Award No. 912
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEEL WORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
February 15, 1996
OPINION AND AWARD
Introduction
This case concerns the discharge of grievant Jerome Willis for allegedly violating his last chance agreement. The case was tried in the company's offices in East Chicago, Indiana on January 16, 1996. Brad Smith represented the company and Alexander Jacque presented the case for grievant and the union. Grievant was present throughout the hearing and testified in his own behalf. The parties submitted the case on final argument.
Appearances
For the company:
B. Smith -- Arbitration Coordinator
P. Parker -- H.R. Gen., Manuf. Maint.
B. Adkins -- H.R. Gen., 80" Hot Strip
J. Daisy -- Day Super., 80" Hot Strip
J. Spear -- Staff Rep., Union Rel.
J. Medellin -- Contract Admin. Resource
For the union:
A. Jacque -- Chrm., Grievance Comm.
J. Willis -- Grievant
L. Aguilar -- Vice Chrm., Gr. Comm.
H. Perkins -- Griever
Background
The company originally discharged grievant on February 22, 1993 for violating company rules 132d and 132i. The latter prohibits sleeping on the job. Rule 132d provides that employees may be disciplined or discharged for "Reporting for work under the influence of intoxicating beverages" or possessing intoxicating beverages on company property. Subsequently, the parties agreed to reinstate grievant subject to the terms of a last chance agreement. As is typical of such documents, the agreement recited the parties' agreement that the company had cause to discharge grievant, but it gave him "one final chance to prove that he can become a responsible employee of the company."
The last chance agreement required "strict observance" of several terms. Paragraph A required grievant to enroll in the company's substance abuse program and said that grievant "will remain off work until released by the Coordinator of the program." The agreement further required grievant to remain in contact with the union's drug and alcohol committee on a weekly basis for one year. Paragraphs D and E, which are central to this case, provide, in relevant part:
D. [Grievant] 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 immediate suspension preliminary to discharge.
E. During a two year period following [grievant's] return to work, the company may test him at any time for the presence of mood altering substances as indicated in item D above. . . . Any absence of over 29 consecutive calendar days will be carved out of the above 2 year random test period and added to the end of it. . . .
Paragraph H waived grievant's right to the Justice and Dignity provisions of the contract for a period of five years "from the date of this agreement." Finally, paragraph I said that the agreement was "grievant's final chance at employment" and that "any repetition of the conduct which led to" the original discharge "will be cause for [grievant's] immediate suspension preliminary to discharge."
Grievant signed his last chance agreement on May 7, 1993. Pursuant to paragraph A, he was not permitted to return to work until he was cleared by the John Bean, counselor for the company's alcohol and substance abuse program. Following that clearance, grievant returned to work on May 25, 1993. He worked without incident for almost two years. On May 1995, grievant was sent to the clinic for a random test pursuant to

the provisions of paragraph E of the last chance agreement. That test showed a blood alcohol level of .18, more than three times the company's allowable level of .05.

The company contends that grievant's discharge was proper because his conduct in reporting to work under the influence of alcohol violated both paragraphs D and I of the last chance agreement. Paragraph D recited that grievant could be discharged if the company detected any amount of alcohol in his system. Paragraph I allows discharge for a violation of any company rule but it particularly condemns a "repetition of the conducts that led to the first discharge. That is just what happened here, the company says. Grievant was originally discharged for reporting for work under the influence of alcohol and he repeated that conduct on May 22, 1995.

The union does not deny that grievant reported for work under the influence of alcohol. Nor does the union condone or seek to excuse such conduct. However, it asserts that grievant deserves one last chance, pointing to the fact that grievant had no other incidents during the period of the last chance agreement. The union's primary defense is its claim that the last chance agreement had expired at the time of grievant's most recent infraction. Thus, while the union recognizes both the utility and the value of last chance agreements, and the high standards they impose upon employees, it argues that the burden is somewhat lessened in this case, since the strict terms of the agreement no longer applied.

The union notes that grievant signed the agreement on May 7, 1993. It asserts that the agreement was to remain in effect for a period of two years, relying primarily on paragraph E, which allowed random drug testing for two years "following [grievant's] return to work." Thus, the union claims that the agreement expired on May 7, 1995 and that grievant's conduct could not have violated either paragraph D or paragraph I. Grievant's testimony acknowledged that company representative Pat Parker reviewed the agreement with him before he signed it, but he said he understood Parker to say that the agreement would remain in effect for two years from the date of signature.

The union also argues that grievant should receive one more chance, whether or not the agreement had expired. Mr. Jacque noted that there was no complaint about grievant's compliance with the agreement for two years. He took random tests following his return to work and passed them all. Grievant said that he drank on May 22, 1995 after having a fight with his wife. Grievant said that he was angry and frustrated and that he started drinking in response to those emotions. Grievant said he was sorry for the incident and says that he has not had a drink since. The union says that one slip should not cause the loss of employment for someone with 28 years of service.

Discussion

Despite Mr. Jacques' best efforts, I cannot find that the last chance agreement had expired at the time of grievant's random test on May 22, 1995. As is typically the case in last chance agreements between these parties, the agreement contains no single clause that expressly addresses the duration. Rather, the question of duration is covered in some paragraphs and not in others. For example, paragraph E, as already pointed out, granted the company the right to subject grievant to random drug tests for a period of two years "following [grievant's] return to work." Paragraph H waived grievant's right to the Justice and Dignity provision for five years "from the date of the agreement"; and paragraph C required grievant to maintain contact with the union alcohol and drug committee for one year. By contrast, paragraphs D and I -- which furnish the primary basis for the company's action -- contain no express duration, though paragraph D is clearly tied to paragraph E.

The company claims that the agreement remains in effect for five years, pointing both to the fact that disciplinary actions can be cited for five years and to the express recognition of a five year period in paragraph H. Some provisions of the agreement are in effect for shorter periods, the company acknowledges, but it says the understanding is that the agreement itself lasts for five years.

The union, of course, denies any such understanding. In the union's view, the agreement's duration is tied to the time limit on random drug tests. Obviously, the easiest way to determine whether an employee violated paragraph D or I is through the results of that testing. Thus, the union reasons that when the right to test expires, the consequences spelled out in paragraphs D and I die too. The union also points out that there is a difference between holding that a recorded disciplinary action (like a last chance agreement) can be cited for five years and a conclusion that the agreement remains in effect for that period.

As I discussed at the hearing with the parties, their last chance agreements sometimes raise issues about duration. It is true, as the union says, that a citable disciplinary action is not necessarily the equivalent of a continuing obligation. Moreover, the fact that grievant waives certain rights for five years does not necessarily mean that every other paragraph of the agreement carries a like time limit, especially when different time limits are spelled out in certain other paragraphs. Despite those concerns, however, I need not

reach the issue of whether paragraphs D and I extend to five years. Both parties agree that paragraphs D and I last for at least two years; they merely disagree about whether that time period has expired. The question of whether the paragraphs have a five year limit becomes relevant only if I find that the two year duration has lapsed. But because I find that the two years period was still in effect at the time of grievant's offense, I need not decide if the paragraphs have a longer duration.

There is no doubt that the offense cited here happened more than two years after grievant signed the last chance agreement; he signed it on May 7, 1993 and he reported for work under the influence on May 22, 1995. But paragraph E, which is clearly tied to paragraph D (indeed, paragraph E expressly references paragraph D), does not say that the company has the right to test grievant from two years of the date of the agreement. Rather, it says that the company has the right to test grievant for two years "following [his] return to work." The difference is a matter of substance.

No one questions that the last chance agreement was effective when it was signed. Paragraph H, in fact, tied the five year waiver of Justice and Dignity to that moment. Thus, it says that grievant waives his rights for five years "from the date of this agreement." It is also clear that paragraph A was to be in effect from the date of signature. It requires grievant to meet with John Bean and, importantly, it recognizes that he will not return to work until Bean releases him. Thus, the agreement itself contemplates that there will be a delay in grievant's return. The two year duration of Paragraph E then began when grievant returned.

This conclusion is consistent with Parker's testimony about the genesis of the language in paragraph E. Parker explained that the company had lost some previous arbitration cases because employees had delayed their return to work or had experienced substantial periods of absence after their return. Although the company wanted a two year period in which to evaluate an employee's progress, that could effectively be denied when employees returned late or had significant absences. Thus, paragraph E was redrafted to insure that the company got the benefit of the two year period. Long periods of absence were added to the two years and, important for purposes of this case, the period did not begin to run until the employee actually started working.

It makes sense to think that the last chance agreement would contain such a provision. The last chance agreement does not benefit the employee alone. True, the agreement gives a discharged worker another chance to prove his worth; but it also contains benefits -- or at least protections -- for the company. The company has a legitimate interest in insuring that an employee complies with commitments he has made in order to secure another chance. Thus, if an employee has promised not to drink or use drugs, the company secures that right to test that promise. It is worth something to have an employee complete a treatment program. But what the company really wants to know is whether an employee can give up alcohol when he also has the pressure of working every day. That's where paragraph E comes in.

Paragraph E monitors an employee over a specified time when he is actually working. Of course, alcoholism is a day-to-day problem and two years of sobriety is no guarantee that an employee will never drink again. But two years is a reasonable time and, if completed, it helps give the company assurance that an employee is serious about recovery.

Obviously, the testing program provides that assurance only if it occurs when the employee is actually working. Paragraph E seems well designed to accomplish that because it says that the testing will occur for two years "following [grievant's] return to work."

Grievant returned to work on May 25, 1993. Thus, the two year period was still in effect on May 22, 1995, when grievant reported to work under the influence of alcohol and was caught in a random alcohol test. The union argues, however, that there are mitigating circumstances in this case. In particular, it cites grievant's long service and the fact that he had almost completed his two years of random alcohol testing without incident. Indeed, grievant was only three days short of the testing period spelled out in paragraph D. The union says that grievant demonstrated that he could work for a substantial length of time without using alcohol and that he should not be punished so harshly for one mistake, especially since it followed an emotional confrontation with his wife.

The company has cited several cases recognizing the utility of last chance agreements. In this case and others, the company has reminded me that both courts and arbitrators have noted the limited ability of arbitrators to ignore the provisions of last chance agreements by granting employees yet another opportunity. There are, of course, cases in which arbitrators have done just that, both at Inland (as union reminds me) and elsewhere. In those cases, arbitrators are usually influenced by strong mitigating circumstances. The company, however, says there are no mitigating circumstances here because of grievant's egregious conduct.

The conduct the company refers to is grievant's claim that, just prior to leaving the house after the argument with his wife, he checked the last chance agreement to make sure that it had expired and it was safe for him to drink again. This testimony, if true, is particularly damning since it undermines the objective of the last chance agreement. The agreement was an opportunity for grievant to prove that he could stay sober and remain a productive employee. The company bargained for the right to test grievant for two years because that period gave it some indication of what the future would hold. Presumably, an employee who stays sober for two years has made enough progress and has enough determination to continue the fight. But if an employee checks to see if the agreement has expired before drinking, it suggests that he is merely playing a game, abstaining only during the period in which it would not be safe to drink.

Obviously, this is what the company believes about grievant, and it does so for good reason -- this is what he told them when he said he stopped and looked at the agreement. Moreover, when an employee offers incriminating testimony about his actions, there is typically no reason for me to disbelieve him. Employees seldom admit damning actions. This case is more troubling, however, because grievant clearly did not think his testimony was incriminating. In fact, he offered it as a way of trying to create a defense.

Grievant's primary claim is that the agreement had already expired. The testimony that he looked at the agreement before leaving to drink was intended to holster the reasonableness of his actions. Thus, the inference he wants me to draw is that he is not a bad man because he did not drink while the agreement was still in effect, and he was conscientious enough to check the effective date. Of course, this says more about grievant's judgment than his prudence since the testimony actually hurts more than it helps, as I have already explained. I am troubled, however, by grievant's subsequent actions, which raise a question about whether he actually believed the agreement had expired.

The day after his drinking binge, grievant was ordered to take an alcohol screen as part of the random testing provision of the last chance agreement. But if he had checked the agreement the night before and if he believed that it was already expired, then why would he submit to the test? No one offered testimony that the company had probable cause to test grievant for alcohol and, importantly, no one told him that he was being tested because of a suspicion of alcohol use. The company's only right to demand the test, then, was through the last chance agreement and, given the absence of other explanation, grievant no doubt understood that the last chance agreement was the reason for the test. It does not make sense to think that he would submit to the test voluntarily unless he thought the agreement required it (especially since he had to know that he would fail the test.)

As I'm certain Mr. Smith would remind me (and may well tell me), grievant testified that he looked at the agreement before drinking and I am obliged to give that testimony some weight. I agree. I cannot know exactly what grievant did. However, I have significant doubt about whether grievant told the truth when he said he checked the agreement before he went drinking, and that doubt serves to ameliorate (at least somewhat) that aggravating character of that evidence. In short, I am not convinced that grievant failed to take the last chance agreement seriously.

In addition to the absence of aggravation, I find that here is also some evidence in mitigation. Of obvious importance is the fact that grievant successfully completed all random tests except the one that would undoubtedly have been his last. Thus, to the extent the agreement was intended to show that grievant could live without alcohol, he very nearly completed it.1 <FN 1> Moreover, I believed grievant's testimony that he did not drink at any other time, that the incident was an exercise of poor judgment brought on by domestic problems, and that he has had nothing to drink since this incident. And, significantly, I am influenced by the fact that grievant has 28 years of service with the company.

I am aware of the fact that normal arbitral discretion is narrowed by the express terms of the last chance agreement. But that agreement does not totally remove the consideration of aggravating and mitigating circumstances. The company recognized as much when it stressed grievant's claim that he checked the agreement before drinking, an act that the company hoped would mute any sympathy I might feel for him. If I were convinced that it happened, it probably would. But, as I have said, I think grievant foolishly told this story in the belief that it would help, not hinder, his case. Although this case is close, the reduced effect of that evidence, along with the mitigating factors mentioned above, convince me that grievant deserves a continued opportunity to demonstrate his ability to work without abusing alcohol.

Grievant has not, however, earned the right to continue working free from the restraints of the last chance agreement. While I will order the company to reinstate him, it may do so by reimposing each paragraph of the last chance agreement for the time period originally agreed to. <FN 2> In order to avoid confusion in the future, the time periods specified for random testing will begin to run from the day grievant begins work. Finally, I will not order that grievant receive any back pay. Although I understand that abstinence

from alcohol is a daily battle, and while grievant has obviously made some progress, the fact remains that he reported from work under the influence, an offense which justifies a substantial disciplinary action. The loss of pay should serve to remind him of the seriousness of his conduct and the grave consequences that will likely accompany another offense.

AWARD

The grievance is sustained, in part. Grievant is to be reinstated without back pay. The company may chose to reinstate grievant by reimposing the terms of his last chance agreement for the time periods originally specified.

/s/ Terry A. Bethel

Terry A. Bethel

February 15, 1996

<FN 1> This case is not intended to say, and should not be cited to mean, that only substantial compliance is required of a last chance agreement.

<FN 2> The last chance agreement was originally agreed to for the benefit of both parties. It may be that the company is willing to reinstate grievant without the continued strictures of that agreement. Should that be the case, it makes no sense for me to impose those burdens on either party. However, since the company has kept its part of the agreement, it is entitled to insist on the continued protections, should it desire to do so. Thus, I will leave it to the company whether to reimpose the terms of the last chance agreement. Because this choice is part of my award, the union may not object to the company's decision.