Award No. 893
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
July 21, 1994
OPINION AND AWARD
Introduction
This case concerns the discharge of grievant Perry Smith for an alleged violation of his last chance agreement of April 8, 1992. The case was tried in the company's offices in East Chicago, Indiana on July 1, 1994. Brad Smith represented the company and Jim Robinson presented the case for grievant and the union. Grievant was present throughout the hearing and testified in his own behalf. Both sides presented pre-hearing briefs and submitted the case on final argument.
Appearances
For the company:
B. Smith -- Arb. Coord., Union Rel.
J. Spear -- Staff Rep., Union Rel
S. Nelson -- Proj. Rep., Union Rel.
K. Keagle -- Intern, Union Relations
L. Selby
For the union:
J. Robinson -- Staff Rep., Dist. 31
A. Jacque -- Grievance Chrm
D. Lutes -- Grievance Sec'y
D. Shattuck -- Griever, Area 27
P. Smith -- Grievant
R. Smith -- Witness
Background
There is no dispute about the facts. On February 21, 1992, the company suspended grievant preliminary to discharge for excessive absenteeism. Subsequently, the union and company and grievant agreed that cause existed for his discharge, but he was reinstated pursuant to the terms of a last chance agreement, which was dated April 8, 1992. Principally at issue in this case is Paragraph H of that agreement, which reads as follows:
Should Mr. Smith, within a period of eighteen (18) months from his return to work, minus any periods of unmonitored inactivity, accrue an absenteeism rate of 5% or greater during any rolling 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 also exist for his suspension preliminary to discharge.
Although paragraph H required that grievant work a total of 18 months without incurring an absenteeism rate of greater than 5% in any rolling 90 day period, the parties agree that this was not merely 18 calendar months. Rather, the 18 month period expands by periods of "unmonitored inactivity." The real dispute in this case involves the meaning of the term "unmonitored inactivity." The parties agree that grievant had an absenteeism rate of greater than 5% -- it was, in fact, 5.97% -- for a 90 day period that began October 15, 1993 and ended January 19, 1994. They disagree, however, about whether the 18 month period specified in paragraph H of the last chance agreement had expired by January 19, 1994. The union contends that the 18 month period expired on December 28, 1993. The company, on the other hand, argues that the period did not terminate until after January 19, 1994.
The disagreement about the ending date for the 18 month period involves a dispute about whether vacation time is to be considered a period of "unmonitored inactivity," as that term is used in paragraph H. The company argues that periods of unmonitored inactivity include vacation time, and points to the AIP itself as support for that assertion. For example, the definition section of the AIP indicates that unmonitored absences will be "carved out" of an evaluation period, and says that "unmonitored absences" include "layoff, leave of absence and vacation." Of equal importance is the reversion to good standing section, which allows employees to revert to a less serious disciplinary step if they work 18 months without

triggering the next more serious step. This section provides expressly that the 18 month period excludes "periods of layoff, vacation, leaves of absence and other periods of inactivity." In his testimony, company witness John Spear said that the 18 month period provided in paragraph H of the last chance agreement was intended to mirror the reversion to good standing provision of the AIP. Vacation periods, he said, are not to be monitored under either the AIP or a last chance agreement.

The union agrees that periods un unmonitored activity under paragraph H include leaves of absence and layoffs. It asserts, however, that vacations should not be considered as periods of unmonitored inactivity. Unlike the situation when employees go on leave or are laid off, the union claims, employees on vacation are still "active" employees. Vacation is an ordinary and expected event that occurs for all employees. They continue to be paid, to receive and accrue benefits, they are not considered to be absent, and their employment status with the employer has not changed, at least in the same way as laid off employees or employees on leave.

The union claims that its interpretation of paragraph H -- one that would exclude vacations from unmonitored inactivity -- is the more reasonable. The last chance agreement, after all, does not expressly invoke the sections of the AIP pointed to by the company as evidence of the meaning of "unmonitored." Moreover, it makes sense to think of vacation as ordinary days since the employee remains active but is not expected to work on those days, just as is true on regular days off, which are also not excluded from the 18 month period.

This dispute about whether vacation is included or excluded in the 18 month period is crucial. The union concedes that, if vacation is unmonitored time under paragraph H, then the company had cause to discharge grievant. This is because the last chance agreement says expressly that the accrual of an absenteeism rate of more than 5% during the 18 month period is sufficient to establish cause. If grievant's 5.97% rate between October 15 and January 19 is within the 18 month period, then, the company's action was justified and the grievance must be denied.

However, if as the union claims, grievant's 18 month period ended prior to January 19 -- December 28 by the union's calculation -- then grievant is not in violation of that portion of paragraph H that relates to the percentage of absenteeism. That would not necessarily mean that grievant would be reinstated. The company claims that grievant would still violate that part of paragraph H concerning a "violation of any other provision" of the AIP. In addition, the company claims that grievant's record since his reinstatement would violate paragraph L of the last chance agreement. In either event, the company claims that cause would exist for discharge.

The union acknowledges that grievant could violate the last chance agreement even if he did not accrue more than a 5% absenteeism rate within the periods specified in paragraph H. Nevertheless, the union claims that, if it clears the 18 month hurdle in paragraph H, it then becomes appropriate for me to consider whether some of the absences that led to grievant's discharge should have been excused, a judgment I am not entitled to make if the 5.97% rate occurred within the 18 month period. The union points to grievant's last two absences and asserts that each should have been excused. One occurred because grievant's father was ill and grievant elected to stay with him and his invalid mother. The last absence was during record cold weather, when grievant was unable to start his car. Removing those two absences from grievant's record, the union claims, would keep him within the range of acceptable performance and require that he be reinstated.

Discussion

I have some sympathy for grievant. In particular, I understand his decision to remain with his parents when they needed him. Nevertheless, I find that I am unable to consider whether that absence, or the one that followed it, should be excused. The union concedes that grievant violated his last chance agreement if I determine that vacation is to be deemed a period of unmonitored inactivity under grievant's last chance agreement. I am persuaded that the term was intended to encompass vacations. Thus, I am precluded from the kind of equitable review that the union asks me to make.

Mr. Robinson correctly asserts that both the union and the company offer a reasonable interpretation of paragraph H. As he stated in final argument, it is likely that each party agreed to the language of paragraph H without realizing that the other party harbored a different interpretation. That does not mean, of course, that the parties never reached agreement. The fact is that they did agree to the language contained in paragraph H. Nor is it necessarily the case that I have to decide which of the two interpretation proffered by the parties is the more reasonable. Rather, the question is what the language would mean to a reasonable person.

In making that determination, one must keep in mind what the parties intended to accomplish by their agreement. It is also of great relevance that the parties had already agreed that cause existed to discharge grievant because off his poor attendance. Paragraph H, then, as part of a last chance agreement, was clearly intended to give grievant another chance to demonstrate that he could work with an acceptable attendance record. It makes sense to believe that one part of that test could be related to the period established in the AIP for reverting to good standing, since that is obviously what grievant was trying to do. Even without that shared understanding, however, it also makes sense to exclude vacations from the time period during which grievant would be evaluated.

What the company wanted to know was whether grievant could report to work on a regular basis. For that purpose, the time period they chose is not determinative. They could have asked whether grievant could demonstrate responsibility over a period of a year or 18 months or even more. The point is that the parties agreed to test whether grievant would work or not. Since that is what the parties were trying to determine, and since the parties agreed that they would not count inactive periods in the test, it makes sense to think that they excluded vacations. The company wanted to know whether grievant would show up when he was scheduled to be there. Having established a 5% cut off, it makes no sense to include as days worked time when grievant wasn't scheduled to report. Doing so would not answer the question that paragraph H was intended to ask.

Because I am convinced that a proper interpretation of paragraph H counts vacation time as periods of unmonitored inactivity, and because that determination precludes my consideration of the reasons for grievant's absences, I have no choice but to deny the grievance. <FN 1>

AWARD

The grievance is denied.

/s/ Terry A. Bethel

Terry A. Bethel

July 21, 1994

<FN 1> The most difficult part of this case has not been an interpretation of paragraph H, since I think the meaning of that clause is not ambiguous. Rather, I am troubled by Mr. Lutes' testimony that he told grievant, in the presence of union relations employee Nelson, that the company wouldn't count lay offs or leaves of absences against him in the 5% calculation. He did not mention vacations. Mr. Nelson was present at the hearing, but did not testify, which adds credibility to Lutes' account. Because Lutes did not expressly tell grievant that vacation did not count and because I think the meaning of paragraph H is not ambiguous, I have not found Lutes' testimony sufficient to undermine the company's case. Nevertheless, such incomplete explanations could have more dire effects and should not be ignored by company representatives.