Arbitration Award No. 767
IN THE MATTER OF ARBITRATION
Between
INLAND STEEL COMPANY
Indiana Harbor Works
and
UNITED STEELWORKERS OF AMERICA
Local Union No. 1010
Grievance No. 1-R-94
Arbitrator: Clare B. McDermott
Opinion and Award
September 9, 1986
Subject: Discharging Grievant for Attendance-Control Violations Which Did Not Infringe Severe Attendance-Control Standards Imposed Upon Him for One-Year Period by Earlier Reinstatement Award.
Statement of the Grievance: "The aggrieved, Willie Franklin, Payroll No. 6698, contends the action taken by the Company, when on January 22, 1986, his suspension culminated in discharge, is unjust and unwarranted in light of the circumstances involved.
"Relief Sought - The aggrieved requests that he be reinstated and paid all monies lost.
"Violation is claimed of Articles 3, Section 1, and 8, Section 1."
Agreement Provisions Involved: Article 3 of the March 1, 1983 Agreement.
Statement of the Award: The grievance is sustained to the extent stated in the last paragraph of the accompanying Opinion.
Chronology
Grievance Filed: 1-23-86
Step 3 Hearing: 2-4-86
Step 3 Minutes: 3-27-86
Step 4 Appeal: 4-4-86
Step 4 Hearing: 4-25-86
Step 4 Minutes: 6-11-86
Appeal to Arbitration: 7-7-86
Arbitration Hearing: 7-15-86
Appearances
Company
R. V. Cayia, Senior Representative, Labor Relations
R. B. Castle, Arbitration Coordinator, Labor Relations
J. J. Senjanin, Manager, No. 2 and 3 Blast Furnaces
C. W. Horn, Section Manager, Sinter Plant, No. 2 and 3 Blast Furnaces
R. K. Scholes, Project Representative, Labor Relations
Union
Bill Trella, Staff Representative
Bill Gailes, 1st. Vice Chairman Grievance Committee
Bobby Joe Thompkins, 2nd. Vice Chairman Grievance Committee
Don Lutes, Secretary Grievance Committee
Ray Fernandez, Griever
Aurelius Allen, Vice Chairman Alcohol & Drug Committee
Willie Franklin, Grievant
BACKGROUND
This grievance from the Nos. 2 and 3 Blast Furnace Department of Indiana Harbor Works claims that grievant's suspension and discharge for alleged excessive absenteeism and overall unsatisfactory work record were without cause, in violation of Article 3 and Article 8, Section 1 of the March 1, 1983 Agreement.
Grievant began with the Company in 1965 and at grievance time was established in the Laborer job at Nos. 2 and 3 Blast Furnace. All else that may be relevant in his background prior to late May of 1983 was set out in the rather extensive Opinion in Award No. 749 (1984), and need not be repeated here. That Award sustained the grievance protesting his discharge for absenteeism resulting from alcoholism and reinstated

grievant to his employment relationship, without back pay. The Award also subjected grievant to stringent conditions, as follows:

"Accordingly, grievant shall he reinstated, with seniority intact, but without back pay, only if he agrees in writing to the following conditions. He shall not drink alcohol. He shall take part in the Company Program for the Problem Drinker, and in addition he shall attend that number of Alcoholics Anonymous meetings each week as is recommended by that agency but no fewer than once each week, and he shall consent to weekly written certification by Alcoholics Anonymous representatives that he has done so, and only serious illness or other emergency condition will excuse his not doing so. He shall report to any place the parties agree upon once each week for discussion with, and examination by, a named representative of each party who may be a physician or technically trained person and who may test for presence of alcohol in grievant's blood by drawn sample or by breath or urine analysis, so that they may be assured that he is not drinking alcohol. He shall not develop an absenteeism or tardiness rate, aside from absences for which he has reported off in advance and which are excused by a physician for reasons other than consumption of alcohol, higher than the Department average for any rolling, thirty-day period. Grievant shall remain subject to all the above conditions for a term of one year from his reinstatement.

"Grievant must realize that, should there be any substantial breach of any of these conditions, he will have subjected himself to loss of his employment."

Grievant was reinstated to active employment on September 17, 1984. His absenteeism record from that date to his suspension on January 9, 1986 is as follows:

| Date | Reason |
|---|---|
| December 4, 1984 through December 17, 1984 | Extended absence due to personal illness |
| December 26, 1984 | Failure to report off |
| March 4, 1985 through March 22 1985 | Extended absence due to personal illness |
| April 3, 1985 | Tardy |
| May 23 and 24, 1985 | Illness |
| July 31, 1985 through August 9 1985 | Extended absence due to personal illness |
| August 26, 1985 through September 2, 1985 | Extended absence due to personal illness |
| January 2 and 3, 1986 | Personal |

Total = 44 days of failing to work as scheduled

The Company says that grievant also had the following disciplinary record from his reinstatement in September of 1984:

| Date | Infraction | Action |
|---|---|---|
| 10-2-84 | Clothing procedure violation | Final warning |
| 5-31-85 | Absenteeism | Discipline - 3 turns |
| 8-23-85 | Improper wearing apparel | Safety warning |

Management explained that on April 1, 1985 the Department installed formal Attendance Program Guidelines, in which attendance data for each employee are fed to a processing system. It notifies Department officials on a daily basis of any employee who has had more absenteeism than the Guidelines allow, either for daily absences or extended, consecutive-day absences, over the stated period.

The new Program is similar to the prior, informal and unwritten one. It was decided when the new system was installed that infractions of the old one and the stage at which any employee stood in the old one would be continued, so that the record was not cleared for introduction of the new one. Management decided, however, that an employee violation during the first thirty days of the new Program would not bring down on him the discipline appropriate for that level but rather he would be interviewed in order to ensure that he understood the state of his absenteeism record, the procedures of the new system, and the consequences of any further occasion of excessive absenteeism.

Grievant was absent ten consecutive days in December of 1984 and one other day, for which he did not report off. He was absent fifteen consecutive days in March of 1985, and he was tardy on April 3. On April 11, 1985 the new Program identified grievant's absentee record as calling for review. In light of his long absenteeism record, the action called for was suspension, subject to discharge, but that was not done. Instead, grievant was interviewed, as stated above.

Grievant was absent May 23 and 24, and on May 31 his absentee record again was noted by the Program for review. The appropriate penalty again was to be suspension, subject to discharge, but that was backed down to a three-day suspension.

Grievant was absent for six days in late August and early September. He reported off for January 2 and 3, 1986 for "personal reasons." The Program then brought up grievant's record for review again, and again the step called for was suspension, subject to discharge. This time that penalty was imposed. Grievant was suspended on January 9 for excessive absenteeism and for an overall unsatisfactory work record. He was discharged on January 22.

Respecting the two January-1986 absences for "personal reasons," which triggered grievant's suspension and discharge, he said he had been taken to a hospital by his brother on January 1 because he was having great difficulty breathing. While there he became involved in incidents for which he was arrested and jailed, which prevented his reporting for work. The Union said those absences thus were unavoidable and should not be held against grievant. The Company said they were caused by grievant and, thus, could not be excused.

In assessing grievant's offenses and the penalty here, the Company counted against him absences going back to January 16, 1981 and running through ten other occasions of absenteeism, tardiness, and failure to report off in 1982 and 1983. In addition, in the grievance proceedings and at the arbitration hearing it referred also to the fact that grievant had been absent twenty-eight times in 1980, including extended absences totaling twenty-two turns. In 1981 grievant was absent seventy-nine occasions, including extended absences totaling sixty-four turns. In 1982 grievant missed work nineteen times, including extended absences totaling seven turns. During the five months that grievant was in active employment in 1983, he was absent fifty-seven times, including extended absences totaling forty-three turns. For the three and one-half months he was in active status in 1984, grievant was absent on eleven occasions, including extended absences totaling ten turns. In 1985 grievant was absent thirty-one turns, including extended absences totaling twenty-eight turns. Up to January 9 of 1986, grievant was absent two turns.

The Company says that for the six calendar years from 1980 through 1985, grievant was absent 225 turns, and than, if consideration be limited to the period from his return to work on September 17, 1984, grievant missed 44 turns in a little over fifteen months. (The period from grievant's reinstatement on September 17, 1984 to his suspension on January 9, 1986 actually covers seventeen months.)

Management says that a principle regularly upheld by arbitrators is that it has the right to expect regular and timely attendance of employees, which grievant was unable to provide. It cites Inland Awards 252, 628, 638, and 644 for that proposition.

The Company notes that grievant was discharged in 1983 for excessive absenteeism and overall unsatisfactory work record and returned to work by Award 749. In light of all that, the Company says grievant should have understood the importance of regular attendance. In spite of those warnings, it notes that grievant missed forty-four turns from September of 1984 to January of 1986.

The Company says that during the last five full calendar years of grievant's employment, he was absent an average of forty-five turns a year. Assuming a schedule of five turns each week, that is said to amount to his being absent for about two months each year.

Moreover, Management says that, although it does not credit the Union claim that a large number of grievant's absences were caused by medical reasons, that really is not significant here, since arbitrators regularly uphold also a principle that Management need not retain on the rolls employees who have shown by their absenteeism record that they cannot work regularly, even though the absences were caused by legitimate illness or injury. It cites arbitration decisions said to hold that way from other bargaining relationships, and statements from Inland Awards 628 and 666.

Management alleges also that the record does not support the Union claim that grievant's more recent absences were caused by a broken blood vessel in his leg. It says, rather, that grievant's physicians' statements, submitted in support of his Sickness & Accident claims that were paid, reveal that those absences were caused by angina, gastritis, chest pain, and hypertension.

The Company says grievant is unable to give any indication that his physical condition is such that his attendance could improve even if he were reinstated.

Management urges that the two absences in January of 1986 that caused grievant's suspension and discharge were fully within his control. He was arrested and jailed for an outstanding bench warrant, possession of a gun without a permit, and disorderly conduct.

In response to the Company's Step 3 requests for documentation regarding griavant's current medical condition and concerning the status of legal charges against him, the Union submitted the following statement from grievant's physician:

'February 4, 1986

To Whom It May Concern:

This is to certify that I examined Mr Willie Franklin today. He was recently hospitalized for Acute Gastritis.
He is now physically able to resume working.
Yours truly,
/s/ E.L.C. Broomes, M.D.'
The Union submitted also the following statement from the East Chicago City Court:
'February 7, 1986
To Whom It May Concern
Please be advised that Mr. Willie Franklin was on trial Thursday February 6th, 1986 at 5:30 PM for Disorderly Conduct and Gun No Permit.
The dispositions on the above cases are as follows:

| | | |
|---|---|---|
| #136295 | Disorderly Conduct | Fine and Cost Suspended |
| #136296 | Gun No Permit | Gun ordered confiscated & destroyed |

If there are any questions regarding the above matter please feel free to contact my office.
Sincerely,
/s/ Robert G. Berger, Pro Tem
East Chicago City Court'
The Union says grievant experienced two physical problems: shortness of breath and on one occasion a blood vessel in his leg broke at work. He was sent to the Clinic and then returned to work but was referred to his family physician. The Union says, if absences resulting from those conditions were discounted, grievant's record would be much better. It says grievant has reported for work when he was physically able to do so. He has been selected to move up to fill the Labor Leader job.
Sinter Plant and No. 2 and 3 Blast Furnace Section Manager Horn explained that absenteeism is very expensive to the Sinter Plant, which occupies a very large area and requires an efficient public-address communication system. New employees assigned to fill in for absentees are not familiar with the public-address system. Moreover, crew changes disrupt a foreman's planning, and overtime is expensive.
Horn noted that the new Attendance Program Guidelines had been installed in other departments, as well. They replaced, on a more formal basis, the prior, unwritten ones. The old arrangement provided that absences for one or more days a month would be considered as cause for discipline. That would be one turn out of an assigned twenty scheduled, or 5 percent. Part II of the new Program for daily absences sets 6 percent or more absences from scheduled days as the trigger point over the prior ninety-day period or since the last discipline, whichever may be more current. The last two steps go to 5 percent. Daily absence is defined as failure to work a scheduled day for a monitored reason, and counts the first two days of an extended absence as two daily absences.
The new Program has a different standard for extended or habitual absences. It is less than four extended absences or less than twelve absences within a review period of the prior 365- or 185-day period or since the last discipline, whichever may be more current, for the first step. The three middle steps have a trigger of four or more extended absences or twelve or more absences, and the last two steps set it at two or more extended absences and six or more absences. An extended absence is defined as absence for three or more consecutive work days for a monitored reason.
Horn made it clear that consecutive days of absence were considered as cause for discipline under the old plan, too, including also those supported by a physician's statement of inability to work because of a medical problem. He said he would consider whether that employee was a first offender or a chronic one.
The old system had five steps, ranging from a reprimand through one-, two-, and three-day suspensions (with review), to five days, subject to discharge. The new Program has five identical steps.
Horn characterized grievant's absenteeism record over the prior five years as chronic, excessive, and intolerable. He said grievant's absenteeism record was excessive, too, for the period from his September-1984 reinstatement.
Horn said that the annual average absentee rate for the Blast Furnace Department for the last two years was about 2 percent, compared with grievant's 14 or l5 percent for the fifteen months since his reinstatement, which exceeded the department average by more than 12 percent.
The witness said he recommended grievant's suspension and discharge in January because of the forty-four missed turns since grievant's reinstatement and his two record reviews, because of his bad absenteeism record before that, because he had been on a last-chance basis, and because he felt grievant was unwilling or unable to fulfill his duty of regular attendance.

The Union stressed that the five documents of Company Ehxhibit 12, Sickness and Accident claims by grievant, included physicians' statements saying grievant was hospitalized for angina pectoris from December 5 through 17, 1984; for angina/gastritis from March 5 through 18, 1985; for chest pain from August 2 to 7, 1985; and for vascular hypertension heart disease from August 27 to September 1, 1985. On each of those four occasions the attending physician stated grievant was disabled from work for at least the period of his hospitalization. The Company agrees grievant was paid Sickness and Accident benefits for each of those periods of medical problems and extended absence. Horn did not consider grievant's illnesses and hospitalizations as extenuating circumstances because he saw grievant as a chronic offender.

The Union questioned Horn about the "Clothing procedure violation" of October 2, 1984, and the "Improper wearing apparel" listed as Infractions in grievant's disciplinary record. They were not grieved at the time, but they may be ignored here for an additional reason. in any event, since Horn said they played no part in his suspension and discharge decisions. Possibly conflicting with that is the fact that one of the reasons asserted by the Company for this suspension and discharge was grievant's allegedly unsatisfactory overall record.

Horn agreed that in the one-year period from grievant's reinstatement on September 17, 1984 while he was under the terms of Award No. 749, he could recall no incident involving grievant and alcohol at work nor any incident caused by alcohol.

Horn could recall only one other employee in the department with an absentee rate over 6 percent who was not discharged. That employee had been discharged but then taken back.

Horn was aware that grievant had been sent to the Clinic because his leg was bleeding. It was reported by grievant as a ruptured blood vessel. Horn was not there then, but he saw grievant when he returned from the Clinic. The Clinic sent him back for duty, but no one suggested he work anymore that day. Horn told grievant to see his personal physician.

Grievant said that Assistant Superintendent Walton, who had suspended and discharged him in 1983, sent him to the Clinic for a test of his blood-alcohol level, apparently under authority of one of the conditions imposed by Award No. 749. That was done on December 26, 1984, and grievant suspected Walton thought he might have been "boozing it up" on the Christmas holiday. The findings were negative.

Grievant gave his account of the events at the hospital on January 1, 1986. He said his family had had a New Year's Eve party on the night of December 31, 1985, and at midnight he and others went outside with their guns and fired them in the air to celebrate, as they always do on that occasion. Grievant stayed at his brother's overnight. He got up about 3:00 p.m. on January 1 and had chest and stomach pains in the evening. His brother took him to the hospital. As he was taking off his pants so the physician could examine him, the .22 pistol he had fired the night before fell out of his back pocket. He says he had forgotten be had it with him.

Hospital Security was called, and then the East Chicago Police. Grievant was arrested and charged with possessing a gun without a permit, and also for an outstanding bench warrant, and, later, for disorderly conduct. He was taken into custody at the hospital after he was treated. He was taken to the Police Station and locked up. He continued to have severe pains, and be was returned to the hospital. The Policeman left the hospital while grievant still was being treated, after telling grievant to wait for his return. Grievant waited about twenty minutes after his treatment. He felt ill and, therefore, he left to walk to his home, saying to himself that the Police knew where he lived and could come and get him. He was walking home, when the Policeman drove up and got him. The Policeman was angry at grievant's leaving the hospital, and he said he would kick grievant's ass and throw the book at him. Grievant agrees he could have replied in kind. Grievant thus was charged with disorderly conduct

The gun apparently was confiscated and destroyed. The docket sheet says grievant pleaded guilty and that the disposition was that grievant was to pay $100 and costs on the gun charge. Grievant says the charges were dropped and that he paid no fine. The docket sheet recites that he first pleaded not guilty to the Disorderly Conduct charge and then changed to a plea of guilty, and the $10 and costs fine was suspended. He says the Policeman did not appear. The Union says grievant paid $41 on the bench warrant, and that all else was suspended.

At any rate, grievant was in jail January 2 and 3, while all that was being arranged, and could not go to work. Those absences were the cause for review of his absenteeism record in January, which review resulted in his suspension and discharge.

The Company stresses that the Arrest Reports (one for "Gun No Permit" and a later one that day for "Disorderly Conduct") say in the slot for "Sobriety," "Drunk" and "H.B.D." (allegedly meaning "had been drinking").

Grievant says he had not been drinking, that the arresting officer was "p.o.'ed" because grievant's leaving the hospital had gotten him (Policeman) in trouble, and that he thus made up the charge that grievant was drunk and had been drinking. Grievant notes he was not charged with public drunkenness and that no breathalyzer test was administered to him. Grievant insists that in all his time at the station on those days and in his later court appearances and proceedings, this suggestion at the arbitration hearing was the first time he had heard a charge that he had been drinking or was drunk that day.

The Company says that, when first asked at this hearing about drinking on January 1, grievant at first said he did not recall and then changed that to a firm statement that he had not drunk alcohol then.

Grievant stresses that the note at the bottom of the Disorderly Conduct arrest report, saying he had left the hospital before he was treated, is wrong and that he was treated first, that he waited for the Policemen, got tired waiting while he was ill, and left.

As to the statements in the Arrest Reports that the Company used to suggest at the hearing that grievant had been drinking on January 1, the Union notes that they necessarily must have been written by Arresting Officer Glass, since only he would have known many of the details recited there. The Union sees it as odd that he wrote fourteen lines (eight in one report and six in the other) of narrative material about grievant's conduct then and yet said not one word in all that about grievant's drinking.

A May 20, 1986 "To Whom It May Concern" statement by Dr. Broomes, one of grievant's treating physicians, notes that in early May of 1986 grievant had intensive abdominal surgeries; that he had a ruptured diverticulitis with peritonitis, and a mechanical intestinal obstruction. A colostomy was performed, which, because of grievant's condition, would remain open for three or four months; that grievant is obese, suffers from chronic obstructive pulmonary disease, the consequences of chronic alcoholism, early cirrhosis of the liver, and arthritis of the spine. The doctor said it was his opinion that grievant will be disabled at least for the next six months and that there was no assurance that even after six months he would be physically able to resume work. The Company stresses also that grievant agrees with that assessment of his present physical condition.

The Union advised that grievant has applied for a Social Security Disability pension but has not yet received a ruling.

The Union contends that, as Dr. Broomes said, grievant's physical problems were caused or made worse by his alcoholism and, it argues, therefore, that it is to be expected that he will have periodic absences caused by those medical problems.

The Company says the narrow time here is the period of months since grievant's reinstatement in September of 1984, but it claims also that it nevertheless is necessary to view as relevant grievant's whole past record, most of which was reviewed in the Opinion in Award No. 749. Management argues that grievant's absenteeism record since September of 1984, taken together with his old and longer record, establishes cause for discharge.

The Company says grievant's 1983 discharge and 1984 reinstatement cannot confer on him greater freedom regarding absenteeism than that governing all other employees. Grievant was made subject to more stringent conditions than existed for him before and than those applicable to other employees. But, says the Company, that should not mean that his prior absenteeism record is beyond review here or that he was not subject to whatever attendance-control program was in place after his reinstatement.

The Company suggests that the equitable problem here is which party should bear the continuing costs of the apparently long-term effects of grievant's alcoholism. It urges it is inappropriate to require the Company to bear those costs after it has done its duty under Article Section 8 and has complied with Award No. 749.

FINDINGS

It must be made clear at the beginning that the Company does not charge grievant with violation of any of the reinstatement conditions of Award No. 749. It does charge him with extended absences in violation of the new attendance-control program put in effect on April 1, 1985, and that raises the governing issue here. It charges him also and rather incidentally with an overall unsatisfactory work record.

Grievant was reinstated without back pay by Award No. 749 and was returned to active employment on September 17, 1984, and by the express terms of that Award he was subject for one year from his reinstatement to six stringent conditions designed to bring his attendance, tardiness, and reporting-off record up to that of the department's average for any rolling thirty-day period by requiring him not to drink alcohol; to attend Alcoholics Anonymous meetings at least once each week and to consent to certification that he had done so, with serious illness or other emergency conditions as the only excuse for not doing so; to report once each week for discussion with representatives of each party and to testing for presence of

alcohol in his blood by drawn sample or breath or urine analysis; and not to develop an absentee or tardiness rate,

". . . aside from absences for which he has reported off in advance and which are excused by a physician for reasons other than consumption of alcohol, higher than the Department average for any rolling, thirty-day period."

Those conditions were more stringent than those then covering other employees and much more severe than any ever applied to grievant before. The significant point, dispositive here, is that grievant satisfied all those conditions. He thus did not violate any of the terms of his reinstatement, established by Award No. 749, to which he was subject until September 16, 1985. Accordingly, Management's charging him with violation of the new or, indeed, any, attendance-control program for absences during that one-year period beginning September17, 1984 conflicts with the expressed and severe attendance requirements established by Award No. 749, to the extent that the absences charged were of the kind that did not violate the reinstatement conditions of that Award. And it is clear that all the absences charged in the seventeen months from grievant's reinstatement to his suspension here were of the kind that did not violate Award No. 749.

This is not to say, by reason of grievant's past record of attendance faults relating to alcoholism and his reinstatement in the earlier Award, that he thereafter was exempt from Company rules. He remained subject, of course, to all reasonable Company rules dealing with discipline for fault. They would include, especially in his case, alcohol-related attendance faults of absenteeism, tardiness, and failure to report off, and would surely cover, too, theft, violence, insubordination, or any other active fault. But, the conditions of grievant's reinstatement subjected him to attendance requirements much more stringent than those applicable to all other employees, and that obviously meant also, because it said so, that he was exempt for that one-year period from discipline for absences which were reported off in advance and excused by a physician for reasons other than recent ingestion of alcohol. Grievant satisfied all that. In the period of seventeen months from his September-1984 reinstatement, he had one failure to report off, one tardiness charge, two days' absence in May of 1985, and the two days' absence in January of 1986 when he was held in jail. In summary, therefore, he was absent forty-four days in seventeen months, but only five of those days of absence were even arguably covered by, and did not violate, the conditions of the earlier Award. The three daily absences within the twelve-month period did not violate the earlier Award because they amounted to an absentee rate of 1.25 percent, which was lower than the Department's 2 percent average. The five daily absences over the seventeen-month period came to less than a 1.5 percent absentee rate. The other thirty-nine days of absence occurred in four different periods of extended illness and hospitalizations, not related to recent ingestion of alcohol, certified as such by physicians, and for which Sickness and Accident benefits were paid. They did not violate the conditions of the earlier Award.

The Company charged also an "overall unsatisfactory work record." That must have referred to faults other than absenteeism, tardiness, and failure to report off. But there were no such faults after September of 1984. There were two strange charges, one in October of 1984 ("Clothing procedure violation") and one in August of 1985 ("Improper wearing apparel"), but Section Manager Horn said he did not consider them in deciding on this suspension and discharge. Without them there was no new unsatisfactory work record to urge in support of a new discharge.

The Company suggested also at the hearing that grievant's two absences in January of 1986 were caused directly by his drinking, noting that of the two Arrest Reports filled by Officer Glass, the first says "Drunk" in the Sobriety slot, and the second says "H.B.D.," said to mean, "Had Been Drinking."

Those notations are sufficient to raise an issue, but not to justify a resolution of it that grievant drank alcohol on December 31 or January 1. The officer did not testify. Grievant did, and he denied in reasonably persuasive manner that he had drunk alcohol. He said that in all his time at the hospital that day, with the Police, at the station, and back at the hospital, as well as during his appearances in court, no one before this arbitration proceeding had said anything about his drinking that day. Finally, in the Arrest Reports, which must have been written by Officer Glass, since only he would have been aware of some of the incidents recited, he wrote six lines of narrative on one report and eight on the other but said not one word about grievant's drinking or being drunk. Thus, it could not be found that grievant's absences on January 2 and 3 were caused by his drinking alcohol.

It is reasonably clear, then, that there was not cause for grievant's January-1986 suspension and discharge. It is equally clear, however, in light of his extended absences since his September-1984 reinstatement and, more pointedly, in view of his physical disabilities at hearing time in July, as certified on May 20 by his treating physician and his own assessment, that for much of 1986 he was unable to work, and his

physician's opinion was that he would be disabled for at least six more months and that there was no assurance that he would be physically able to work even after that period.

There need be, and under this Agreement there is not, however, any necessary and universally applicable connection between an employee's right to resist discharge and his presence on each weekly schedule. That is to say that an employee's disabling illness or injury may be so frequent and extended that it would be a purely futile exercise to continue scheduling him each week. His absences may be such that putting his name on a weekly schedule would be only a paper notice, with all concerned knowing full well that he would not be able to report for work and that he would not. Thus, Management's inability to discharge grievant on this record does not mean it must continue to schedule him each week.

This Agreement recognizes that distinction. Article 3 recites that among the managerial rights vested in the Company is the right "...to lay off employees because of lack of work or for other legitimate reasons ..." Grievant's being disabled from reporting for work for long periods of time by reason of illness is a legitimate reason for not putting him on the schedule. That is reflected also in Article 13, Section 1, where seniority is defined as including the ability to perform the work. Since he is disabled by various illnesses from performing any work, grievant's seniority does not entitle him to a place on the schedule for any job. Accordingly, although grievant may not be discharged, he may be left off schedules until he can demonstrate by persuasive medical advice that his physical condition has improved so as reasonably to support the conclusion that he will be able to report for work and perform it with about average regularity. Until he can do so, Management need not call him to work.

Of course, should grievant's period of absence for physical disability extend beyond the period stated in Article 13, Section 11-b (paragraph 13.68), his continuous service and employment relationship would be broken and terminated, not for "cause" or fault, but by automatic operation of the Agreement.

Consequently, the grievance will be sustained to the extent of ruling that the suspension and discharge were not for cause, and grievant shall be reinstated to his employment relationship with full seniority, and he shall be reimbursed for earnings and other contractual benefits lost by reason of the improper suspension and discharge, but only from January 10 to April 7 or whatever other earlier date he became disabled from the bowel condition that hospitalized him on April 8 to May 12 and for which he had a major abdominal operation. His treating physician said on May 20 that he was disabled from work and would continue as such for at least the next six months, and that there was no assurance that he would be able to resume work even after that period. Management need not schedule grievant for work until he presents reasonably persuasive medical opinions that he is able to work.

AWARD

The grievance is sustained to the extent stated in the last paragraph of the accompanying Opinion.

/s/ Clare B. McDermott

Clare B. McDermott

Arbitrator