Arbitration Award No. 765
IN THE MATTER OF ARBITRATION
Between
INLAND STEEL COMPANY
Indiana Harbor Works
and
UNITED STEELWORKERS OF AMERICA
Local Union No. 1010
Grievance No. 28-R-51
Arbitrator: Clare B. McDermott
Opinion and Award
May 30,1986
Subject: Discharge--Reporting for Work Under The Influence of Intoxicating Beverages--Evading Breathalyzer Test.
Statement of the Grievance: "The aggrieved, John Stout, Payroll No. 8345, contends the action taken by the Company when on June 17, 1985, 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 denied.
Chronology
Grievance Filed: 6-19-85
Step 3 Hearing: 7-2-85
Step 3 Minutes: 8-21-85
Step 4 Appeal: 8-30-85
Step 4 Hearings: 1-16-86, 1-31-86
Step 4 Minutes: 4-10-86
Appeal to Arbitration: 4-22-86
Arbitration Hearing: 4-29-86
Appearances
Company
Robert B. Castle, Arbitration Coordinator
Marion R. Roglich, Senior Representative, Labor Relations
Steven W. Nelson, Representative, Labor Relations
John W. Decker, Supervisor of Administration, Medical Department
Joe Rodriguez, Emergency Medical Technician, Medical Department
Ron Michalak, Shipping Foreman, No. 3 Cold Strip Mill Department
Larry P. Doyle, Desk Sargeant, Safety & Plant Protection Services
Irma Hernandez, Secretary, Labor Relations
John Bean, Clinic Counselor, Medical Department
William Brownewell, Clinic Technologist, Medical Department
Union
Bill Trella, Staff Representative
Don Lutes, Secretary, Grievance Committee
Rudy Schneider, Griever
John Stout, Grievant
John McWilliams, Witness
John Blakemore, Witness
BACKGROUND
This grievance from No. 3 Cold Strip Mill of Indiana Harbor Works protests grievant's discharge for allegedly reporting to work under the influence of intoxicating beverages, for violation of his prior last-chance reinstatement arrangement, and for his allegedly overall unsatisfactory work record, as violative of Articles 3, and 8, Section 1 of the March 10 1983 Agreement.
Grievant began with the Company in 1965. He was working as a Crane Follower in May of 1985.

On the night turn of May 31, grievant was assigned as a Crane Follower in the Shipping Sequence of No. 3 Cold Mill Finished Products Department. The turn began at 11:30 p.m. Turn Supervisor Michalak was lining up his employees and could not find grievant at about 11:45 p.m. After a search, Michalak went to the locker room and found grievant at his locker. He asked grievant what time he was supposed to start working. Grievant said he had forgotten his safety glasses, had come back to get them, and would be out right away.

Michalak says grievant came out to the floor at about midnight and began "baying in" coils off the side-trimmer. Michalak watched grievant from about fifteen feet away for approximately ten minutes but did not speak with him then. He watched grievant "bay" about four coils. He says grievant appeared unsteady and unaware of his surroundings. Michalak says that grievant's mannerisms appeared unsteady, in the way he went about identifying coils and marking the computer cards. He was not himself and was behaving differently from the way he acted at other times. Michalak went up to grievant, who was turned away from him and was engaged in writing coil data on a card, and asked if he were all right. Grievant did not respond. Michalak says grievant usually replies. He agrees there is considerable noise out on the mill floor at that area.

Michalak told grievant to go to the office, but he continued to work. Michalak again told grievant to go to the office, and he did.

In the office, Michalak told grievant to sit down, and Michalak says that, as grievant did, his foot went out from under him, he lost his balance, and fell into the chair.

Michalak asked grievant if anything were wrong, and grievant said "No." Michalak says grievant appeared unstable and incoherent. Michalak told grievant he was going to send him to the Clinic for a breathalyzer test because he appeared unstable and unaware of his surroundings.

Michalak says that grievant then said Michalak would not get a chance to do that because he was leaving. Michalak told grievant to stay in the office and, if he were to leave, he would be disciplined for insubordination. Grievant left the office. Michalak says grievant usually is compliant.

Michalak called Plant Protection for a Guard to be sent to the office. Michalak went out to the floor and told grievant to return to the office, and he did.

Michalak says the office is about twelve feet by twelve feet, with a hallway off it. Michalak and grievant were there for ten or fifteen minutes, with Michalak five or six feet from grievant there and within two feet of him out on the mill floor. At no time in any of these occasions did Michalak detect an odor of alcohol on grievant's breath. He said at the hearing that he has a slight sinus problem that deadens his sense of smell. The Union notes that when Michalak met with the Staff Representative just before the arbitration hearing he agreed he had not smelled alcohol on grievant's breath, but that he said nothing then about a sinus condition's numbing his sense of smell.

Michalak said also that grievant's mannerisms were different, in that he did not speak directly to Michalak but turned his head to the side and did not look at him. He said he asked grievant if he had a problem, and grievant said "No." On that basis he decided grievant was incoherent.

Michalak told the Guards in the office that he wanted grievant to have a fitness-to-work evaluation at the Clinic. The Guards (Sergeant Chalifoux and then Patrolman Doyle) took grievant to the car. Doyle says he noticed a smell of alcohol on grievant's breath while in the office and a strong smell of it while the three were in the car. Grievant was in the front seat, with Chalifoux, and Doyle was in the back seat.

Doyle said that while grievant was stating background information to the person at the Clinic, Doyle was perhaps six feet away. Grievant's speech was slow and slurred, and Doyle smelled an odor of alcohol on grievant's breath.

Grievant then was taken to the back of the Clinic, and Doyle did not accompany him there. Grievant returned and went for the breathalyzer test, and Doyle went with him. Emergency Medical Technician Rodriguez told grievant how to hold the mouthpiece, to take a deep breath, and blow into the machine. Grievant appeared to blow, but nothing registered on the machine, Rodriguez said he would show grievant how to do it, and he did, and the panel lights registered ".00." Grievant appeared to attempt to blow into the machine again, and again nothing registered. Rodriguez had his fingers on the tube as grievant blew.

Emergency Medical Technician Rodriguez made a patient-assessment of grievant at the Clinic and attempted to administer the breathalyzer test to him.

Rodriguez says the patient assessment has two parts, one physical and one psychological. The physical part requires the taking of vital signs, such as temperature, blood pressure, pulse, heart rate, skin signs, including presence of marks on arms, pupillary response, heel-to-toe walking on a line with head up, and

smelling whether the person exudes an odor of alcohol. Grievant's temperature, blood pressure, and pulse were within the normal ranges.

Rodriguez said while taking grievant's temperature, blood pressure, and pupillary response, he was very close to grievant and detected a strong ethanol (alcohol) odor in grievant's breath. He says grievant walked the heel-to-toe test very slowly and would not keep his head up but kept looking down. Rodriguez twice told grievant to stop, while he was walking, but grievant did not. Rodriguez says grievant's pupillary response to light was sluggish. There were no marks on grievant's arms.

In the psychological part of the patient-assessment, Rodriguez asked grievant questions relating to the date, time, place, and what had happened, seeking to assess his quickness of response, memory, judgment, orientation, and perception. He said grievant appeared to be defensive, with slow mannerisms, and that his speech was slurred to the point that Rodriguez had difficulty understanding him. Some answers to questions were not relevant, and some questions were not answered at all, grievant saying that he was very tired and had had no sleep. He allegedly was argumentative at first. Rodriguez recorded that grievant's perception and flow of thought were not clear and that some verbal orders were not followed. Rodriguez says he asked grievant his medical history and whether he had past injuries, and that grievant said he had no injuries.

Rodriguez then attempted to administer the breathalyzer test to grievant, using a Smith and Wesson 1000 machine. He broke an ampul of acid into it to correlate it. It went through its cycles to purge itself, and the light came on saying, "Blow." Rodriguez had put a clean mouthpiece on it, and he told grievant to take a deep breath and blow into the mouthpiece. Grievant put the mouthpiece in his mouth and appeared to blow into it, but nothing happened, meaning that the device did not register at all. Rodriguez believed grievant was not really blowing, but grievant said he was. Rodriguez took that mouthpiece out, put in a new one, blew into it, and the machine registered ".00," indicating absence of alcohol in Rodriguez's exhalation.

Rodriguez broke another ampul, reset the machine, put in a new mouthpiece, and again told grievant to blow into it. Grievant "blew" but did not trigger any register on the machine. This time Rodriguez held his fingers on the plastic tube so he could feel whether or not grievant actually blew any breath into it. He felt no pressure when grievant "blew." The mouthpiece is made of clear plastic and comes from a plastic wrapper. Rodriguez says the moisture in breath ordinarily steams the clear mouthpiece when breath is blown into it. There was no such "steaming" when grievant "blew," and thus Rodriguez was sure grievant was not blowing, but grievant said he had and that the machine had registered ".00." Rodriguez says that was not true.

Rodriguez concluded that grievant neither passed nor, indeed, took, the test and, based upon his patient-assessment of grievant and his conclusion that grievant had evaded the breathalyzer test, decided that he was not fit to work and, concerned about his safety, determined that he should not drive.

Rodriguez told the two Guards that, on the basis of the patient-assessment and grievant's failure to take the breathalyzer test properly, he (Rodriguez) decided grievant would be sent home because he was unfit to work. Since Rodriguez had determined that grievant was not in condition to drive, the Guards had to drive him, in accordance with Company policy in such circumstances.

Doyle says that after the Guards and grievant got back into the car outside the Clinic, grievant said that, because he felt he had passed the breathalyzer test, he asked to have a blood test taken. Sergeant Chalifoux said the Company did not administer such tests at the Clinic, but he would go back in the Clinic and ask. He did, and Rodriguez told him the Company did not give such blood tests there. Chalifoux returned to the car and told grievant that. He said, however, that St. Catherine's Hospital was close by and that, if grievant really wanted to have his blood tested, the Guards would take him there. Grievant asked, if they did so, whether they would wait for him and then drive him home, and they said they would not. Grievant then said he would go home, since he had no other way to get home if they were to leave him at the hospital.

The Guards drove grievant back to the Department. He cleaned out his locker, changed clothes, and they drove him home. No alcohol or other contraband was found in his clothes or in the locker.

Doyle says the windows in the car were up and the air conditioning on, and that he still smelled a strong odor of alcohol from grievant, whose speech was slurred and whose eyes were slightly glassy. Doyle estimates that in driving grievant to and from the Clinic, back to the Department, and to his home (about twenty minutes), he was in the car with grievant for about one and one-half hours.

Doyle never had seen grievant before this event and agreed he does not know if slow and slurred speech habits are normal for grievant. Sergeant Chalifoux was no longer with the Company at hearing time. He did not testify.

Grievant was suspended preliminary to discharge on June 3 for violation of Company Rule No. 127-d, reporting for work under the influence of intoxicating beverages, violation of his recent last-chance reinstatement, and his overall unsatisfactory work record. There was a suspension-period hearing on June 10, and the suspension was converted to discharge on June 17. This grievance followed.

In the five-year period prior to this event, grievant had the following disciplinary record:

Date	Infraction	Action
1-26-84	Violation of Rule 127-(1), -(m) and -(o)	Discipline - 3 turns
3-21-84	Overall work record	Record Review/Final Warning
4-2-84	Violation of Rule 127-(d)	Discipline - 3 turns
6-7-84	Overall work record	Record Review/Final Warning
1-14-85	Violation of Rule 127-(d) and overall record	Suspension preliminary to discharge
2-15-85		Reinstatement on "last chance" basis
4-11-85	Overall work record	Reinstatement Record Review/Final Warning

As stated immediately above, grievant was conditionally reinstated to employment on February 15, 1985, following a January-1985 suspension subject to discharge for an earlier violation of the rule proscribing reporting to work under the influence of intoxicating beverages. The conditions governing that reinstatement were as follows:

"1. You will enroll in a rehabilitative program for problem drinkers at an Alcohol Treatment Facility. Upon release, you will substantiate your satisfactory completion of said program to J. Bean, Clinic Counselor, Medical Department.

"2. You will enroll in the Inland Program for the Problem Drinker and will fully participate in this Program for a minimum of thirty (30) days prior to returning to active employment.

"3. Upon returning to active employment, you will continue to fully participate in the Inland Program for the Problem Drinker until released by the Inland Medical Department.

"4. Until you return to active employment, all time lost as a result of the Company's action, including any unworked holidays, shall constitute disciplinary time off.

"5. Upon resuming work, you will meet with your department superintendent, at which time your record will be reviewed and your duties and obligations as an employee of Inland Steel again outlined.

"6. This arrangement represents a final chance at employment for you and any repetition of the conduct which precipitated your suspension preliminary to discharge in this instance or any violation of Company rules or regulations will be grounds for your immediate suspension preliminary to discharge."

Those conditions were reviewed with grievant when he returned to work on April 11, 1985.

Grievant's account differs from the Company's. His car was not operating and, therefore, he drove to work the night of May 31 with employee McWilliams. Grievant says he had worked the previous midnight shift and had gone directly home and worked on his car until about 3:00 p.m. He went to get a part, but the place was closed at 4:00 p.m. He went to bed and got up at 6:00 p.m. when the "news" was on. He ate dinner and spent time with his three children until McWilliams picked him up at 10:00 or 10:30 p.m. Grievant says he drank no intoxicating beverage that evening.

Grievant says he was out on the mill floor on the night in question when he discovered he had forgotten his safety glasses. He went back to his locker to get them. He returned to the floor. Grievant does not recall hearing Supervisor Michalak's asking him if he were all right. He stresses that the operations are very noisy, so much so that Wrappers who work at the lines wear ear covers. He heard Michalak tell him, while grievant was at the desk, to go to the office. He did so.

"Baying in" coils requires that the Crane Follower take off one of the two tickets on the coil and record on it the coil number and place stored, and then to run that information into the computer terminal. He also must chuck block the stored coil on each side. A coil over 10,000 pounds must have four to six blocks. Blocks are kept at the end of each row of coils. Grievant bayed four Coils before Michalak called him to the office. He says that would have taken him at least fifteen to twenty minutes. Michalak said that placing chuck blocks requires that the employee go from one side of the coil to the other. It cannot be done safely on those coils from one side of the coil.

Grievant had suffered a knee injury in an automobile accident in 1979. He has had two arthroscopic procedures, an arthrogram, and a meniscectomy. Medical records say he walks with a stiff knee. They say also that there is objective evidence of some dysfunction of his right knee, and a physician thinks he is partially disabled because of his knee injury.

This is relevant here only because grievant suggests his regular walking gait is not smooth and may have led those who saw it that night to conclude he was staggering. Grievant says his surgery removed one-half of the cushion in his knee, and that bones are touching, so that he cannot put pressure on his knee. He still has daily problems with it. It gave him problems also in his walking the line without looking down. He says, moreover, that he thought Rodriguez meant he should walk the line so precisely that each foot would be on the cracks in the floor and, therefore, he put his head down in order to see that that occurred. He insists he did walk the line properly.

Grievant says that the wheeled chair in the office was placed near the table. He was standing between the table and the front of the chair, so that the backs of his legs touched the front of the chair while he was standing there. As he went to sit down, his legs caused the wheeled chair to begin to roll back and out from under him. Thus, he reached back for the arms to prevent that. He says he did not fall.

When Michalak said in the office that he was sending grievant to the Clinic for a breathalyzer test, grievant said he was going back to his work, and Michalak said he should not leave. Grievant left.

Grievant says he does not recall whether or not he looked directly at Michalak when he spoke to him in the office that night but that he ordinarily does not do so when speaking to him.

Grievant says he had no problem blowing into the breathalyzer machine in January. He blew into it this time, too, and he insists he saw it read ".00," both times he blew. He did not say that to Rodriguez. He said the device did not print for his or for Rodriguez's blowing into it. Grievant says Rodriguez told him he was not blowing hard enough.

Grievant says he asked for a second machine to be used. He had to leave the room. Rodriguez did something to the machine, called grievant back in, and he blew into it a second time, and again it read ".00."

Regarding the patient-assessment test, grievant says Rodriguez asked why he was at the Clinic, and grievant said nothing.

Grievant insists that while still in the Clinic he asked the Guards for a blood-alcohol test. He says also that he asked the Guards to drop him off at St. Catherine's Hospital so he could get a blood test there, but they answered that Company policy required them to take him directly home. Grievant claims that St. Mary Medical Center in Gary was directly on the way to his home and that they had to go past another hospital to get to his house. Grievant says Guard Doyle was lying when he said the Guards told him they could drop him off for a blood-alcohol test at St. Catherine's in East Chicago, but that they could not wait for him. Grievant says it was 2:00 or 2:30 a.m. when he got home and that it is about two miles to Methodist Hospital. He says he could not get a taxi in his neighborhood at that time of the morning, that he had no neighbors he could ask to drive him there, and that he was afraid to walk there at that time in that high-crime area.

Grievant denies he was drinking on this evening or night, that he can remember. In the grievance proceedings he said he had used Polo after-shave lotion, and that Doyle and Rodriguez must have smelled that and mistaken it for an odor of alcohol on his breath.

Those witnesses smelled Polo at the arbitration hearing and said it was not what they had smelled that night from grievant. Rodriguez said he has used Polo and that he knows the difference in the smell of the two liquids.

Grievant denies he was defensive and argumentative at the Clinic. He says he was not angry at anybody and did not refuse to do anything he was told. He did not answer some questions just because he did not want his answers to be used against him.

Grievant agrees he is an alcoholic and has had a drinking problem for four or five years. He says he had not been drinking, either, just before the time of his January breathalyzer test, on which his breath registered .28. He says he had had a tooth pulled and had been gargling with Listerine. He feels that the breathalyzer machine then must have read the alcohol in the Listerine.

Grievant stresses that when he returned to work in April from the January suspension, he was warned that any repetition of offenses would mean that his job would be forfeited. Thus, he emphasizes that he was aware he would lose his job if he violated the rules again, saying that he thus would not have been so stupid as to do so.

Grievant points out that he attended AA meetings. before and since his discharge and that he tried to continue in the Company Program after the suspension but was told that he should hold off. He exhibited six slips, showing his attendance at Serenity House in Gary. He said he had such slips for other meetings. He said he had additional slips at home for each week. By arrangement with the parties, he submitted other slips after the hearing, for attendance at two such meetings in March of 1985, plus one for March and one

for May of 1986. These were submitted to the Company and the Arbitrator, and the Company submitted written comments on them.

Rodriguez has been with the Company as Emergency Medical Technician at the Clinic for nine years. He began in this activity in 1966 as a graduate Ambulance Attendant of the New York City Health and Hospitals Department. He worked for a volunteer ambulance service and then for New York City from 1966 to 1969 and then had two years as a Combat Medic in the service, with one year as such in Vietnam. He returned to the Health and Hospitals Department of New York City from 1971 to 1973, worked as Emergency Medical Technician in San Juan, Puerto Rico in 1973 and 1974, and then as a Paramedic and Ambulance Attendant for the Rescue Team of Crown Point, Indiana, until September of 1977, when he came with the Company. He is a state Certified Emergency Medical Technician and Paramedic. He has had occasions to be in contact with persons under the influence of alcohol. He was trained in administering breathalyzer tests for a week in San Juan by a Lab Technician and got later training on three different Smith and Wesson machines, including the 1000 device used here. He has administered breathalyzer tests for about nine years, and estimates he has done about 200 of them.

Rodriguez says grievant did not request a blood-alcohol test while he still was in the Clinic.

At about 2:00 a.m. grievant called Rodriguez at the Clinic and was argumentative, saying he did not know why he had been sent home, since he passed the breathalyzer test and saw the machine register ".00." Rodriguez says that was not true.

Rodriguez never had seen or dealt with grievant before and, therefore, was not aware whether or not grievant's normal speech was slurred.

The Union notes that the Smith and Wesson 1000 breathalyzer machine was replaced on August 15, 1985, because of problems with its printer, the device that prints out a written record of the test result that registers also on the machine's lights. Medical Department Supervisor of Administration Decker said the Clinic has used a breathalyzer for this purpose for thirty years or more and has modified its devices with advances in the equipment. He said the patient-assessment technique had been used by the Clinic for three years before this event.

The Union suggests the breathalyzer device was not functioning properly. Decker explained that it is monitored yearly by testing and certification and is calibrated by the Clinic each week, using a vial with a known alcoholic content, and that it must register, and has, within plus or minus .02 of the known sample. The machine was calibrated on May 27, 1985 and registered .09 on a test vial of 10 percent alcoholic content. This test in question here was attempted in the early hours of June 1. The device was calibrated again on June 3 and again registered .09 on a known sample of 10 percent alcoholic content. Decker said he checked medical records of the seven employees who were tested from May 20 to June 9. Four registered .05 or above and were sent home, while three registered .00 and were returned to work.

Decker said this machine was taken out of service because of the bad printer on August 15. It was repaired and returned to service on August 27 and was used until November of 1985, when the printer and a solenoid were not functioning. It was replaced by an updated Smith and Wesson 2000 machine. Decker said this machine had been serviced and tested in July of 1984 and again in August of 1985. It had no intervening trouble, except that the "Blow" light, telling the testee to blow, went out on February 5 and a read-out light went out on May 14, 1985.

Decker agreed that the Clinic takes blood samples every day in administering physical examinations, but he insisted the Clinic does not draw blood for a blood-alcohol test and has not done so for ten years.

Clinic Counselor Bean, who is Coordinator of the Company's Alcohol and Drug Program, explained that grievant had been in the Program in May of 1984. He was hospitalized for three weeks at the Methodist Hospital Alcoholic Treatment Unit and later was an outpatient in the Program for seven months from May of 1984 to January of 1985. From January 29 to February 28, 1985, he was at the Koala Treatment Center in Lebanon, Indiana, and in the Company's Outpatient Program from February 29 to May 24, 1985. The first phase of the Company Program requires hospitalization, and the second is a ninety-day, outpatient program, with a follow-up on a monthly basis thereafter.

Grievant's stay at the treatment center in Lebanon was precipitated by his failing a patient-assessment and a breathalyzer test at the Clinic on January 11, 1985. On that test he had a reading of .28 on a scale on which .10 is, by state law, unfit for driving, and .05 triggers a Company decision that the person is unfit to work. The Union prodded grievant, and he went to the Lebanon treatment center.

Grievant has been in the Company Program at least twice, the last time being mandatory, as part of his return to work arrangement. Bean agreed that from January to May of 1985 grievant attended the required

weekly meetings and missed no appointments. He was taking Antabuse then. Grievant attempted to continue participating in the Company Program after his suspension but was not allowed to do so.
Employee McWilliams has known grievant for two or three years. Grievant rode to and from work with him this week, because grievant was having car trouble. It is a trip of about twenty minutes, and McWilliams said he detected no odor of alcohol from grievant the night of May 31. He did not appear at the suspension-period hearing or at Steps 3 or 4. He was not asked to testify until a week before the arbitration hearing.
The Company urges, in light of grievant's very recent last-chance reinstatement, that the only real question here is the factual one of whether or not he reported to work on May 31 under the influence of intoxicating beverages. It insists that, if he did, the grievance must be denied, without necessity for consideration of whether or not discharge is an appropriate penalty for this offense.
The Union disagreed and said there might be sufficient extenuating circumstances here to require that the Arbitrator rule that discharge was not proper for this offense.
Management says the evidence is conclusive that grievant did report under the influence of intoxicating beverages. It insists that three witnesses so testified. Michalak observed grievant and said he was unsteady, unresponsive, contentious, and argumentative, behaved differently from his ordinary ways, and that he fell into the chair. Management says the only explanation for that is that grievant was under the influence of intoxicating beverages.
The Company stresses that Patrolman Doyle smelled a strong odor of alcohol on grievant's breath and said his speech was slurred. Rodriguez detected the same odor and said also that grievant's speech was slurred, his pupillary reflex sluggish, that he was unsteady and unresponsive, and that he deliberately evaded the breathatyzer test, in that he feigned blowing into it but did not really do so.
The Company says two of those witnesses did not know grievant before and, therefore, could have had no reason to be out to "get" grievant. Supervisor Michalak had no animosity against grievant.
Management says grievant's past history is consistent with this offense. He admits he is an alcoholic and twice before (April of 1984 and January of 1985) has reported for work under the influence of intoxicating beverages and was sent home and disciplined, the first time by a three-turn suspension and the second by a three-month suspension that ended only on April 11, shortly before the present offense. The Company argues, therefore, that a breathalyzer finding of a prohibited alcohol level was not necessary here.
The Company contends that grievant's defenses are not convincing. It urges that grievant's saying that the chair moved should not be accepted over Michalak's having seen him fall. Management says that grievant walked around well at the arbitration hearing.
The Company scoffs at grievant's claim that what Patrolman Doyle and Rodriguez smelled as alcohol really was Polo after-shave lotion. Each of those Company witnesses was certain he could tell the difference between the two different odors.
Management insists the breathalyzer machine did not malfunction and insists that grievant evaded taking the test because, it suggests, he was aware that, if he were to take it, it would convict him of the offense charged. The Company stresses that Rodriguez took the breathalyzer test, and the machine did not malfunction then.
Management says grievant's plea for a blood-alcohol test at the Clinic or a hospital was a subterfuge. It claims that the plea was not a strong and seriously intended one. Grievant knew his job was on the line, and the Company suggests, if he really wanted a blood-alcohol test, he could have gone the two miles to the hospital and gotten one.
Grievant denies that he drank on May 31, but Management says that is identical to his denying that he drank in January, when his breathalyzer test registered .28, nearly three times over the state driving limitation. That time, too, grievant insisted he had not had any intoxicating beverages. He said he had a bad wisdom tooth and was gargling with Listerine, and he suggested the machine must have read the alcohol in the Listerine.
As to whether grievant's allegedly slow and slurred speech is normal for him, Management says that apparently is not true, judging by his responsive and articulate speech and conversation at the arbitration hearing.
The Union characterizes Michalak's claim that grievant was unresponsive and incoherent as absurd. It stresses that grievant obviously understood all that Michalak said and that he heard, and that Michalak just as clearly understood all that grievant said. The Union stresses that Michalak was not at the Step 3 Meeting. He had had a heart attack and was off work then. Management submitted his handwritten notes of his view of these events, made on the night in question. The Union contends that those notes should be rejected here

in any area where grievant's Step 3 testimony contradicts them. Supervisor Michalak was interviewed by the Union's Step 4 Representative in April of 1986.
It is emphasized also that Michalak smelled no alcohol on grievant and that he was aware of grievant's limp, from his earlier automobile accident, that allegedly caused his odd gait, which would explain claims that he was unsteady.
The Union says grievant cannot be faulted for the breathalyzer machine's alleged failure to work properly. That it did so fail is said to be supported by the fact that it was taken out of service after this incident. Since no breathalyzer reading was obtained, the Union claims it became more necessary than ever for the Company to have a blood-alcohol test of grievant. That was why he asked for one.
The Union stresses that the Company has said that the examination at the Clinic "indicated" grievant was under the influence of intoxicating beverages. It is argued, however, that an "indication" is not positive proof and, had the Company wanted to prove its point, it would have sought to have a blood-alcohol test made on grievant. The claim is that the Company's alleged failure to substantiate that grievant was under the influence of intoxicating beverages cannot itself be used to take the place of "cause" or to excuse discharging grievant without cause. Had there been a blood-alcohol test, guessing would have been unnecessary, says the Union.
FINDINGS
This is not the ordinary problem where determination of whether an employee has reported for work under the influence of intoxicants is to be made solely by analysis of the observations of lay witnesses. It is not to be made here with the aid of a breathalyzer analysis, either. Nor is it to be determined by a traditional combination of those two methods. It must be made by assessment of the testimony of three Company witnesses who saw and heard what grievant did and said, of grievant, and of other Union witnesses, and by according appropriate weight to grievant's having evaded the breathalyzer test. As will be demonstrated later, it is the latter point that provides the clincher, requiring that the grievance be denied.
Indeed, looking only to Supervisor Michalak's testimony, the charge is not proved. For example, he described several basic observations of grievant and then stated the conclusions he drew from them. Michalak watched grievant "bay in" four coils off the side-trimmer and said grievant appeared unsteady and unaware of his surroundings. This testimony by Michalak at the arbitration hearing really was his reading verbatim from his handwritten notes that he had made out that night and which had been introduced at Step 3, when Michalak was ill and not available.
Michalak then went to grievant and asked if he were all right. Grievant did not reply. Michalak decided then from what has been stated so far that there was something wrong with grievant and that he should go to the office. He told grievant to do so, but grievant continued to work. Michatak told grievant a second time to go to the office, and this time he did. Michalak had decided from watching grievant and before he went up to him, that grievant appeared unsteady and unaware of his surroundings. Michalak did not state any of the underlying and basic observations which he had made that had caused him to form either conclusion. The charge of grievant's being unaware of his surroundings is not easy to understand.
Some negative inference was taken by Michalak from grievant's not answering his question whether grievant were all right and his not responding to his first direction to go to the office.
But that was explained adequately. The area is quite noisy, as Michalak agreed, so much so that Wrappers who work in it regularly wear ear guards. Moreover, Michalak says he came up to grievant from behind and while he was intent on writing data on coil cards. In light of those circumstances, grievant's not replying and responding to Michalak's question and direction have no bearing on this charge. It seems more probable than not that grievant simply did not hear Michalak, as grievant says.
Michalak says that in the office grievant fell into a chair as he was sitting down. The setting had Michalak sitting on one side of two desks which were placed back to back, and grievant standing at the other side. Michalak says that, as grievant sat down, he lost his balance and fell into the seat of the chair. Michalak agreed grievant's seat fell accurately into the seat of the wheeled chair. The chair has arms and is on casters. Michalak said the chair did not roll away as grievant sat down. He says grievant fell back and landed securely but harder than ordinarily would be expected. He did not miss the seat or sway as if he might fall out of it. Grievant looked surprised. He lost his balance, but his hands did not go up. This is the first statement by Michalak of a basic observation of grievant's conduct that would tend to suggest grievant might be under the influence of intoxicants.
Grievant denies he fell. He says the backs of his legs were touching the chair and, as he moved to sit down at Michalak's direction, they nudged the chair sufficiently to cause it to roll away from him on its casters. Thus, he reached back for the arms to keep it from rolling out from under him. Michalak did not say that

grievant's hands went up. He said grievant landed harder than would be expected but accurately and securely in the chair, with a surprised look on his face. All that is equally consistent with grievant's attempt to keep the chair from rolling away from him.

Michalak then asked grievant if there was anything wrong, and grievant said "No." From all that Michalak described so far in these Findings, he then said grievant appeared to be unstable and incoherent, and he told grievant he was going to send him to the Clinic for a breathalyzer test.

Michalak's description of grievant's "fall" into the chair might tend to support the "unstable" condition, but the "incoherent" one is confusing. Every one of the three times Michalak spoke to grievant, and which grievant heard, he answered relevantly or responded, depending upon whether an oral answer or other action were required.

Michalak agreed he did not smell alcohol on grievant's breath, although he was relatively close to him in the office and very close to him out on the floor. He said his slight sinus condition dulls his sense of smell.

Michalak said that grievant seemed unsteady in his mannerisms, that is, the way he went about identifying coils and marking the computer cards. It just was not grievant's behavior and was different from the way he had conducted himself on turns when Michalak had not sent him to the Clinic. Michalak has known grievant for about five years.

Michalak said grievant was not looking directly at him as he spoke to Michalak that night, but turned his head to one side, which he normally does not do. Michalak did say grievant appeared unsteady but he gave no examples, aside from the fall into the chair. Grievant's knee injury and operations might have explained that, but no such explanation was necessary, since Michalak did not specify any staggering or wobbling gait by grievant in support of his claim of unsteadiness.

The charge of reporting for work under the influence of intoxicating beverages requires that there have been some impairment of function, but the result of all this analysis, which was necessary because of the very general and conclusionary nature of Michalak's testimony, is that it does not support the ultimate charge. In all fairness, however, it might not have been meant to do so. Its purpose might have been only to show why Michalak was sufficiently suspicious about grievant's condition to justify his decision to send him to the Clinic. Absent a definitive breathalzyer reading, however, Management seems then to have fallen back on some of what Michalak said as proof of the ultimate charge. It is clear, however, that little, if any of it, does so. Thus, if decision turned solely on the testimony of Michalak, the grievance would have to be sustained.

But there were two other Company witnesses, and they were more convincing. Patrolman Doyle was more specific and spoke in persuasive detail. He said he noticed alcohol on grievant's breath in the office and a strong odor while in the car. He was about six feet away while grievant gave information at the Clinic, and he heard that grievant's speech was slow and slurred, and again smelled alcohol.

When back in the car, Doyle says grievant said he felt he had passed the breathalyzer test and asked to have a blood-alcohol test. The Sergeant checked and confirmed that the Clinic did not administer such tests. It draws blood only at the direction of the day physician, not then in attendance, and in the administration of physical examinations. It does not test blood for that or any other purpose.

The Guards said they would drive grievant to St. Catherine's Hospital, where he might get a blood-alcohol test, but that they could not wait for him. Grievant declined that offer, since he had no other way to get home.

Doyle says that while driving grievant home he heard his slurred speech, saw his slightly glassy eyes, noticed he was very slow to respond to questions and statements asked of or made to him, and smelled a strong odor of alcohol. Doyle said the latter was not the smell of Polo after-shave lotion.

Doyle's testimony introduces in convincing detail the elements of a strong smell of alcohol on grievant's breath, slurred speech, glassy eyes, and slow and unresponsive reactions. These are notoriously obvious indications of a person's being under the influence, and were the first objective, basic observations that would tend to support Michalak's, much more general and subjective conclusions.

Emergency Medical Technician Rodriguez was a very convincing witness. He said, with the kind of supporting details that carry the ring of truth, that grievant's pupillary response to light was sluggish, his speech slurred, that he walked the line very slowly, that his breath gave off a strong odor of alcohol (which Rodriguez could distinguish from Polo after-shave lotion, since he has used it), and that he feigned blowing into the breathalyzer machine. Rodriguez was sure of the latter conclusion for two reasons. He held his fingers on the plastic tube (confirmed by Doyle) while grievant "blew" the second time, and he could feel that no pressure of breath was entering the tube. Moreover, the mouthpiece is clear and, when moist human

breath is blown into it, it becomes cloudy from condensation (confirmed by demonstration at the arbitration hearing) and he saw no condensation when grievant "blew."
At one point, grievant had said he blew into the device, and that it worked, and he saw it register ".00." If that were so, why did he thereafter say that he asked that another machine be obtained, as he claims he did?
As the Company correctly notes, assuming that grievant's speech at the arbitration hearing was normal, then his normal speech is not at all slurred. Thus, testimony of two Company witnesses saying it was on the night in question is additional indication that his mental, emotional, and physical states were visibly affected by something. The strong odor of alcohol pinpoints the cause.
The Union says grievant's knee injury and operations explain his gait. But, aside from Rodriguez's account of his walking the straight, heel-to-toe line, only Michalak suggested he was unsteady. Thus, no serious explanation was needed. The ultimate decision here is not based on grievant's gait.
It is mathematically possible that it is only coincidental, but grievant's suggestion here that the strong odor of alcohol on his breath really came from his Polo after-shave lotion is of some significance. That is remarkably like the explanation he gave in January after producing a breathalyzer reading of .28, nearly three times over the accepted state level for driving. There, too, he denied drinking alcohol and said he failed the breathalyzer test because the machine registered the alcohol in Listerine that he had been gargling with for a bad wisdom tooth. He did not say he had gargled immediately before taking the test.
Grievant says while still in the Clinic he asked the Guards for a blood-alcohol test. Doyle denies that. But, if he still was in the Clinic, why would he ask Guards, rather than Rodriguez, who clearly was in charge of the test and the Clinic?
In light of grievant's very recent and bad disciplinary record and his even more recent suspension subject to discharge for the identical offense, and his return to work under a clear and unmistakable "last chance" understanding, the only real question here is whether he was guilty of the offense charged. If he was, the grievance would have to be denied, since discharge would be a clearly appropriate penalty.
The only odd twist in attempting to resolve that question is the absence, in spite of serious efforts to get one, of a breathalyzer reading. That requires that this question be resolved, as it has been in routine fashion countless times, without the more precise aid of somewhat more scientific measuring devices, but by a combination of two factors, that is, by assessing the persuasiveness of the testimony of lay witnesses who observed grievant's actions, heard his words, and thus were in position to assess his sobriety, and by considering the weight to be given to grievant's short-circuiting the breathalyzer. On that basis, it must be concluded that a preponderance of the evidence does show that grievant reported for work under the influence of intoxicating beverages.
In the first place, it is relevant that he does not have the history of a teetotaler. He is an alcoholic, agrees he has been for four or five years, twice has been in the Company's Alcoholic Program, was hospitalized very recently for alcoholism, and twice before within a twenty-five-month period had been disciplined for this very offense. Accordingly, his reporting for work under the influence is not unusual.
The Union says, however, that he knew his job was on the line this time and, therefore, that he would not have been so stupid as to commit this offense.
Stupidity apparently has little or nothing to do with this condition, however. It clearly did not at the time of his January-1985 offense. Unfortunately, recidivism is distressingly high on this condition.
Two Company witnesses with no suggested or imaginable motive to make up this story about grievant testified to classically apt signs of grievant's being under the influence. His eyes were glassy, his speech slurred, and his pupils sluggish in reacting to light.
Furthermore, the absence of a breathalyzer test was not an accident here. It was not caused by malfunctioning equipment. It was caused by grievant's sabotaging the test procedures. The evidence simply does not support grievant's claim that he did blow into the machine, which then did not function properly.
In the first place, grievant had said initially that he blew twice and saw the machine read ".00" each time. Thus, he said he passed. He called Rodriguez later that night and repeated that. Later on in these proceedings and at the arbitration hearing, however, another claim was added. In addition to the claim that he had cooperated and passed the test, it was said that he did his best and the machine simply did not work. Neither claim is supported by the record.
Moreover, grievant cannot have it both ways. If he twice had blown into the device and it twice had registered ".00," as he said that night and at the hearing, how could it be argued credibly that the machine did not work? And, if the machine really did not work, how could grievant expect belief when he said he twice had blown into it and he saw it register ".00" each time? That those two inconsistent arguments were pressed seriously undermines confidence in the existence of each of them.

Rodriguez was a convincing witness who was obviously experienced and comfortable with proper operation of this breathalyzer device, such that, when it did not register at all to grievant's twice "blowing" into it but did to Rodriguez's blowing into it, his explanation that the fault was that grievant was feigning blowing, was a much more probable solution to the problem than was grievant's suggestion that the machine was not working or that he really had passed the test twice but Rodriguez was blindly or maliciously refusing to accept that. Objective evidence of malfunctioning equipment is just not present here. The device was tested and certified. It was calibrated three days before and four days after this attempted test, and it registered accurately. It stayed in service until August 15, over two and one-half months later. Then it was taken out of service because of a bad printer and returned to service and used until November.

Thus, there is no persuasive evidence that the equipment did not work, solely for grievant's attempt. It did for Rodriguez's. The evidence is much more convincing that grievant did not blow into the device. Accordingly it must be found that grievant evaded the breathalyzer test by refusing to blow into it and only pretending to do so. The only plausible motive for his refusing to blow into the device was that he was reasonably certain that, if he were to cooperate and take the test, it would convict him of the offense charged.

A blood-alcohol test was not essential here. The evidence as a whole shows that the charge was established without it. It would have been helpful, perhaps, but the only rational conclusion to draw from this record is that it would not have helped grievant's position.

Accordingly, although the evidence of Company witnesses who saw and heard grievant's actions and words was not overwhelming, it is sufficient, when considered along with grievant's evading the breathalyzer test, to establish that he did report for work under the influence of intoxicating beverages.

Consequently, in light of the record as a whole, it must be found by a preponderance of the evidence that grievant did report for work under the influence of intoxicating beverages. Thus, in view of his recent, last-chance reinstatement arrangement, the discharge was for cause, and the grievance will be denied.

AWARD

The grievance is denied.

/s/ Clare B. McDermott

Clare B. McDermott

Arbitrator