Award No. 750
IN THE MATTER OF ARBITRATION
Between
INLAND STEEL COMPANY
Indiana Harbor Works
and
UNITED STEELWORKERS OF AMERICA
Local Union No. 1010
Grievance No. 4-R-4
Arbitrator: Clare B. McDermott
Opinion and Award
October 16, 1984
Subject: Discharge--Attempted Theft of Another Employee's Paycheck.
Statement of the Grievance: "The aggrieved, Charles Tindal, Payroll No. 11088, contends the action taken by the Company, when on December 8, 1983, 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 Article 3, 8, 14 Section 1, 1, 8 of the Collective Bargaining Agreement."
Agreement Provisions Involved: Article 3, Section 1 of the March 1, 1983 Agreement.
Statement of the Award: The grievance is denied.
CHRONOLOGY
Grievance Filed: December 13, 1984
Step 3 Hearing: January 3 & 17, 1984
Step 3 Minutes: April 3, 1984
Step 4 Appeal: April 13, 1984
Step 4 Hearing(s) April 17, 1984
Step 4 Minutes: August 10, 1984
Appeal to Arbitration: August 13, 1984
Arbitration Hearing: August 21, 1984
Appearances
Company
Robert B. Castle -- Arbitration Coordinator, Labor Relations
Royce A. Hebbard -- Assistant Superintendent, No. 4 BOF
John A. Nielsen -- Coordinator, Labor Relations
Andrew M. Bruns -- Representative, Labor Relations
Richard Smulevitz -- Senior Clerk, Payroll Services
Sue Cohen -- Senior Clerk, Payroll Services
William Stowe -- Industrial Relations Trainee, Labor Relations
Morris W. Pratt -- Captain, Safety and Protection Services
Union
Tom Barrett -- Staff Representative
Joe Gyurko -- Chairman, Grievance Committee
Don Lutes -- Secretary, Grievance Committee
Jim Robinson -- Griever
Paula Tindal -- Witness
Charles Tindal -- Grievant
James Winningham -- Witness
BACKGROUND
This grievance from No. 4 Basic Oxygen Furnace Department of Indiana Harbor Works claims that grievant's discharge for allegedly attempting to steal another employee's identification badge by falsely identifying himself as the other employee, so as to be able to obtain and cash the other's paycheck, and for possession and use of drugs on Company property, was without cause, in violation of Article 3, Section 1, Article 8, Section 1, and Article 14, Section 8 of the March 1, 1983 Agreement.
Grievant began with the Company in March of 1977 and was working as an Ingot Clerk in No. 4 Basic Oxygen Furnace Department in September of 1983.

Between 8:30 and 8:40 a.m. on September 26, 1983, a payday at the plant, a black man appeared at the window at Payroll Services and said he was employee Ralph Outling, Check No. 11048, announcing that he had lost his employee identification badge and needed a replacement. He signed the replacement badge register as "Ralph Outling." The employee identification badge is the only proof, along with the right name, required to pick up an employee's paycheck. Payroll Services Clerk Sue Cohen watched the man sign "Ralph Outling," in the replacement badge register.

As required by established procedure, Cohen went to the Employee Name and Signature Card of employee Outling in order to compare the signature just written with that of Ralph Outling. She saw that the signature did not match, and she asked, as she always does in such situations, if the person had changed his handwriting recently. He said he had not, and Cohen then called her colleague, Senior Accounting Clerk Smulevitz, into the situation. They compared the signature just given with all signatures of Ralph Outling in the records, and none matched the one just submitted. They asked the man for personal identification, such as a driver's license. He said he had none with him, that it was in his car, and he would get it. Cohen and Smulevitz said the man was standing right in front of them, 12" or 18" away, for the four or five minutes he was there.

The man left the office, and Smulevitz, who had become suspicious, followed him in order to get better identification from the license plate on the car. The car was parked facing Smulevitz. Smulevitz said it was a maroon, 1978 or 1979 Grand Prix. He walked past within two or three feet of the car on the driver's side and saw the man lying across the seat, as if reaching into the glove compartment. Smulevitz intended to get behind the car to see the license number when it pulled out backwards and then as it proceeded frontwards out of the lot. There was no license plate on the front of the car, so Smulevitz concluded the car was registered in Indiana. As Smulevitz passed the car, the man started up and backed out of the spot and continued backwards for about 200 or 300 feet at a speed of ten to fifteen miles per hour. Smulevitz thought that was to prevent his seeing the license number on the back, and he said he thought the backing maneuver was dangerous because it led into a blind traffic corner. Smulevitz thus could not get the license number.

He went back to the office, described what he had seen, called the pay station where Outling normally would get his check to see that it was still there, and called Plant Protection to report the details of this event, including his description of the man. Cohen and Smulevitz say the man's demeanor was calm, reserved, and not belligerent.

At about 3:30 p.m. employee Outling came to the Conference Room, as he had been requested to do. He is not the man who had been at Payroll Services in the morning. The whole event was described to him, including a description of the man and the car. Outling was amazed and said the descriptions fit a man he knew, who worked as a Clerk in the office at No. 4 Basic Oxygen Furnace Department, where Outling works, and from his job duties easily could have learned Outling's payroll number. The man Outling named was grievant.

Smulevitz got out the file on grievant and compared grievant's signature there with that submitted that morning. He thought there were similarities. Smulevitz told that to Plant Protection Captain Pratt. Pratt showed grievant's photograph in his Personnel Record to Cohen and Smulevitz, apparently on September 29. Cohen could not identify grievant positively as the man, from the picture. She says the features were the same but the hair style was not. She could not say grievant was or was not the man, from the photograph, alone.

Smulevitz later on could not recall having seen the photograph, but he said later that he told Pratt he would rather see the individual in person and not try to identify him from a picture because persons change over the years.

After grievant's name came up, Captain Pratt called grievant's home on September 26 but got no answer. He tried again the next morning, with the same result. He and Lieutenant Puhek then went to grievant's home in Gary, and no one was there. They asked a neighbor to ask grievant to call Plant Protection. By the time they returned to their office at the plant, grievant and his wife had called. Grievant called soon again, and Pratt identified himself and asked if grievant owned a maroon 1979 Grand Prix, and grievant said he did. Pratt said he would like to have a discussion with grievant and asked if he would come to the plant. Grievant said he had a cold and had been to a doctor, who had told him to stay in, and he was not up to coming in then. He agreed to meet Pratt at the plant the next day (September 28) between 9:00 and 10:00 a.m.

Grievant did not show up for that meeting. Pratt called grievant's department and was told that his wife had called to report him off indefinitely, by order of a physician.

It was learned afterwards that late on Wednesday, September 28, 1983, grievant was admitted to the Gary Methodist Hospital because of drug abuse, and that he later entered Northwestern University Hospital for the same reason. The Company chose not to attempt to get in touch with him while he was hospitalized. Grievant was released from Northwestern University Hospital on October 24 and reported to the Company Clinic for return-to-work clearance on November 10. He was questioned that day by Captain Pratt and Lieutenant Puhek about the September 26 incident at Payroll Services. He disclaimed any knowledge of that event and said he could not recall being at Payroll Services at all that day. Pratt questioned grievant about that day, and he said he got off work in the morning, picked up his check, went home, picked up his wife and daughter, and took the latter to school. He and his wife had a tiff, he dropped his wife off, and went to meet his friends and use drugs for the rest of the day. He said that on that day he had used cocaine, marijuana, THC (most potent constituent of marijuana), and had free-based cocaine by smoking a mixture of cocaine and baking soda that had been heated over a flame. Grievant said because of all the drugs he had ingested then, he simply could not recall what he had done that day. He did not deny being at Payroll Services, he said he simply could not remember what he had done or where he had been. He said he had marital and money problems because of his drug abuse and that that had led him to do crazy things to get money, such as, strong-arming persons, purse-snatching, and holding up people.

Grievant then agreed to go with Pratt and Puhek to Payroll Services. Cohen and Smulevitz were not told they were coming. Pratt went into the Payroll Services Office first, followed by grievant, and Lieutenant Puhek brought up the rear, the first two holding the door for the follower. The three were not in physical contact with each other. Pratt went to the fourth of five windows, grievant to the third, and Puhek stayed back eight or ten feet. The first to see grievant was Smulevitz. He had been at his desk, and he came toward the window, looked at grievant, and said, "That's him." Cohen was walking into the office. She saw grievant and immediately recognized him as the man who had claimed to be Ralph Outling. She reported that to Pratt. Cohen and Smulevitz say grievant's hair was different on this occasion from the way he wore it on September 26, but each identified him as the one who had identified himself as Ralph Outling that day.

The department conducted an investigative meeting on November 17. Grievant admitted that after he got off work on the morning of September 26, he got his paycheck at about 6:40 a.m. and then walked to his car in Lot No. 40 and smoked PCP (phencyclidine, a hallucinogenic controlled drug). At that meeting, Cohen and Smulevitz again identified grievant as the man who tried to get a replacement badge in the name of Ralph Outling.

On November 23 grievant was suspended, subject to discharge for violation of Rules 127b, 127j, and 127k, and for his overall work record. The Rules stated above read as follows:

"127. The following offenses are among those which may be cause for discipline, up to and including suspension preliminary to discharge:

". . .

"b. Reporting for work under the influence of drugs not prescribed by a licensed physician for personal use while at work; being in possession of, or use of, such drugs while on company property, or bringing such drugs onto company property.

"j. Stealing or malicious conduct, including destroying, damaging, or hiding any property of other employees or of the Company, and the destruction, damaging or pilfering of vending machines or any equipment made available to employees for the purposes of in-plant feeding.

"k. Falsifying or refusing to give testimony when accidents are being investigated; or falsifying or assisting in falsification of personnel records or any other records; or giving false information in making application for employment."

A suspension-period hearing was held on December 1, and on December 8, 1983, the suspension was converted to discharge, and this grievance followed.

Paula Tindal, grievant's wife, testified that she spent the night of September 25-26 at her mother's, as she often does when grievant works nights. She says grievant got there at 7:45 a.m. and they took their daughter to school at about 8:00 a.m. They went to a Jewel store to cash his paycheck, which trip took approximately ten minutes, then four blocks to a Shell gas station, consuming about ten or fifteen minutes, and then to the telephone company to pay a bill and were there five or ten minutes. She said the telephone office was not open until 8:30 a.m. They drove to grievant's cousin's, and she and grievant had a slight argument there. They went home, she changed clothes, and grievant drove her to her girl friend's house. They had another fight about money, and he left at 9:30 a.m. to go and get high with his friends. She said

she was with grievant from 7:45 to 9:30 a.m. that day and that they never were at the Payroll Services Office.

She went to see a lawyer that afternoon about getting a separation from grievant. She said grievant did not come home that night and, therefore, she did not see him until the next night. She and her girl friend took grievant to the emergency room of a hospital that night or early the next morning, but he acted the fool and left the hospital. She was afraid to be with him. Later that night, grievant's sister and brother took him to a hospital. She could not recall what grievant had told her about his activities on September 26. She said grievant told her he could remember nothing, and she told him he could not have done what he was charged with because he had been with her and they had not been at Payroll Services. Then grievant said he did not commit this offense.

James Winningham is grievant's uncle by marriage and is an employee at Plant 4 Electrical. He said in Step 3 that he saw grievant and his wife in their driveway at 9:00 a.m. on September 26. He said at the arbitration hearing that he saw them at 8:30, 8:45, or 9:00 a.m. At the Step 3 Meeting grievant's father-in-law said he saw grievant and Mrs. Tindal at his home at 7:30 or 7:45 when grievant came to take his daughter to school. Mrs. Tindal's girl friend said at Step 3 she saw the couple at her house between 9:30 and 9:35 a.m.

In light of this alibi evidence, the Union charges that Company witnesses must have identified grievant by mistake. It stresses the lapse of over six weeks from September 26, when the incident occurred, to November 10, when Cohen and Smulevitz saw and identified grievant, as sufficient to explain the claimed inaccuracy of their memory. It is said their recollections of the man simply became unclear and, therefore, erroneous, as allegedly shown by Smulevitz's forgetting that in the interim he had been shown grievant's photograph. Reference is made also to the canard that all black people look alike to white people.

The Union notes that Smulevitz said that about 200 employees appear at Payroll Services on payday. It wonders how Cohen and Smulevitz could recall one employee out of 200. It says that payroll numbers often are on work schedules and are common knowledge to other employees. Thus, it is said that grievant's working in the same department as Outling cannot be seen as a suspicious element.

The Union points out that Smulevitz said grievant backed up his car for about 300 feet at ten or fifteen miles per hour in a straight line. It wonders how a person who had gotten high on PCP shortly after 7:00 a.m. could have done that at 8:40 a.m.

It is argued also that grievant's car does not match the one described by Smulevitz. Grievant's car is a 1979 maroon Grand Prix, but it had distinctive gold trim and Vogue tires, which were not mentioned by Smulevitz.

The Union stresses that only grievant's photograph was shown to Cohen and Smulevitz and not grievant's, along with others. It charges also that the way in which grievant was presented to Cohen and Smulevitz was unfair and prejudicial. He was escorted to Payroll Services in the company of two Plant Protection officers, which allegedly suggested his guilt to Cohen and Smulevitz, and he was not in a "line up" with others but was the only black man there.

Regarding the charge of drug possession and use on Company property, the Union contends that grievant's admission should not be seen as proof of a violation. It is urged also that the rule was meant to prevent possession and use of drugs in the plant proper and to prevent employees from working under their influence at the scene of operations where there is a risk of injury. Here, grievant had finished his turn and was going home. Moreover, it is argued that the parking lot where grievant smoked PCP has not traditionally been considered to be Plant property, citing Arbitration Decision 705. That decision held that an employee who parked in a Company lot and slipped on ice there, injured himself, and lost part of a turn, for which he was not paid, did not suffer an "industrial accident" because he was not yet on the clock and, therefore, was not entitled to pay for the time lost under Article 14.1.4.

The Union says Management's citing grievant for a drug violation is itself in violation of Article 14.10, recognizing that drug abuse is a treatable condition and under which the parties agree to cooperate in encouraging employees so afflicted to undergo a coordinated program directed to their rehabilitation. It is said that grievant testified that he had a drug problem and had taken hospitalization steps to recover from it. His admission allegedly was made as part of his therapy, in that such persons are told to be honest about their problem.

The Company does not think Cohen and Smulevitz were mistaken in their identification of grievant. Grievant was at the window, 12" or 18" in front of Cohen, in full view and normal office lighting. Smulevitz said he had a clear, direct, and close view of grievant. The Company agrees that those two employees see scores of others on a payday, but it stresses the very suspicious circumstances of this event

as sufficient to make it stand out in their minds and to alert them at the time to the need for careful observation of grievant and to the need to remember him. It is said, moreover, that the day-to-day work of Cohen and Smulevitz requires constant use of identification skills. They have combined experience of fifty years on those jobs.

As to the alibi testimony, the Company notes that the event occurred on September 26 and the witnesses, aside from Mrs. Tindal, were not alerted to the possible need to recall details of that day until over six weeks later in mid-November, or fourteen weeks later in early January of 1984. Without such immediate flagging of the special necessity to recall details of that day, the Company says it is unreasonable to credit those witnesses with ability that much later to separate facts of that day from facts of all other days as to grievant's whereabouts. Grievant's uncle said he regularly takes his daughter to school and that the route takes him past grievant's house, and his father-in-law and his wife's girl friend said they see grievant regularly. The Company thus finds it difficult to see why September 26 would stand out from the usual run of events of other ordinary days in the witnesses' memory, nearly two months or four months after the event. Even so, however, it is said that the last two witnesses' seeing grievant at 7:30, 7:45, 9:30, or 9:35 a.m. would not mean that grievant could not have been at Payroll Services at 8:30 or 8:40 a.m.

The Company agrees the testimony of Mrs. Tindal would keep grievant away from Payroll Services at the critical times, but it says she, too, has the same intensely strong interest in the outcome of this grievance as grievant does, so as to raise a significant credibility issue about her testimony.

Management notes also that, although grievant said in the early stages of the investigation that he had ingested drugs on September 26 to the extent that he could remember nothing about what he did then or where he had been, yet at Step 3 and later his memory seemed to have improved and he then denied having been at Payroll Services on the morning of September 26. The Company says his admission at the beginning of the investigation that he could not recall events of that day are more reliable then his belated, reconstructed version.

Management emphasizes that there is no suggestion in this record of anything that might have motivated Cohen and Smulevitz to fabricate this story and falsify their testimony of identification of grievant.

The Company scouts the Union argument about the gold trim on grievant's car. It contends that the fact that grievant's car is a 1979 maroon Grand Prix with gold trim does not distinguish it from the 1979 Grand Prix seen and described by Smulevitz. It notes that grievant, himself, described his car in the initial stages of this problem, without mention of gold trim.

The Company insists that the rule against possession or use of drugs on Company property always has been enforced as including the parking lots, citing Arbitration Award Nos. 636 and 637.

As to the requirements of Article 14.10, the Company says it satisfies them by cooperating with any employee who seeks assistance voluntarily or at its direction, but here it was unaware of grievant's drug problem until after he had violated these rules. It urges that he cannot attempt to steal a paycheck and then use his drug abuse to evade the normal consequences of that violation. It is said that grievant sought treatment only after his unsuccessful attempt to steal another employee's replacement badge and after the Company already was in hot pursuit of him for that offense.

The Union denies that and asserts that grievant had himself hospitalized late on Wednesday, September 28, allegedly before he was aware that the Company was after him and before he had any idea he was in trouble.

Management scoffs at that, noting that grievant was aware on September 27 that Captain Pratt wanted to talk with him and had asked if he owned a maroon 1979 Grand Prix.

In addition, the Company says grievant's admission of possession and use of drugs on Company property was made in its investigation of attempted theft and not as part of a therapy program or in a private meeting with a Company representative in a rehabilitation effort.

Management stresses that grievant worked in the office in the same department as employee Outling and, therefore, had a good opportunity to learn Outling's payroll number. It says also that grievant's admitted money problems clearly gave him a motive for an attempt to get another employee's pay check, an offense similar to others he admitted, such as strong-arming, purse-snatching, and holdups.

The Union emphasizes that about two months after this incident an employee tried to get a replacement badge by impersonating another employee, and he was not discharged. That attempt, too, was unsuccessful, but the Company stresses that employee later admitted his attempt. That was not done on a payday, and that employee was not trying to get another employee's paycheck. He was married but had a girl friend. The Union was having a Christmas party, and the pay badge he wanted was a way to get extra tickets for the party for his girl friend.

Union witness Lutes testified at his request. He is Secretary of the Grievance Committee and has spent nine years on the Union Alcohol and Drug Abuse Committee. He thought it outrageous that Management would use grievant's admission of possession and use of a drug in the parking lot against him as it is doing here. He said the parties committed themselves in Article 14.10 to cooperate in encouraging employees so afflicted to undergo a coordinated program directed to their rehabilitation. The witness said grievant had just come out of such a hospitalization program, where he probably had been advised that honesty about his problem was a first step toward recovery. He then came to the Company on November 17 and in an investigation on another matter honestly admitted his use of a drug on September 26, as he probably had been advised to do. Then he was told he would be discharged for his honest admission. Lutes said that, if the Company were to succeed in this effort, the parties' programs for rehabilitation of drug abusers would be ruined, for no one would admit such abuse for fear of losing his job. Lutes said grievant had attended thirty-some drug abuse meetings in the three months preceding the hearing. Grievant said he first had gone to see the head of the Company's Program for the Problem Drinker, Bean. That program deals with drug abuse, too. Bean told grievant to tell the truth when he was interviewed by Plant Protection.

The Union says other employees have been found in possession of drugs in parking lots, and yet they were not discharged.

As to the Company's charge that the witnesses for grievant reasonably could not be expected to remember in mid-November and early January exactly what time they had seen grievant on September 26, when they apparently see him routinely nearly every day, the Union stresses that grievant's wife could do so. She said that day stood out in her memory because she had been married only in May and here she was on September 26 seeing a lawyer about getting a separation.

FINDINGS

It is obvious that an offense was committed at Payroll Services on the morning of September 26, and it is equally clear that it was sufficiently serious to justify discharge of the guilty person.

The only question open on this record is whether or not the evidence connecting grievant to the attempted theft is sufficiently certain to warrant discharging this grievant. That it is is shown by the following analysis.

Two apparently reliable persons who did not know grievant beforehand and, therefore, had no motivation for falsely identifying him as the offender, testified persuasively that he was the man who sought to get a replacement badge by claiming to be Outling. Cohen and Smulevitz stood close in front of the man for four or five minutes, in ordinary office lighting. The car the man backed away in was a maroon 1979 Grand Prix, and grievant drives a maroon 1979 Grand Prix.

Grievant's money problems, stemming in large part from his use of drugs, gave him clear motivation for wanting another paycheck, and his working in the office of Outling's department gave him ovious opportunity to learn Outling's payroll number.

Accordingly, the Company evidence is sufficient, if allowed to stand, to supply cause for grievant's discharge, so that the grievance would have to be denied.

The attack on the Company case by grievant, himself, is woefully weak because, as he admitted on November 10 and 17, he was so "drugged up" on September 26 that he later had no independent recollection of what he had done or where he had been that day. Thus, in the initial stages of the investigation, grievant did not, because he could not, deny the offense he was charged with. He could say only that he could not remember being at Payroll Services.

Grievant's saying later in the grievance proceedings that he was not there and did not do this thus cannot be accepted at face value, since at least twice before this he had said only that he could not remember. Indeed, at the arbitration hearing he confirmed that he had admitted at the beginning that he could not remember what he had done or where he had been that day.

There really is no convincing ground for finding that Cohen or Smulovitz or both were mistaken in their identification of grievant. Each had a good look at him over a period of several minutes during a bizarre event that would make him stand out in their memory. Neither their seeing photographs before November 10 or the manner in which grievant was presented to them that day would require or justify ignoring their identification testimony, There is no fixed rule that such identification be done only in a kind of police-station lineup, with grievant mixed among others.

The alibi testimony of Winningham at the arbitration hearing and of grievant's father-in-law and his wife's girl friend at Step 3 need not be picked apart in detail. It is sufficient to observe that, even assuming their testimony and time estimates were reasonably accurate, there still would have been time for grievant to

have been at Payroll Services at 8:30 or 8:40 a.m. on September 26 and still to have been where they said they say him at 7:30, 7:45, or 9:00, 9:30; or 9:35 a.m.

The testimony of Paula Tindal was different. She said she was with grievant from 7:45 until 9:30 a.m. that day and that they never were at Payroll Services. But she was mixed up about whether or not she saw grievant again on September 26 or not until the next day. She said at one point that she did not see grievant until the next day and at another that she took him to the hospital that night. When possible confusion about other matters is coupled with her obvious and understandable desire to help grievant through these difficult times and events, it must be concluded that her testimony is not sufficient to upset the entirely disinterested and unbiased testimony of Cohen and Smulevitz, both of whom convincingly have put grievant at Payroll Services at 8:30 or 8:40 a.m. that day.

Accordingly, the preponderance of the evidence demonstrates that grievant did attempt falsely to get a replacement badge of another employee so as to steal his paycheck. That is sufficient ground for discharge, without any consideration of the charge of possession and use of a drug on Company property, which has not been considered here. Consequently, the grievance will be denied.

AWARD

The grievance is denied.

/s/ Clare B. McDermott

Clare B. McDermott

Arbitrator