Arbitration Award No. 761
IN THE MATTER OF ARBITRATION
Between
INLAND STEEL COMPANY
Indiana Harbor Works
and
UNITED STEELWORKERS OF AMERICA
Local Union No. 1010
Grievance No. 3-P-72
Arbitrator: Clare B McDermott
Opinion and Award
August 29, 1986
Subject: Untimeliness of Step 1 Discussion.
Statement of the Grievance: "Grievant contends that management made an unauthorized deduction in his back pay from award 699, that establish double discipline.
"Article & Section of Collective Bargaining Agreement Violated: Article 3, Section 1.
"Relief Sought - That management make the Grievant whole of the unauthorized deduction."
Agreement Provisions Involved: Article 6, Section 4 (paragraph 6.14) of the August 1, 1980 Agreement.
Statement of the Award: The grievance is dismissed.
Chronology
Grievance Filed: 11/29/82
Step 3 Hearings: 3/15/83, 4/5/83
Step 3 Minutes: 5/24/83
Step 4 Appeal: 6/7/83
Step 4 Hearings: 7/12/85, 9/5 & 9/27/85, 10/18 & 10/25/85
Step 4 Minutes: 11/27/85
Appeal to Arbitration: 12/5/85
Arbitration Hearing: 12/17/85
Transcript Received: 3/27/86
Appearances
Company
Robert B. Castle -- Arbitration Coordinator
T. L. Kinach -- Section Manager, Labor Relations
Randal T. Larson -- Manager of Labor Relations, Material Service Corporation
Michael O. Oliver -- Senior Representative, Labor Relations
Roger K. Scholes -- Project Representative, Labor Relations
Eleanor Woods -- Secretary to Manager, Labor Relations
Union
Bill Trella -- Staff Representative
Gilbert Serrano -- Grievant
Gavino Galvan -- Chairman Grievance Committee
Don Lutes -- Secretary Grievance Committee
Melvin Adams -- Griever
BACKGROUND
This grievance from No. 3 Coke Plant claims that, upon returning grievant to work pursuant to Arbitration Award 699, which sustained his grievance against discharge, the Company improperly withheld $1,678.78 from his back pay, in violation of Article 3, Article 4, Sections 1 and 4, and Article 8, Section 1 of the August 1, 1980 Agreement.
Grievant was suspended and later discharged in 1980. His grievance was sustained in part in Arbitration Award 699 in 1981, with the award reading as follows:
"1. Gilbert L. Serrano shall be restored to employment with the Company, with seniority rights.
"2. Gilbert L. Serrano shall be entitled to back pay for time lost from work for the period between October 13, 1980, and the effective date of his restoration to employment. The intervening period between August 13, 1980, and October 13, 1980, shall be considered to constitute a period of disciplinary suspension from employment."

Grievant was returned to work on March 10, 1981. The Company then requested information from grievant as to his earnings in other employment during his suspension and discharge period in order to be able to calculate the net sum which would make him whole, according to the formula of Article 8, Section 1 of the Agreement.

Grievant wrote to the Company Representative on March 17, 1981, and pertinent parts of that letter read as follows:

"The information that you requested as to my total earnings during my suspension, I do not have. At the time I requested it from my past employers they requested for what purpose.

"Since I told them Inland wanted it, they in turn requested a letter of proof of request.

"At this time, I am requesting a letter from you as to what purpose my total earnings have to do with my reinstatement and back-pay."

The Company replied as follows on April 13:

"In order to determine the amount of your back pay, the following information is required:

"1. For each source of employment, your earnings from October 13, 1980 until March 31, 1981.

"2. What your average weekly earnings were from these sources of employment, prior to August 13, 1980."

Grievant did not provide information as to his outside earnings for the period prior to August 13, 1980 but did eventually furnish the following list of sources and income for the dates shown:

Date	Source	Amount
8/29/80 - 3/10/81	Lake County Deputy Sheriff's Assn.	$1,949.11
9/7/80 - 9/13/80	Buy Low, Inc.	168.00
11/10/80 - 11/16/80	Ceres Marine Terminals, Inc.	142.80
1/20/81 - 3/6/81	City of East Chicago	1,134.00
		$3,383.11

The $168.00 income from Buy Low, Inc. was not deducted from the gross amount in grievant's back-pay calculation because it was earned by work done between August 13 and October 13, 1980, which Award 699 said was to be a period of disciplinary suspension. Similarly, a part ($270.33) of the Lake County Deputy Sheriff's Association was not deducted, for the same reason.

The amount earned by grievant from Lake County Deputy Sheriff's Association from October 14, 1980 through March 9, 1981 came to $1,678.78; from Ceres Marine Terminals, Inc., was $142.80; and from the City of East Chicago $1,134.00. Thus, the total earnings by grievant from outside sources during the appropriate reimbursement period of Article 8, Section 1, came to $2,955.58.

Accordingly, when Management toted up the net sum due grievant to make him whole it calculated the earnings he would have received except for the suspension and discharge, and it "offset" the earnings he would not have received except for the suspension and discharge. Thus, the subtrahend of that subtraction problem was the $2,955.58 grievant earned in other employment during the relevant suspension and discharge period. Subtracting that amount, left a difference of $7,002.81, and that sum was paid to grievant by check on August 17, 1981.

Then Management Representative Larson and grievant had many discussions about the amount of grievant's back pay, with grievant asserting that, since Award 699 had not stated that any deductions should be made, none could be, and Larson noting that Article 8 of the Agreement authorized and required the deductions stated there.

In any event, grievant was paid $7,002.81 by check issued to him on August 17, 1981. Grievant was an Assistant Grievance Committeeman, and on September 17, 1981 he initiated a Step 1 discussion with Acting General Foreman Campo, at which grievant contended that Management made an unauthorized deduction in his back pay from Award 699, which established double discipline and requested that he be made whole for the unauthorized deduction.

The Company answered that the matter was not acceptable into the grievance proceedings since it was untimely filed, that is, thirty-one days after the time mentioned in Article 6, Section 4 (paragraph 6.14), rather than the thirty calendar days required there.

As the grievance progressed through the proceedings, the Union said in Step 3 that the complaint was timely because the violation alleged was a permanent, on-going loss and, therefore, subject to complaint at any time.

The Union said also in Step 3 that it did not contest deduction of grievant's outside earnings from sources other than the Lake County Deputy Sheriff's Association, since grievant had earned those sums during the regular daylight hours during which he would have been working for the Company if not suspended and discharged and, therefore, that he would not have received them except for the suspension and discharge. It insisted, however, that the $1,678.78 from Lake County Deputy Sheriff's Association was money grievant earned during evening hours when he would not have been working with the Company if not discharged, since he ordinarily worked day turn. Thus, as to that sum, the Union argued it could not be deducted, urging that grievant would have earned it even if not discharged.

The provisions of Article 6, Section 4 (paragraph 6.14) set out the standard for decision of the timeliness issue. It reads as follows;

6.14 "Section 4. Except as otherwise specifically provided in this Agreement, complaints shall be presented promptly and, in all events, the Step 1 discussion of complaints must be held within thirty (30) calendar days from the date the cause of the complaint occurred, or within thirty (30) calendar days from the time the employee should have known of the occurrence of the event upon which the complaint is based."

The Company says that grievant took part in many discussions of the way to calculate the back pay due him during the period from his return to work on March 10 and his receipt of the $7,002.81 check on August 17. It feels certain, therefore, that when he got that check he knew or reasonably should have known, because he had been told, that his back pay had been reduced by his outside earnings during the relevant period, including the $1,678.78 he had received from Lake County Deputy Sheriff's Association. The Company notes grievant had thirty calendar days from then in which to hold a Step 1 discussion. He held it on the thirty-first day, and the Company insists it thus was too late. It stresses that the Agreement requires that complaints be presented promptly and, "in all events," that the Step 1 discussion of complaints "must" be held within thirty calendar days from the date the cause occurred or from the date the employee should have known of the event. Management insists, therefore, that this grievance was untimely and must be dismissed.

The Company denies that this is a permanent, on-going violation, which could be filed at any time. It insists that issuance of the check on August 17, 1981 was a one-shot, final event, not a continuing one, and that it started the thirty-calendar-day clock, which expired on September 16, 1981.

The Company stresses the testimony of then Arbitration Coordinator Larson to the effect that grievant participated in many discussions with him on the calculations of his back pay. Larson said that on July 23, 1981, he told grievant in great detail of the calculation of the outside earnings that would be offset, including the $1,678.78 now in dispute, that would be made.

The Company notes, moreover, that grievant had filed Grievance 3-P-18 on May 8, 1981, protesting delay in payment of his back pay. In the Step 3 discussion of that grievance on July 29, 1981, the back pay and its offsets were explained again to grievant.

Management stresses that the Union has not pointed to any contractual provision that would exempt this grievance from the thirty-calendar-day limit for the Step 1 discussion and which would convert it to a continuing violation.

In corrections to the Step 4 Minutes, the Union contended it had argued in that meeting that the parties' policy regarding "correction of errors" supported its argument here that this Step 1 discussion was indeed timely. It argued that incentive overpayments have been recouped from employees without concern for any thirty-day time limit. The Union says the same principle must be applied here to the Company's allegedly withholding too much from grievant's back pay.

The Union alleged at the arbitration hearing that grievant had tried to have a discussion with his Supervisor but that the meeting was put back until the thirty-first day.

The Company notes that up to the arbitration hearing the Union had not argued that grievant met or had tried to meet the thirty-calendar-day limitation of paragraph 8.3.1. Instead, it had argued that the limitation did not apply to this situation because it allegedly was a continuing violation. At arbitration the Union then said for the first time that the Supervisor had put the grievant off. The Company says the late nature of that charge, with no prior mention of it in Steps 3 or 4, shows it to be incredible.

As to "correction of errors," the Company said it had heard nothing about that until arbitration and really did not understand the claim then. In any event, the Company argues that would apply, if at all, only to inadvertent miscalculations of incentive details, and would not have anything to do with this quite deliberate offset, which did not result from a mistake.

The Company agreed that, in case of incentive over-payments, it would recoup the total, a little at a time, over successive pay periods, without feeling bound by a thirty-calendar-day time limitation.

On the merits, the Union says that grievant had been a member of the Lake County Deputy Sheriff's Association since 1979, and had been permitted to work as a Deputy for as many hours as he chose and whenever he wanted in the day or night. It says he had worked such a flexible schedule as a Deputy both before and after his suspension and discharge and that he did so mostly at night. Since he ordinarily worked day turn with the Company, the Union says he would have worked as a Deputy even if not discharged. Thus, it argues that the Company has no standing in fairness or under Article 8, Section 1 to deduct money grievant earned during hours he, would not have devoted to Inland, whether or not he had been discharged. Grievant had taken formal courses in law enforcement at Calumet College in 1974, thus allegedly demonstrating that his interest in that effort was not one that had occurred to him only after his discharge.
The Company notes the language of Article 8, Section 1 to the effect that in suspension and discharge cases only, the arbitrator may, when circumstances warrant, modify or eliminate the offset of earning or other amounts as would not have been received except for the suspension or discharge. Here, the arbitrator did not modify or eliminate such offset and, therefore, the Company says he clearly intended that such deductions be made. If he had not so intended, Management says he would have set out other terms and conditions he thought proper. He did not do so, and thus the Agreement requires the offset that was made. The Company argues that grievant should not receive a windfall, which he would receive, if he were allowed to keep all he made from outside earnings during the relevant period while receiving also the full earnings he would have made if not discharged.
The Company says that grievant admits that before his suspension and discharge he never worked as many hours as a Deputy Sheriff as he did following his discharge. That is said to show that that work became for grievant employment in lieu of employment with Inland, the same as the other outside employment he secured during the suspension and discharge period, and that the Union does not dispute the offset of earnings from those other sources.
The Company stresses that it asked grievant for outside earnings data prior to August 13, 1980 beginning back in April of 1981 and that he never did supply it. It argues that refusal must be seen here as affirmation of the Company contention that he would not have worked the number of hours as Deputy Sheriff after his discharge were it not for the discharge. Grievant admitted at the arbitration hearing that he did not have significant income from the Deputy Sheriff source before his suspension and discharge. Apparently, he earned only $23.92 there in 1980 before his suspension.
The Company says grievant had time available for other employment after his discharge solely because he no longer was working for the Company. It notes, for example, that after his suspension and discharge grievant worked about six hours each day he worked as Deputy Sheriff. He had practically no earnings from that source before his discharge and, therefore, it says the Union argument that grievant would have worked the number of hours he reported even if he had not been discharged and still were working at Inland is not credible.
Management argues that, not only does grievant's pre-suspension work history with the Lake County Deputy Sheriff's Association prove that he would not have worked regularly in a part-time capacity after his normal Inland hours had he not been suspended and discharged, but that his actual post-suspension work history supports the same conclusion. It notes that grievant submitted pay stubs from three outside sources. The Company says they show the following chronology of grievant's outside employment after his suspension:
Work Chronology
Dates Employer(s) Amounts
8/29/80 to 9/6/80 Lake County Deputy Sheriff's Association $ 66.00
9/7/80 to 9/13/80 Buy Low, Inc. 168.00
9/26/80 to 10/12/80 Lake County Deputy Sheriff's Association 204.33
10/13/80 to 11/9/80 Lake County Deputy Sheriff's Association 99.00
11/10/80 to 11/16/80 Ceres Marine Terminal, Inc. 142.80
11/22/80 to 1/19/81 Lake County Deputy Sheriff's Association 1,043.25
1/20/81 to 3/6/81 Lake County Deputy Sheriff's Association & City of East Chicago 1,134.00
536.53
Management says that that chronology reveals that grievant ordinarily did not work additional part-time hours as a Deputy Sheriff on the same day he had worked normal hours for other employers after his suspension and discharge. For most of that period he worked either exclusively as Deputy Sheriff or for Buy Low or Ceres, but not for more than one employer on the same day. The Company concludes,

therefore, that grievant would not have worked a significant number of hours as Deputy Sheriff except for his suspension and discharge. Thus, it says those earnings are to be offset under Article 8, Section 1.
The Company says grievant's pre-suspension work history is important because the Agreement requires offset of all outside earnings except those which the employee would have received even if not suspended or discharged. Management says the Union argument here wishes to have the Agreement prevent offset of earnings that the grievant could have received even if not suspended or discharged, rather than those he would have received even if not suspended or discharged. Management says that construction would rewrite the Agreement, which cannot be done.
Then Arbitration Coordinator Larson testified that he had many, many discussions with grievant about the details of the offsets that the Company would make from gross back pay. One such special meeting by appointment was at 3:30 p.m. on July 23, 1981, after grievant got off his day turn. The delay in calculating and paying grievant the net sum due him was caused by grievant's failure to supply the information about his earnings during the suspension and discharge period. Apparently grievant was under the impression that, since the Award in 699 was silent on offsets, no deductions could be made from his gross award and, therefore, that Management had no right to demand the information on outside earnings and that he had no duty to supply it. It seems that before July 23 grievant ultimately had supplied such information to the Company about his outside earnings during the suspension and discharge period.
In any event, Larson testified that at the July 23 meeting with grievant he showed him a summary (Company Exhibit 25) of the information and calculations of what grievant would have earned with the Company if not suspended and discharged (including what his work schedule would have been, and taking account of incentive, Sunday premium, holiday pay (worked and unworked), and overtime he could have received). The Union had a copy of that summary at the arbitration hearing, indicating to Larson that he had given a copy of it to grievant at the July 23 meeting.
Larson explained that to grievant and explained also and showed him the four sources of outside income that grievant had supplied, some of which were not to be deducted because earned during the disciplinary-suspension period and some of which ($2,955.58) which would be deducted.
Larson says grievant understood and agreed to all that. Larson asked grievant to sign, as he says is customary, a statement holding the Company harmless for this transaction. Grievant refused, and they arranged another meeting for July 27, but grievant did not keep that appointment.
Larson explained that the Step 3 Meeting in Grievance 3-P-18, filed by grievant protesting delay in receiving his back pay, was held on July 29. Larson again explained at that hearing all details of the gross and net calculations of grievant's back pay.
The check grievant received on August 17 was for the net amount explained by Larson at the two meetings, at least, above.
Grievant denied that Larson either discussed with him or showed him at their July 23 meeting any summary of gross and net calculations shown on Company Exhibit 25, and he denied that the Company had explained the details of the deductions to him in the Step 3 Meeting of Grievance 3-P-18. He says he first saw Company Exhibit 25 at the Step 3 Meeting on this grievance a month or two before this arbitration hearing. Grievant says the only paper he was shown on July 23 was the "full and final settlement" document that he refused to sign because, he says, he was not given the money at that time. Grievant denies that he agreed with Larson's figures.
Grievant says he got the net back-pay check and spoke to Superintendent Bracco and to Rocchio, saying the Company had no right to deduct for any outside earnings because Award 699 did not authorize any such deductions. Grievant says Bracco told him to see Foreman Campo. He did. The Company objected to this testimony at the arbitration hearing on the ground that never before in these proceedings had grievant alleged that he had talked to any Company representatives on this problem before his Step 1 discussion with Campo. Management claimed it thus was too late to inject a new factual issue into the proceedings.
Grievant agreed he knew when he got the net back-pay check that deductions had been made from gross back pay. He had calculated he would have earned about $11,000 with the Company if not suspended and discharged. He felt nothing should be deducted from that gross amount, since Award 699 did not expressly authorize any deductions. He said he knew, upon receiving the check, that deductions had been made, but he did not know how much.
The Company objected again, noting that no such claim ever had been made before the arbitration hearing.
Grievant says he went to Superintendent Rocchio when he got the check and not to Larson, with whom he had been dealing on this very question over the several prior months, because he did not think about it.

The Company notes grievant's status as a Union representative and stresses his admission that he is aware of his right to write corrections to Steps 3 and 4 Minutes, and it introduced a three and one-half page exhibit of grievant's Step 3 Minutes, submitted with the Union's three-page corrections and additions to Step 3 Minutes in Grievance 3-P-29.

The Company stresses also what it sees as a significant conflict in grievant's statements. In Step 3 it was said that grievant had been a member of the Lake County Deputy Sheriff's Association from 1979, that he was permitted to work as many hours as he wanted, and that he worked that flexible schedule both before and after his suspension and discharge. At this arbitration hearing, however, grievant said he had not worked for the Association before his suspension and discharge. In explanation of that, grievant said he was "employed" by the Association then, but did not know if he actually had worked there before his discharge.

The Company stresses also that grievant was representing himself in this Step 1 Oral Discussion on September 17, and that the Company position there was that the discussion was untimely, and yet grievant did not deny that and did not assert that it was timely, as he has done on other similar grievances. Nothing was said in that regard at Step 2, Step 3, or Step 4, either.

Grievant said at the arbitration hearing that preparing for and getting the Deputy Sheriff position, including weapon costs and uniform and transportation expenses to Crown Point and Merrillville, cost him between $700 and $800, and he argued that, if the Company was entitled to reduce its damages by offsetting his outside earnings, he should be able to offset against those offsets the expenses he was put to in qualifying to make those outside earnings.

The Company answered that grievant's own explanations of those expenses made it clear he had incurred them in late 1979 or early 1980, over a year before his suspension and discharge.

FINDINGS

It is necessary first to deal with the timeliness issue, and its relevant facts demonstrate that the Step 1 discussion was fatally untimely.

The dates are not in dispute. The check was delivered to grievant on August 17, and he, as his own Assistant Grievance Committeeman, initiated the Step 1 discussion on September 1981, thirty-one calendar days later. The count began with August 18 as "day one," and thirty calendar days expired on September 16. Accordingly, on the face of things, the Step 1 discussion was too late by one day, using the governing language of Article 6, Section 4 of the Agreement, unless the evidence and arguments were to establish that there was something extraordinary about this situation that would parry the thrust of that provision or excuse failure to comply with it. Nothing does so.

One possibly special element of this grievance, that distinguishes it from several analogies suggested in this record, is that the Company and grievant, his own Assistant Grievance Committeeman, were in unusually frequent communication about his gross and net pay entitlement almost from his return to work in early March. Indeed, on May 8, 1981, grievant filed Grievance 3-P-18, complaining about delay in paying him his back pay. But that delay was entirely attributable to grievant's refusal to provide the Company with the essential outside-earnings information, necessary to enable it to make the calculations required by Article 8, Section 1. Accordingly, the initial cause of this entire controversy was grievant's uncooperative refusal to show the Company what he had earned from outside sources during the relevant discharge period. That was caused by grievant's belief, in the face of plain language of Article 8, Section 1, that he need not furnish any such information because he read the Award 699 as not authorizing any deductions from outside earnings. That was plainly wrong.

It is relevant here, however, not on the merits of the ultimate contractual propriety of any such deductions, but as casting fatal doubt on grievant's claim, not made until the arbitration hearing, that no one from the Company ever told him anything about the details of these offsets. That is incredible, both in light of the convincing testimony of then Company Arbitration Coordinator Larson, and as confirmed by the grievance record which this grievant patrols and preserves in meticulous fashion. It is relevant also because, in this situation, in contrast to several of the suggested analogies of ordinary pay-check questions and possible disputes, grievant was told in full detail about all elements of the offsets before he received the net back-pay check on August 17. Thus, there was no necessity for his later seeking explanations from supervisors and Accounting after the check was issued. In the ordinary pay-check dispute it may be necessary to ask what had happened, and that might toll the thirty-calendar-day clock until some later date when an explanation for the net amount was given.

This was entirely different. Grievant was told over several months before he received the check all necessary details of what the Company was intending to deduct. Thus, issuance of the check was the final

event that began the running of the thirty-calendar-day clock of Article 6, Section 4. Grievant initiated this Step 1 discussion on the thirty-first day, one day too late.

Grievant's claim, not made until the arbitration hearing, that he had, or tried to have, a Step 1 discussion with various Company representatives at some other, unspecified dates, simply is not persuasive. Grievant agrees he is aware of the opportunities for making points in the grievance proceedings and for insisting upon the accuracy of Minutes, both Steps 3 and 4, and yet, no such claim of timely presentation of this Step 1 discussion was asserted in any level of the grievance proceedings. Nor, assuming it was made and ignored by the Company's written Minutes, was any correction of the Minutes to make that point suggested by grievant. The same would apply to grievant's arbitration-hearing claim that he did not previously understand the deductions that would be made. He never had suggested that before, either. It is not a persuasive statement in any event, in light of the convincing evidence of Arbitration Coordinator Larson.

Accordingly, since the Company insisted from the very beginning that the Step 1 discussion was untimely, grievant's failure to dispute that on the basis alleged later that he had discussed it sooner or that he had tried to do so and was unfairly frustrated by Company representatives fails for two reasons. It simply is not credible. Moreover, it may not be made for the first time in arbitration. Article 6, Section 5 (paragraph 6.18) enjoins the Union and Company to disclose full and detailed statements of the facts relied upon.

Accordingly, with the Company having defended on the ground of untimeliness and grievant having said only that this was a continuing violation not subject to the time limits of Article 6, Section 4, and that it was inapplicable also by reasoning to an alleged Company freedom from such restrictions in a "correction of errors" situation in an incentive over-payment and recoupment case, it just is not convincing for grievant to say for the first time in arbitration that, in addition to those contractual arguments, the fact actually was that he held the Step 1 discussion in timely fashion and, moreover, that, if he had not, the Company representative had frustrated his efforts to do so.

It is clear, moreover, that this was not a "continuing violation" situation. Grievant was told all necessary details before he got the check and, thus, when it was issued, he knew or reasonably should have known that his net, back-pay check represented what the Company once and for all said was to be his ultimate payment.

The parties' correction-of-errors policy, whatever it may prove to be, could not apply here to rescue this situation from an untimely Step 1 discussion. Apparently there is no contractual language on "correction of errors" and, therefore, the parties are more free in that area to develop whatever policy might satisfy their joint interests. This is different. There is definite and specific language in the Agreement on the necessity to have the Step 1 discussion within thirty calendar days from the date the cause occurred or from the time the employee should have known of the event. That occurred on August 17, and September 17 was too late.

Finally, no violation of Article 4, Section 1 was established, nor was this matter processed in any way different with this grievant than with other employees, so that there was no discrimination against grievant on any ground covered by Article 4, Section 4.

The evidence as a whole thus requires the finding that the Step 1 discussion was not held within the time limits required by Article 6, Section 4. Accordingly, the grievance must be dismissed, with no ruling on its merits.

AWARD

The grievance is dismissed.

/s/ Clare B. McDermott

Clare B McDermott

Arbitrator