievant's hospitalization in early March was a rehabilitation program. There mere fact that he was hospitalized suffering from depression and polysubstance dependence does not mean he was in rehabilitation. He was, after all, only in the hospital for three days. For all the record shows, he could have been treated for depression or for an overdose or for physical symptoms stemming from his drug use. The second problem is the February 14 visit to the hospital. This seems clearly not to have been part of any rehabilitation effort. Rather, it appears that grievant went to the hospital with chest pains that turned out to have been caused by cocaine use.

No one questions that the Company would have had cause to act against grievant if it had observed him using drugs. Nor would it matter if the Company had gained its knowledge through a newspaper article reporting an arrest for drug possession. Admittedly, the hospital reports are not public documents. However, it was within grievant's ability to control whether the documents were forwarded to the Company. I find that it was not improper for the Company to use those reports as evidence that grievant had used drugs. The issue, then, is whether the prescription against drug use in the last chance agreement was still in effect in February, 1998.

Each side can point to portions of the agreement in support of its interpretation. There is no general time limit in the agreement. Paragraphs 2 and 6 are in effect for two years, and paragraph 1 is in effect for only 1. Thus, the Company might argue that these shorter time limits were necessary since otherwise those provisions would be in effect longer. But paragraph 7 has a 5 year effective date. In addition, Inland Award 912 does say that the language in paragraphs 2 and 3 is linked.

I cannot say that last chance agreements are always intended to last for 5 years. Here, however, the circumstances convince me that the proscription against drug use in paragraph 2 was not to be limited to 2 years. By the time of his reinstatement in 1995, grievant had been hospitalized from drug abuse at least 12 times; he had been kicked out of or dropped out of the Inland Assistance program 6 times; and he had several other problems with alcohol or drug abuse. In his previous arbitration hearing, grievant said he had a life long problem with addiction and that he had elected to attend the Teen Challenge program in order to save his life. In those circumstances, it does not make sense to believe that the Company would have agreed to reinstate grievant with an understanding that he could return to drug or alcohol use after two years. Given his history and the considerable effect drug use had on his work experiences, the Company legitimately could expect that grievant would abstain from drug use completely.

This expectation is not inconsistent with the 2 year limitation on random testing contained in paragraph 3. Arbitrators in this industry and others have recognized that, typically, an

[PAGES MISSING]

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

October 9, 1998

<FN 1> Because I have found that the Company's case need not rely on paragraphs 8 and 10, I need not resolve this argument.