Award No. 776
OPINION AND AWARD
In the Matter of Arbitration Between
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 11-R-32
Appeal No. 1387
Arbitrator: Herbert Fishgold
August 31, 1987
Appearances:
For the Company
R.V. Cayia, Arbitration Coordinator, Union Relations
G. Van Asperen, Manager, Coated Products and Continuous Heat Treating Dept.
R. Vela, Section Manager, Advocacy, Arbitration and Administration, Union Relations
D. Venable, Supervisor, Coated Products and Continuous Heat Treating Dept..
S. Nelson, Representative, Operations, Union Relations
P. Parker, Representative, Operations, Union Relations
J. Bean, Clinic Counselor, Medical Dept.
For the Union
W. Trella, Staff Representative
G. Justak, Grievant
J.E. Gutierrez, Grievance Committeeman
A. Purham, Witness
P. Litton, Asssistant Grievance Committeeman
Statement of the Grievance: "The aggrieved, Guy Justak, Payroll No. 17468, contends he was unjustly suspended in light of the cirucumstances involved."
Relief sought: The aggrieved requests that he be reinstated with all rights and benefits due him under the Collective Bargaining Agreement.
Contract provisions cited: The Union alleges violation of Article 3, Section 1 and Article 8, Section 1 of the Collective Bargaining Agreement.
Statement of the Award: The grievance is not arbitrable.
CHRONOLOGY
Grievance No. 11-R-32
Grievance filed: April 23, 1986
Step 3 hearing: May 6, 1986
Step 3 minutes: May 12, 1986
Step 4 appeal: May 30, 1986
Step 4 hearing(s): August 15, 1986; January 19 and 29, 1987; February 19, 1987
Step 4 minutes: July 21, 1987
Appeal to Arbitration: July 22, 1987
Arbitration hearing: July 29, 1987
Award issued: August 31, 1987
By way of background, the grievant, Guy Justak, was employed by the Company on August 15, 1977, and was established as a General Laborer in the Coated Products and Continuous Heat Treating Department of Plant No. 1 Galvanizing. During the last five years of his employment, grievant received a series of discipline, including "final chance" reinstatements on May 28, 1985 and October 18, 1985.
On the B turn of March 31, 1986, grievant was assigned to work as a Piler on the No. 3 Line in the Plant No. 1 Galvanizing Department. At approximatedly 9:50 am the grievant approached his Foreman, D. Venable, and informed him that he needed a sealer (crimper). a tool which is used to crimp the steel bands that are placed around a coil. All of the air operated crimpers were in need of repair, and Venable handed grievant a hand sealer. According to Venable, grievant then became upset, threw the sealer on the floor, and stated he was going to see the Department Manager, G. Van Asperen. Venbale claims that he then directed grievant to remove the coil that had just been banded by Justak, and when grievant continued to walk away,

he called grievant's name twice, but grievant kept on walking. There is no dispute that grievant left his work station at that point and was a short time later escorted from the plant for insubordination.
On April 7, 1986, a department investigation of this incident was convered by Manager Van Asperen at which time grievant and Venbable gave their accounts of the March 31 incident. As a result of the above incident and in light of the grievant's prior discipline record which included the October 18, 1985 "last chance" reinstatement conditions which governed the grievant's continuing employment, the grievant was suspended preliminary to discharge on April 9, 1986.
By certified letter dated April 8, 1986, grievant was notified that effective April 9, 1986, he was suspended for five days preliminary to discharge for failure to comply with the October 18, 1985 stipulations and overall unsatisfactory work record. The letter also advised the grievant that:
"Under the provisions of Article 8, Section 1 of the Collective Bargaining Agreement, March 1, 1983, you may, within five (5) days from the effective date of this letter request a hearing before the Manager of Labor Relations and at such hearing you are entitled to Union Representation."
In light of the grievant's failure to request a suspension hearing during the five day period cited in the above letter which expired at 5:00 pm on April 16, 1986, he was discharged on April 17, 1986 without any further notice by the Company.
On April 23, 1986, the instant grievance was filed contesting the Company's suspensions and discharge decision. On April 25, 1986, the Company notified the Union that it was returning all copies of the grievance unanswered since the grievant had not requested a suspension hearing. On May 6, 1986, the Company afforded the Union a courtesy hearing on this matter. Subsequently, on May 12, the Company sent the Union a letter reiterating that the grievant's discharge had become final in light of his failure to request a suspension hearing and that consequently the grievance was not entitled to consideration under the grievance procedure.
At the outset, the Company argues that the subject grievance is not arbitrable in light of the grievant's failure to request a suspension hearing within the five day period afforded under Article 8, Section 1 of the Collective Bargaining Agreeement. Tht provision states in relevant part:
"Section 1. In the exercise of its right to discharge employees for cause, as set forth in Article 3, the Company agrees that an employee shall not be peremptorily discharged, but in all instance in which the company may conclude that discharge is warranted, he shall first be suspended for five (5) days and notified in writing that he is subject to discharge at the end of such period. A copy of such notice shall be furnished to such employee's grievance committeeman promptly. During such five-day period, if the employee believes that he has been unujustly dealt with, he may request and shall be granted during this period a hearing and statement of his offense. Before the Superintendent of Labor Relations, or his designated representative, with the employee's grievance committeeman and officers of Union present if the facts and circustance shall be disclosed to and by both parties.
"If a hearing is requested, the Company shall, within five (5) days after such hearing, decide whether such suspension shall culminate in discharge, or whether it shall be modified, extended or revoked, and the employee and the Union shall be notified in writing of such decision. If no hearing is requested within the five-day period, the discharge shall become final at the end of such period without further notice or action by the Company, unless the Company shall modify, extend or revoke the suspension or discharge."
There is no dispute between the parties that the provisions of Article 8, Section 1 require, and the practice of the parties in applying that provision has been that the holding of a suspension hearing within the required five day period is a conditon precedent to filing a timely grievance. Moreover, according to the parties stipulations of fact, there is no dispute that the grievant recieved the suspension letter on April 19, 1986. The stipulations further indicate that a copy of the suspension letter was sent to Grievance Committeeman J. Gutierrez on April 8 and that Department Manager Van Asperen telephoned Gutierrez on April 10, and informed him that grievant had been suspended preliminary to discharge.
Finally , there is no dispute between the parties that the grievant telephoned Mihalak, Administrative Supervisor for the Coated Products and Continuous Heat Treating Department at approximately 7:15 am on April 16, at which time Mihalak informed grievant that he had been suspended preliminary to discharge and that he should contact his Grievance Committeeman immediately regarding any recourse he wished to pursue.
Citing a number of Inland Awards, discussing whether a grievance is arbitrable where the time limitations set forth in the Agreement have not been met, the Company contends that, based on the record herein, the grievant's failure to request a suspension hearing is a fatal flaw which should serve to bar his grievance from being processed and considered on the merits.

Notwithstanding the above, the Union argues that there were mitigating curcumstances which should serve to excuse the grievant's failure to request a suspension hearing. The Company's response is two-fold. First, the Company points out that unlike, i.e., Article 13, Section 11, Paragraph b (3) of the Agreement, there is no saving clause in Article 8, Section 1 which allows for consideration of mitigating circumstances. Notwithstanding this, the Company further contends that the items raised by the Union as mitigating curcumstances are simply insufficient to cure the procedural defect in this case.

Turning then, to the issue of timeliness, the Arbitrator acknowledges that where the Agreement does not contain clear time limitations for requesting a suspension hearing, failure to observe them generally will result in dismissal of a subsequent grievance if the failure is protested. Thus, the practical effect of failing to adhere to the specific time limits in many instances is that the merits of the dispute are never decided. However, contrary to the position of the Company, the Arbitrator is of the opinion that, even if the time limits are clear and there is no express saving clause, the failure to make timely request will not necessarily result in dismissal of the grievance "if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the [A]greement." Elkouri & Elkouri, How Arbitration Works, BNA, 4th Ed., 1985, P. 194.

Accordingly, it becomes necessary to address the proffered circumstances urged by the Union to serve as mitigation against the dismissal of the grievance for grievant's failure to have requested a suspension hearing.

The grievant acknowledges that he received the certified letter on April 10, but claims he did not open it immediately because he was on his way to see his wife's grandmother, who was seriously ill. In fact, she died later that day, and it was not until the evening of April 15, following her funeral, that grievant opened the letter. Grievant testified that he did not know when the five-day period ended, so the next morning, April 16, not having his own phone, he went to a pay phone and called Mihalak to find out when the five days were over and what he should do.

According to the grievant, Mihalak told him that this [April 16] was the last day and that he better contact Gutierrez before the day was over. Grievant further testified that he tried to call Gutierrez at the Union hall, but was unsuccessful. Grievant did not ask for anyone else at the Union, nor did he call Mihalak and tell him he could not find Gutierrez. Moreover, grievant does not remember trying to contact anyone on April 17, because, according to his testimony, he "thought it was too late."

Whatever else one might say about the events occurring between April 10-15 regarding his wife's grandmother's death, it is clear that by the evening of April 15, grievant was well aware of the contents of the certified letter, and by 7:15 am on April 16, was well aware that the 16th was the last day within which to request a suspension hearing. In an attempt to explain his actions on April 16, grievant testified that he did not know that he, himself could have requested the hearing, that he could have had another Union representative request the hearing, or that he could have asked for an extension of time.

The Arbitrator is unable to place much weight on this explanation as a basis for finding that it would be "unreasonable to require strict compliance with the time limts" provided in Article 8, Section 1. In the first place, grievant's own testimony indicates that he knew and/or believed that April 16 was the final day to take any action to prevent the discharge from becoming final. Moreover, he had previously been suspended preliminary to discharge on two occasions in 1985, and, having attended those suspension hearings, he was aware of their importance as part of the discharge procedures.

The Union, through the testimony of J. Gutierrez, Grievance Committeeman, proffers that, despite the stipulations referred to, it is not clear that the Union had either written or telephonic notice that grievant had been suspended preliminary to discharge effective April 9. However, upon further question, Gutierrez acknowledged that he probably knew within the applicable five-day period. In any event, where, as here, the employee had knowledge of the adverse action and did not either request a suspension hearing or an extension of time, the Union cannot be heard to argue that the time limit should be extended because the Union did not know. Herein, either the grievant or the Union could have given notice to the Company of a reasonable basis for delaying the request for a suspension hearing within the five-day period.

Finally, the Union's proffer that the granting of a courtesy hearing by the Company to discuss both the procedural issue and the incident of March 31 should serve as a waiver to the Company's timeliness protest is also without merit. As has been recognized by arbitral authority, where clear and timely objection is made to time-limit violations, as was done in the instant matter, no waiver will result from subsequent processing of the grievance on the merits. As Elkouri & Elkouri have noted:

"...it has been suggested that upon making timely objection to delayed filing, the objecting party ordinarily should then discuss the grievance on the merits so that all issues will be ready for presentation to an arbitrator if the case reaches that stage." [Id. at 195]

Herein, the holding of a courtesy hearing on May 6 provided the Company with an opportunity to determine whether good reasons were presented for its consideration as to whether, under Article 8, Section 1, it would modify or revoke its decision to discharge the grievant.

Accordingly, for all the reasons set forth above, the Arbitrator finds that the grievant has failed to present mitigating circumstances such that it would be unreasonable to require strict compliance with the time limits specified by Article 8, Section 1. The grievant having failed to request a suspension hearing within the applicable five-day period, a condition precedent to filing a timely grievance, the Arbitrator must dismiss the grievance as not being arbitrable.

AWARD

The grievance is dismissed

/s/ Herbert Fishgold

Herbert Fishgold

Arbitrator

Washington, D.C.

August 31, 1987