Award No. 775
OPINION AND AWARD
In the Matter of Arbitration Between
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 24-S-2
Appeal No. 1386
Arbitrator: Herbert Fishgold
September 10, 1987
Appearances:
For the Company
R.V. Cayia, Arbitration Coordinator, Union Relations
D. Newton, Section Manager, Satellite Shops, Mobile Equipment Sevices
R. Vela, Section Manager, Advocacy, Arbitration and Administration, Union Relations
F. Brown, Senior Planner, Mobile Equipment Services
M. Oliver, Staff Coordinator, Union Relations
For the Union
W. Trella, Staff Representative
F. Gonzales, Grievance Committeeman
F. Scott, Grievant
Statement of the Grievance: "The aggrieved, Fred Scott, Payroll No. 21867, contends the action taken by the Company when on August 29, 1986, his suspension culminated in discharge, is unjust and unwarranted in light of the circumstances."
Relief sought: "The aggrieved requests that he be reinstated and paid all monies lost."
Contract provisions cited: "The Union cites the Company with alleged violations Collective Bargaining Agreement."
Statement of the Award:
CHRONOLOGY
Grievance No. 24-S-2
Grievance filed: September 4, 1986
Step 3 hearing: September 16, 1986
Step 3 minutes: October 13, 1986
Step 4 appeal: October 22, 1986
Step 4 hearing(s): November 19, 1986; January 21, 29, 1987; April 22, 1987; May 1, 1987
Step 4 minutes: July 20, 1987
Appeal to Arbitration: July 22, 1987
Arbitration hearing: July 28, 1987
Award issued: September 10, 1987
By way of background, the grievant, Fred Scott, was employed by the Company on December 7, 1970, and at the time of his suspension on August 21, 1986 and subsequent discharge on August 29, 1986, he was established as a Mechanic within the Mobile Equipment Services Department. During the past five years of his employment, grievant received the following discipline:

Date	Infraction	Action
12-17-81	Failure to work as scheduled	Discipline - 1 turn
8-18-82	Left job early	Reprimand
6-1-83	Left job early	Discipline - 1 turn
7-16-84	Violation of General Rules for Safety and Personal Conduct, T27-j (theft)	Discipline - 10 turns
8-1-84	Overall Record	Record Review with Assistant Superintendent/Final Warning
4-23-85	Failure to work as scheduled	Reprimand
9-9-85	Failure to work as scheduled	Discipline - 1 turn
11-1-85	Failure to work as scheduled	Discipline - 2 turns
4-14-86	Failure to work as scheduled	Discipline - 3 turns

5-6-86 Absenteeism and Overall Record Record Review/Final Warning

The grievant's rate of absenteeism over the past several years shows that in 1983, grievant failed to work as scheduled on 44 days (including 37 turns of extended absence); in 1984, grievant failed to work as scheduled on 14 days; and in 1985, grievant failed to work as scheduled on 16 days. Through August 21, 1986, grievant failed to work as scheduled on 9 days.

This record of absenteeism subjected the grievant to progressive discipline, which commenced with the issuance of a reprimand on April 23, 1985. Grievant's absenteeism continued thereafter, and he received progressively greater disciplinary penalties, culminating with a record review and final warning interview that was held on May 6, 1986. During this interview, grievant was specifically informed that if his attendance did not improve, he would be suspended preliminary to discharge. Thereafter, between May 5, 1986 and August 21, 1986, a period of less than four months, grievant failed to work as scheduled on four separate occasions, culminated by his report off as "sick" on August 21, 1986.

In light of his record of absenteeism and progressive discipline designed to correct his absenteeism, the Company notified the grievant that he was suspended for five days preliminary to discharge for failure to work as scheduled. Pursuant to Article 8, Section 1 of the Collective Bargaining Agreement a suspension hearing was held on August 26, 1986. An investigation following the hearing failed to disclose any facts or circumstances which would warrant altering the department manager's decision. Consequently, the grievant was discharged on August 29, 1986.

The concept of the regular attendance by employees has long been recognized at Inland Steel. Indeed, in Award 773, the undersigned had occasion to reaffirm the words of Arbitrator David Cole from Inland Award No. 628, wherein he stated:

"It should hardly be necessary to restate the Company's right to expect regular and timely attendance of its employees with due regard by them of the Company's obligation to schedule and regulate operations as an essential part of its management function."

In the instant case, as the record indicates, the Company attempted to correct grievant's attendance deficiencies through progressive discipline under the Department's written no-fault absenteeism policy. Thus, he received a one-turn discipline for failure to work as scheduled on September 9, 1985, which was followed by a two-turn discipline on November 1, 1985 and a three-turn discipline on April 14, 1986. Underlying the concept of just cause and progressive discipline is the notion that employees may be held accountable for their behavior because they have the capacity to control it. Indeed, under the Mobile Equipment Services Department absenteeism policy the great probability is that any discipline under the no-fault plan would flow largely from behavior the employee could have controlled. Indeed, the record in this case indicates that the four instances occuring after the record review and final warning on May 6, 1986 were within grievant's control. Further, at both the suspension hearing and the arbitration hearing, grievant stated that he could not recall what was the matter with himself on July 9, and July 30, 1986; acknowledged that he made the decision to leave work early on August 4, 1986; and stated that he missed work on August 21, 1986 due to a very bad headache and lack of sleep.

From this record, the Company concluded that it had reached the point where it had to decide whether it would continue to keep the grievant on the payroll. Having breached his duty to regularly report for work as scheduled, and since the use of progressive discipline did not have the effect of correcting the problem, the Company determined that discharge, rather than further warnings or suspensions, was justified.

The Union, citing Article 8, Section 1, which invests the Arbitrator with discretion to modify the degree of discipline imposed by the Company, contends that certain factors should mitigate against the ultimate penalty of discharge. In particular, the Union maintains that the grievant is a long-service employee who, at the Step 3 Hearing, affirmed how much he needs his job and vowed to improve his record; that the record shows that the grievant has worked while he was ailing; that the Company's decision to discharge grievant was influenced by his prior non-attenedance discipline record; and that the discharge constitutes disparate treatment in comparison to other employees with worse absenteeism records. In the first instance, the Company is not required to return the grievant to employment if he persists in maintaining a record of attendance that exceed acceptable limits. His 15 plus years of service with the Company entitle him to consideration, but it does not provide him with immunity from the Company's right to discipline an employee for an irregularity in attendance. However, what the Arbitrator is being asked to consider herein is whether the record indicates that rehabilitation is feasible. As for the grievant's vow to improve his record, the Company points to his actions following the May 6 record review, his inability to explain why he was off on July 9 and July 30, and his apparent lack of commitment to improve his working as scheduled as evidenced by his attitude at the suspension hearing.

Yet, a closer examination of the record indicates that the grievant has demonstrated other than an indifference for his job. Thus, even though he chose to leave early on August 4, it was only after he received a call from his wife at work indicating a family emergency and told his supervisor of the call. While Supervisor G. Freedy's response, "If you have to go, you have to go" did not constitute permission to leave, neither did it direct that he not leave. Moreover, during April 7-10, 1986, grievant was out sick with the flu on April 7,9 and 10, but returned to work on April 8. Had he stayed out on April 8, as well, he only would have been charged with one incident, instead of two. Finally, during the relevant, period of time, grievant came to work at a time he believed his finger to be broken. Immediately after his discharge he went to a doctor, who confirmed that he had a fractured finger.

The Union further argues that the Company's decision to discharge the grievant appears to have been influenced by grievant's 10-day discipline for violation of Inland General Rules for Safety and Personal Conduct 127-j. (stealing) in July 1984. In this regard, according to Appendix J-2 of the collective bargaining agreement, the Justice and Dignity clause, a discharged employee is to remain at work until the Step 3 denial of his/her grievance, except under certain specified conditions. The Union alleges that the Company finalized its decsision to discharge the grievant prior to the suspension hearing by not permitting him to work during the period between his suspension on August 21 and September 16, 1986 when at the Step 3 Hearing the Company announced its decision to deny the grievance.

Citing unique and compelling circumstances, the Company determined that, under Appendix J-2, it had the the right to pay grievant for not working, according to what his work schedule would have been, while his case was being considered. The Company maintains that the decision to remove the grievant from work during this interim period of time was an appropriate exercise of management discretion, and was based upon circumstances that operating management thought were unique and compelling.

At the outset, the Company contends that the Union's argument involving the Company's application and interpretation of Appendix J-2 is not properly before the Arbitrator since it was not raised prior to the pre-hearing brief. The Arbitrator agrees that the question of whether the Company properly applied Appendix J-2 to keep the grievant from work in the instant case, relying upon his prior 1974 discipline for "theft" and his working the midnight shift, unsupervised on Sundays, is not properly before him. However, in terms of reviewing the Company's decision to discharge and the question of mitigating factors, the grievant's prior discipline record, including his suspension for stealing, may be relevant.

In this regard, the Company denies that it had finalized its decision to discharge the grievant prior to the suspension hearing. From the record presented, it appears to the Arbitrator that the grievant was accorded a full and fair suspension hearing, and both his explanantions and his record of absenteeism were considered. However, the Company acknowledged that it considered grievant's entire record, including the non-attendance discipline, in determining whether mitigating factors warranted a modifcation of the penalty, and concluded that none existed.

The Arbitrator respectfully disagrees. There are mitigating circumstances present which would justify grievant's restoration to employment. In addition to the instances referred to above which indicated an attitude other than indifference to his obligations to work as scheduled during the relevant times at issue, the Arbitrator also takes notice of the fact that the Company, in its discretion, and where rehabilitation is deemed possible, has given other employees "last chance" reinstatements. Indeed, at the hearing, testimony indicated that at least two other employees in the Department, who had worse absentee records than the grievant, were not discharged in such circumstances--R. Evans and G. Jones. In the case of Evans, he was reinstated with no back pay because he was a 25-year employee with no non-absentee discipline, who promised to change his attitude. In the case of Jones, he was reinstated on a "last chance" basis when, after the suspension, he admitted he had a drinking problem and agreed to enter a rehabilitation program, although he had denied he had a drinking problem all during the progressive discipline steps.

Herein, while it is true that Scott received a 10-day suspension for "stealing," the record indicates that the incident, occurring on July 7, 1984, involved "unauthorized possession of one meal ticket which [grievant] attempted to cash." A grievance was filed, but the record is unclear as to what happened after Step 3. There is no other non-absentee discipline noted in his record, and, contrary to employees involved in some other Inland Awards, e.g. Award 773 and Award 628, Scott had never previously been reinstated on a "last chance" basis. Moreover, as noted, Scott had exhibited the ability to work as scheduled even when ailing, and promised to adhere to his responsibiltity to continue to work as scheduled.

While Scott must share a major part of the responsibility for the events which led to his suspension and termination from employment, the Arbitrator concludes that there are mitigating circumstances present which would justify his restoration to employment on a "last chance" reinstatement. He is not, however,

entitled to any back pay for the period between the date of his suspension and termination from employment and the effective date of his restoration thereto, except for the pay he already received pursuant to Appendix J-2. The intervening period should be considered to constitute a period of disciplinary suspension from employment.

AWARD

For the reasons herein above set forth, Fred Scott should be immediately restored to employment with Company on a "last chance" reinstatement, with seniority rights, but without any back pay for the period between the date of his suspension and termination from employment and the effective date of his restoration thereto, except for the pay he already received pursuant to Appendix J-2. The intervening period should be considered a period of disciplinary suspension from employment.

/s/ Herbert Fishgold

Herbert Fishgold

Arbitrator

Washington, D.C.

September 10, 1987