Award No. 951
In the Matter of Arbitration Between
Inland Steel Company
and
United Steelworkers of America
Local Union No. 1010
Gr Nos, 28-V-058; 28-V-062
Appeal No. 1562
Arbitrator: Jeanne M. Vanhof
September 30, 1998

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on August 5, 1998 at the Company's offices in East Chicago, Indiana.

APPEARANCES

Advocate for the Union:
A. Jacque, Chairman, Grievance Committee
Witnesses:
F. Kinsey, Assistant Griever
R. Duvall, Grievant
Advocate for the Company:
P. Parker, Section Manager, Arbitration and Advocacy
Witnesses:
P. Berklich, Senior Representative, Compensation, Personnel & Training
J. Bean, EAP Counselor -- Medical Department
K. Galvan, Section Manager of Services and Anneals -- No. 3 Cold Strip Department

BACKGROUND:

The Grievant, R. Duvall, had been working for the Company for more than twenty (20) years at the time of his discharge. At that time he was working as a Laborer assigned to help clean part of the area at the No. 3 Cold Strip; he had begun working in this department in February, 1997. Laborers at the No. 3 Cold Strip perform a variety of tasks, including the difficult task of keeping the walking and working surfaces clean. Usually one of the units in the department is down for maintenance at any given time, and this maintenance includes cleaning, which is performed by the Laborers. The Grievant's duties included pulling by hand from the basement scraps of the metal bands used to bind coils. The straps are very sharp and can cut someone's face or hands if not handled carefully.

This award addresses grievances over two discharges, one for continued failures to report off and the second for coming to work under the influence of drugs. The Grievant's disciplinary history is as follows:

DATE	INFRACTION	DISCIPLINE
07/31/96	Failure to Work as Scheduled	Reprimand
08/30/96	Failure to Report Off	Reprimand <FN 1>
7/31/97	Sleeping, smoking on the job leaving work area	Reprimand <FN 2>
09/23/97	Failure to Work as Scheduled	Reprimand Letter
09/24/97	Failure to Report Off	Five Days Discipline
10/16/97	Record Review	
10/27/97	Failure to Report Off	Susp. Pending Discharge
10/30/97	Discharge	
11/11/97	Working Under Influence	Susp. Pending Discharge
11/17/97	Discharge	

The Grievant's record is more complicated than is suggested by the above outline. The Company presented evidence that between February 17, 1997, when he came over to the No. 3 Cold Strip, and October 16, 1997 the Grievant failed to report off on eleven (11) separate occasions. Ms. Galvan testified that she was transferred over as the Section Manager of the Grievant's Department in August, 1997 and began talking to the Grievant about his attendance problems at that time. She stated that she had a hard time reaching him because she was not assigned full time to the Department and the Grievant was missing work when she was transitioning over into the Department. She told the supervisors that when the Grievant did come in they should call her, they did and she talked with him. According to Ms. Galvan she met with him in a formal

documented meeting on September 16, 1997. His record at that time showed that he had FRO's on August 13, 14, 15, 16, 27, and 28, and on September 2 and 3. He also had eight report-offs for other reasons (sick, personal, transportation) in late July, August and early September.

On September 4, 1997 the Grievant had reported off for an extended absence, in order to address his long-term battle with drug addiction. The records of Mr. Bean (the Company's EAP Counselor) indicate that the Grievant entered an intensive treatment program at Charter House on September 4 but discharged himself on September 8, 1997. He asked Mr. Bean on September 8, 1997 to release him to return to work, but Mr. Bean refused to do so. The Grievant made an appointment from Mr. Bean's office with a doctor, and that doctor released him to return to work, according to Mr. Bean.

The Company's records show that the clinic cleared him on 9/10/97 to return to work, and that he was directed to report on 9/11/97 on the 3-11 shift. The records also show that he was charged with an FRO when he called in at 4:00 p.m. on the 11th, saying that he was at the doctor's office, where he was being directed not to return to work until the 15th. The record indicates that he had another FRO on the 15th, and Ms. Galvan testified that she then had the disciplinary discussion with him on the 16th. The records of this meeting indicate that the parties discussed that the Grievant had an ongoing drug/alcohol problem that was being addressed, and that both his absenteeism and FRO's were out of control and would no longer be tolerated. A discipline of three days off and a letter were put on hold preliminary to contacting Mr. Bean about the sincerity of the Grievant's addressing his addiction issues, and waiting to see what the absentee system would "kick out." The Section Manager stated that during this period when the Grievant was interviewed he refused to sign "yes" in answer to the written question about whether he had a drug problem, because he was working on the problem. When Ms. Galvan contacted Mr. Bean he told her that the Grievant had had a problem for some time and that she should go ahead with the discipline. The absentee system "kicked out" the Grievant's name for issuance of a reprimand letter on September 23, 1977.

The Grievant had two more FRO's on September 22 and 23. The Section Manager stated that she met with the Grievant on September 25, 1997 and disciplined him with five days off and a letter for the FRO's, a reprimand letter from the absentee system, and a record review. The Section Manager stated that she had disciplinary letters imposing discipline of less than five days sitting on her desk for the earlier FRO's, but did not issue them to the Grievant because he was not coming into work. The Grievant was off on an extended absence from October 5 through October 12, 1997. On October 16, 1997 the Grievant received a record review. He had several other FRO's on the days following his record review and on October 27, 1997 he was suspending pending discharge for his continued failure to report off. On October 30, 1997 that suspension was transformed into a discharge. Ms. Galvan testified that she knows the Grievant personally and tried to work with him over his attendance problems, but was unable to do so.

The Union grieved the discharge and the Grievant returned to work under the Justice and Dignity clause of the Agreement. On November 5, 1997 the Grievant was waiting to start a job at the 56 tandem mill when he was told that a supervisor wanted to see him in the office. The supervisor ordered him to take a fitness for work test, he did so, and the results showed that he had cocaine in his system. On November 11, 1997 the Grievant was notified that he was being suspended pending discharge for violating Rule 132(b), reporting for work under the influence of drugs. He was discharged for that offense on November 17, 1997.

The Grievant testified that he has been using drugs for many years. He stated that he has been able to remain off drugs for as long as ten (10) months at a time in the past, on his own. Mr. Bean, Inland EAP Counselor, testified that the Grievant has been in the Inland Program for Drug and Alcohol Abuse several times, and that he has not been successful in the program. The grievant also has been treated in hospitals and in other substance abuse treatment programs on several occasions beginning as early as the early 1980's. Mr. Bean testified that the Grievant has been difficult to work with, often not complying with the requirements and suggestions of the programs he has entered.

The Grievant testified that using drugs has caused many problems in his life, including losing his job, problems with relationships, incarceration and other problems. He testified that he knows that at earlier times when he entered rehabilitation it was not successful because he did not want to stop using drugs. However, he testified that after he lost his job he realized that if he does not stop using drugs, he is in danger of losing his freedom, through incarceration, and his life. Therefore he has pursued a course of rehabilitation since several weeks after losing his job, attending more than 140 AA and NA meetings in the past seven months, including the night before the arbitration hearing. He presented the records to support that attendance, and testified that he knows that he is more likely to succeed if he attends more meetings and that addicts who do not attend meetings are fooling themselves. The Grievant stated that he has

checked in with the Union's program every Thursday, and has gained fifty (50) pounds since entering rehabilitation. When asked his opinion of the Grievant's chances of successful long-term rehabilitation, Mr. Bean noted that the Grievant's attendance at so many AA and NA meetings shows a positive change in his approach towards treatment over his attitude in the past, and that he is moving in the right direction. Moreover, Mr. Bean stated that his overall history of rehabilitation is not very favorable.

The Grievant testified that on some of the occasions when he was charged with an FRO he did call in, but he called in late. He testified that in other departments these instances would not have been counted as FRO's.

In regard to the November 5th incident, the Grievant testified that he was not ingesting drugs at work, because that would be too obvious. He testified that there probably was cocaine in his body from previous usage, and that the actual high from cocaine lasts only a few minutes. Mr. Bean testified at length about the physiological symptoms of someone using cocaine and withdrawing from it.

THE COMPANY'S POSITION|

The Company argues that the Grievant was put on notice that his continued failure to report off would lead to discharge. Yet the Grievant failed to report off even immediately after these discussions. The Company acknowledges that the Grievant did not have the normal progression of discipline for FRO's. However, this is not a typical case because here the Grievant abandoned his job, and was not present to receive the discipline for the FRO's. The Company contends that under these circumstances discharge for his continued FRO's was appropriate.

Then, during the Justice and Dignity period following his discharge the Grievant appeared for work under the influence of cocaine. He violated an extremely serious rule during a period when most employees are behaving as model employees. The Company relies upon several arbitration awards in which Inland arbitrators have upheld discharges for appearing for work under the influence of drugs or alcohol. Since arbitrators consider post-discharge rehabilitation efforts as a mitigating factor in favor of the Grievant, the Company urges that this post-discharge drug use also be considered as an aggravating factor in favor of discharge.

The Company also questions whether the Grievant is truly rehabilitated and ready to return to work. This Grievant has been through many rehabilitation programs, and has only remained drug-free for at most ten (10) months before suffering a relapse into drug use. It has only been seven (7) months that the Grievant has been in rehabilitation at this point. The Union and the Company have worked very hard with the Grievant to try to get him to rehabilitate himself, but his past record does not bode well for his continuing to stay off drugs, the Company argues.

THE UNION'S POSITION:

The Union contends that the Grievant was not afforded progressive discipline in this case. The Company cannot rely upon the fact that the Grievant was not coming in to explain its failure to provide progressive discipline, because Management could have mailed the disciplinary notices to him or notified the Union. Because the Grievant was not provided with progressive discipline, the discharge should be overturned, the Union argues.

As for the drug use, the Grievant should be treated no differently than other employees with a drug problem. Although a violation of Rule 132(b) may subject an employee to discharge, it is not automatic. The Union relies upon Inland Award No. 727, in which the discharge of an employee with drug problems was overturned, and notes that both Parties have agreed in the labor agreement that drug addiction is a treatable condition.

The Union argues that the Grievant has shown that he has rehabilitated himself. According to the Union there is an amazing difference in the Grievant over the past seven months, as exhibited by his weight gain. In addition, the Grievant has recognized that he faced either death or jail if he continued to use drugs, and he recognizes that he must continue to go to meetings in order to help stay off drugs.

The Union notes that the Grievant had no history of discipline prior to 1996 and has more than twenty (20) years of service. A lot of his absences in 1996 were tardies and he had no way to know that he had been marked tardy until he saw his paycheck. Someone should have warned him that he was having a problem with tardiness before disciplining him. In addition, the Union states that many of the Grievant's FRO's were instances in which he called in late, rather than not at all. The Union requests only that the Grievant be brought back under a Last Chance Agreement and is not requesting that he be awarded backpay.

OPINION:

This is a case involving the discharge of an employee for continued failures to report off and for coming to work under the influence of drugs. There were actually two separate discharge actions; the second one, for

reporting to work under the influence, occurred after the Grievant already had been discharged for excessive FRO's, while the original discharge was in the grievance procedure and the Grievant was working under the Justice and Dignity clause.

Turning to the first discharge for continued failures to report off, the Company acknowledges that progressive discipline was not applied in the normal way in this case. The disciplinary history shows that the Grievant received a reprimand for a failure to report off on August 30, 1996 and the next formal discipline was a five day disciplinary suspension more than a year later, on September 25, 1997. There were no intervening disciplinary actions and the Grievant never served the five day suspension. <FN 3> The Grievant had several more FRO's and was discharged. Thus, the Grievant had very few steps of progressive discipline and no disciplinary time off leading up to discharge.

The Section Manager stated that she wanted to impose more disciplinary steps upon the Grievant, but that he was not at work to receive the discipline. The record shows that the Grievant was coming into work only very erratically in the weeks leading up to his discharge. Some of the absences were excused, such as the vacation days, some were less serious than others, such as the extended sick days, but some were very serious, such as the FRO's. <FN 4> It appears from all the evidence that the Grievant's drug abuse problem was spiraling completely out of control at this point, and it is not clear whether more progressive discipline would have helped him get back on course. <FN 5>

The Section Manager's testimony that the disciplinary notices were piling up on her desk is credible, as is her testimony about sincerely trying to help the Grievant with his serious drug abuse problem. Her testimony indicates that when she held disciplinary discussions with the Grievant she did try to impress upon him the seriousness of his situation. The record also shows that the Grievant had a number of FRO's within days of disciplinary discussions with his Department.

As the situation evolved here, the Grievant was not afforded the full panoply of progressive discipline which the Company has extended to other employees. Progressive discipline is not a precise equation, however, and employees are not entitled to exactly the same steps of that process in each case, unless the labor agreement prescribes certain steps, which is not the case here. Much of the reason for why the situation developed as it did here was that the Grievant had virtually abandoned his job at that point. <FN 6>

Nevertheless, there are certain mitigating factors at issue here. This was not a case in which the Grievant had a long history of discipline for absenteeism. The Grievant is a twenty-year employee and his disciplinary record over the last five years shows only a single reprimand for absenteeism prior to the two-month period immediately prior to his discharge. The Grievant's absenteeism over the weeks just prior to his discharge essentially destroyed his attendance record all at once. When a long-term employee has an attendance problem lasting a relatively short period of time, even a serious problem, the nature of the cause for the absenteeism must be considered. Here the Grievant acknowledged that his absenteeism was caused by a drug abuse problem. Other employees with drug and alcohol problems have experienced similar periods when the problem became so bad that they were not coming into work regularly for several weeks, and the Company has not discharged this as quickly as the Grievant. In addition, the Grievant was taking some steps, however abortive, during this period to address his drug abuse problems, and Management knew about them.

In addition, his efforts at rehabilitation since his discharge have been impressive. The evidence shows that the Grievant has had great difficulty in complying with treatment programs in the past and that one of his problems was that he did not really like the group processes common in NA and AA.He seems to have changed that attitude, as demonstrated by his very frequent NA and AA attendance over the past seven months. It is difficult to attend five meetings per week and gain fifty pounds in a rehabilitation program unless one has been committed to rehabilitation, at least during that period. <FN 7>

This evidence also affects my judgment regarding the Grievant's post-discharge conduct in reporting to work under the influence of drugs. The Union does not deny that the Grievant was working "under the influence" of cocaine. Even assuming that he was not in the acute stages of the cocaine high, <FN 8> the Grievant probably was still under the effects of the withdrawal symptoms detailed by Mr. Bean.

The Union argues that discharge is a possible but not mandatory discipline for this offense. In Inland Award 864, I held that discharge was not appropriate for an employee who committed a first offense of working under the influence of alcohol, where the Parties agreed that employees are typically not discharged for a first violation. In the instant case the Company has cited several cases in which Inland arbitrators have upheld discharges for a first offense under this rule. Inland Award No. 635 (Mittenthal, Arb. 1977); Inland Award 696, (Luskin, Arb. 1981); Inland Award No. 737 (Luskin, 1983). However, in

each of these cases the arbitrator found that there was possession or use of drugs on Company property. Here there is not sufficient evidence to conclude that the Grievant was using or in possession of cocaine at work. In addition, it may be that these cases were decided prior to the introduction into the Agreement of the language regarding the Parties agreement that alcohol and drug abuse be regarded as treatable conditions, since these opinions do not mention the language.

Based upon the factors discussed above and the Parties' agreement that drug abuse is a treatable condition, I am not persuaded that there was just cause for the Grievant's discharge in October, 1997. Nevertheless the Company has some significant concerns in regard to the Grievant's ability to stay off drugs and come to work regularly and on time. The Union has not requested backpay in this case and asks only that the Grievant be reinstated under a Last Chance Agreement. I concur with this approach, given the Grievant's serious absenteeism Just prior to his discharge, (including especially his succession of FRO's), his very long-term problem with drug abuse, his weak attempts to deal with that problem prior to his discharge and the Union's admission that he was under the influence of cocaine at work on November 5.

The Company may seek assurances that the Grievant will continue seeking the support he needs to remain drug-free. Thus, the Company may reinstate the Grievant under the terms of a Last Chance Agreement, like the Agreements they have reached for other employees with similar problems. As part of that Agreement, the Grievant may be placed under a requirement of random drug and alcohol testing for a period of at least two years, and a requirement that he participate in the Inland alcohol and drug program for a period of at least one year after reinstatement. I will retain jurisdiction for a period of thirty days in order to resolve any issues arising from this award.

AWARD

The grievance is sustained in part. The Grievant is to be reinstated and the Company may impose a Last Chance Agreement as described above. No backpay is to be awarded. The Arbitrator will retain jurisdiction of this grievance for a period of thirty days from the date of this award in order to resolve any disputes arising in relation to this award.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof

Labor Arbitrator

Approved by Terry A. Bethel, Umpire

Dated this 30th day of September, 1998.

In Inland Award No. 951 I reserved Jurisdiction to address any issues arising from the award. In the award I held that the Company could reinstate the Grievant under the terms of a Last Chance Agreement, "like the Agreements they have reached for employees with similar problems." I also stated that the Grievant could be placed under a requirement for random drug and alcohol testing for at least two (2) years.

The parties have asked me to resolve a dispute over whether the Grievant should be placed under a requirement of random testing for a two (2) or five (5) year period. Having considered the arguments put forth before me in the telephone conference held Friday, October 23, 1998, I conclude that the Grievant's Last Chance Agreement may require two (2) years of random testing. According to the Parties, nearly all of the negotiated Last Chance Agreements for persons with alcohol and drug problems have contained a two (2) year random testing period. The Grievant's situation is not so different from other employees so as to justify a five (5) year period.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof

Labor Arbitrator

Dated this 23rd day of October, 1998.

<FN 1> This appears to be a written notation of an oral reprimand, since it does not state that it is a reprimand letter on the form.

<FN 2> This also appears to be an oral reprimand, for the same reason as stated in Footnote I.

<FN 3> The record indicates that the Grievant was warned that a three-day discipline would be imposed under certain conditions, the Grievant had additional FRO's in the days following this discussion, and the five day discipline was imposed instead.

<FN 4> The Grievant's testimony that on some of these days he did call in late, rather than not at all, was refuted by the Section Manager and is not supported by any other evidence in the record. This evidence might provide some mitigation if there were also proof that those calls came a few minutes after the turn began, rather than hours later, when the foreman already had made the difficult decisions about how to

replace the Grievant on that day. The Grievant acknowledged that he knew that he was required to call off before the shift.

<FN 5> This view is supported by the fact that even after discharge he came to work "under the influence" of cocaine.

<FN 6> I note, however, that the Grievant was not technically charged with abandoning his job.

<FN 7> I recognize that the Grievant has admitted to a very long-term problem with drug addiction, and has failed in other rehabilitation programs. He also said, however, that he recognizes what he must do to assure that he does not relapse, i.e. to keep attending meetings.

<FN 8> There was evidence that the actual high from cocaine lasts only a few minutes, and the Grievant testified that he did not and would not ingest cocaine at work because people who have just ingested the drug can act very strangely, and "it would be too obvious." I found this testimony credible. However, Mr. Bean testified about the dangerous residual effects of cocaine withdrawal. The Grievant himself mentioned that he had probably been up for several days doing cocaine prior to coming to work and that he fell asleep at the clinic where he was being tested for drugs that day.