Award No.847
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America,
Local No. 1010.
Grievance No. 1-T-24
Appeal No. 1458
Arbitrator: Jeanne M. Vonhof
June 28, 1999
REGULAR ARBITRATION
INTRODUCTION
The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Friday, June 7, 1991 at the Company's offices in East Chicago, Indiana. The Company filed a pre-hearing brief and the Union filed a pre-hearing memorandum in the case.
APPEARANCES
For the Union:
J. Robinson, Chairman, Grievance Committee
D. Lutes, Secretary, Grievance Committee
J. Hicks, Grievant
R. Fernandez, Griever
J. Cadwalader, Vice Chairman, Union Alcohol and Drug Committee
For the Company:
B. Smith, Project Representative, Union Relations
J. Bean, Employee Assistance Coordinator
R. Evans, Paramedic, Medical Department
R. Jones, Lieutenant, Guardsmark
R. Cayia, Section Manager, Union Relations
P. Parker, Project Representative, Union Relations
RELEVANT CONTRACT PROVISIONS:
ARTICLE 3
PLANT MANAGEMENT
Section 1. Except as limited by the provisions of the Agreement, the Management of the plant and the direction of the working forces, including the right to direct, plan and control plant operations, to hire, recall, transfer, promote, demote, suspend for cause, discipline and discharge employees for cause, . . .and to manage the properties in the traditional manner are vested exclusively in the Company. . . .
BACKGROUND
The case before the Arbitrator involves the discharge of an employee under a Last Chance Agreement. The Grievant, J. Hicks, had been employed at Inland for twenty-three (23) years at the time of his discharge. The Grievant had been suspended and discharged in December, 1989 for excessive absenteeism. Under the terms of a "Last Chance" Agreement dated February 7, 1990, the Parties acknowledged that there was cause to discharge him at the time, but agreed to reinstate him under the strict terms of the agreement. Among other restrictions, the Last Chance Agreement stated,
5. Mr. Hicks shall not ingest any mood altering substance (i.e., alcohol or drug not prescribed by a physician). Detection of aforementioned substance(s), regardless of amount, will be grounds for his immediate suspension subject to discharge.
6. For a period of two (2) years following Mr. Hicks' return to the work schedule, the Company may test him at any time for the presence of mood altering substances as described above. Testing may be by drawn blood or breath and/or urine analysis.
11. This arrangement represents a final chance at employment for Mr. Hicks. Failure to meet any of the conditions set forth above or any repetition of the conduct which led to Mr. Hicks' most recent suspension action or violation of any other Company rules or regulations will be cause for his immediate suspension preliminary to discharge.
(Company Exhibit No. 1).
The Grievant also agreed to participate in certain Company and Union programs for employees with substance abuse problems.

On March 6, 1991 the Medical Department sent a guard to retrieve the Grievant for a random drug test. The Grievant testified that after some initial confusion over whether he was the correct employee, he proceeded to the Medical Department with the guard. He testified that he entered the room used for conducting the drug tests, and gave a urine sample, as required, after the initial screening. He further testified that he closed the self-sealing bottle and gave it to the paramedic on duty.

The Grievant then testified that, before his sample was properly sealed and labeled by the paramedic, he signed the form acknowledging that the specimen being sent to the lab was his. He stated that he did so because he trusted the paramedic to do his job correctly. He also testified that there was another urine sample, in an identical container, on the counter at the same time. In addition, the Grievant testified that the guard was not present when the Grievant handed over his specimen to the paramedic and signed the paper.

The Company's witnesses, the paramedic and the guard, testified that the urine specimen was properly labeled and sealed in the Grievant's presence, before he signed the form and left room. They also testified that there was no other urine specimen present in the room at the time. In addition, they testified that the guard was present at all times during this procedure.

Cocaine was detected in the urine specimen identified as the Grievant's. The Grievant was discharged on March 28, 1991, under the terms of his Last Chance Agreement.

The Company presented evidence that the room in question was not used to collect any type of urine samples, other than for drug testing. There also was evidence that the room had not been used for another drug test for five days prior to the Grievant's test.

The Union presented several witnesses who are recovering alcoholics and who testified that they are familiar with the Grievant's recovery. They testified about the good progress of his recovery and that they had never known him to be a cocaine user. The Grievant denied that he had ingested any cocaine, other than a few times when he was in the military in the early 1970's.

The Union filed a grievance over the discharge, dated April 2, 1991, based upon the chain of custody issues. The Company denied the grievance, the Parties could not reach agreement, and the matter proceeded to arbitration.

THE COMPANY'S POSITION

The Company contends that the discharge should be upheld and the grievance denied. In support of this position the Company argues that the failure of one random drug screening clearly demonstrates that the Grievant has breached the terms of his Last Chance Agreement. The Company argues further that the Grievant's violation of the Last Chance Agreement constitutes just cause for his discharge. In addition, the Company contends that it has consistently in the past followed a policy of discharging employees who violate their Last Chance Agreements.

The Company cites a number of arbitration awards which have favored the enforcement of Last Chance Agreements. The Company also cites a federal judicial opinion which allegedly supports the proposition that Last Chance Agreements are a determinant for just cause in cases where they are employed.

The Company also disputes the allegation that the Grievant's urine sample was switched with a contaminated sample already in the testing room. In support of this proposition the Company argues that both its witnesses testified that the proper chain of custody procedures were followed and that there was no other urine specimen in the room. The Company notes that the room was used only for drug testing and EKG'S, and that no other urine sample had been taken in the room for the previous five days.

The Company further contests the credibility of the Grievant. Arguing that the Grievant alone has something to gain by fabricating the facts in this dispute, the Company argues that its two witnesses had no motive to lie.

The Company requests that the Arbitrator consider not only the possible motivations of the witnesses, but also that she examine the credibility issue against the other facts in this case. For example, the Company suggests that it is not believable that the Grievant would sign the form stating that the urine sample was his before his own sample was clearly marked, considering that he was familiar with the chain of custody procedures, he alleged that there was another sample in the room, and that he knew that a sample indicating the presence of drugs or alcohol could cost him his job.

The Company further contests the Union's suggestion that because the Grievant is known as an alcoholic, it is unlikely that he was using cocaine. The Company argues that it is not uncommon for an alcoholic to lapse into the use of another drug with which he is familiar, and the Grievant admitted that he was familiar with cocaine from his years in the military.

In addition, the Company contests the Union's suggestion that a high standard of proof should be required of the Company in this case. According to the Company a preponderance of the evidence is all that is

required in all discipline cases between these Parties. The Company contends that it has met this standard and that therefore the grievance should be denied and the discharge upheld.

THE UNION'S POSITION

The Union concurs that the Last Chance Agreement defines the standard of cause at it applies to this case. The Union also acknowledges that it is not challenging the chain of custody procedures established by the Company for its handling of drug testing. The Union contends, however, that the evidence indicates that the proper procedures were not followed in this case.

The Union argues first that the evidence marshalled by the Company in support of its case should be held to a high standard of proof. The Union notes that the Grievant has twenty-three (23) years with the Company, and should not be expected to lose his job and long tenure without a very high standard of proof.

In assessing credibility, the Union requests that the Arbitrator consider what is not in the record, i.e. any predisposition to cocaine abuse on the part of the Grievant. There was no evidence of any prior use of cocaine by the Grievant, other than his own testimony regarding use on a few occasions in Vietnam, the Union argues. Furthermore, the testimony regarding his participation in the EAP and AA programs contradicts this presumption.

Furthermore, in assessing credibility, the Union argues that this is not the typical case where the Company could argue that a foreman had no reason to lie. The allegations of misconduct in this case involve a very serious part of the paramedic's duties here, the Union suggests, and if he did make a mistake, he might have a reason to fabricate the facts.

Furthermore, the Union contends that doubt is cast on the credibility of the Company's witnesses because they reported that nothing unusual happened in the testing room, when in fact there was a discrepancy over the Grievant's correct name. In addition, the Union contends that the issue of whether the paramedic said something about there being no other samples in the room detracts from the credibility of the Company's witnesses.

The Union further asserts that the Grievant's reaction to the news that he had tested positive for drug use does not suggest that he was guilty. Stunned, shocked silence in the face of an accusation the Grievant never dreamed would be made against him is an appropriate response, the Union argues.

The Union also contends that simply because the Grievant initiated the chain of custody process by closing the cap on the bottle containing his urine specimen does not mean that the rest of the procedures were followed, inevitably.

In conclusion, the Union contends that it is not necessary for the Union to prove that the Company's two witnesses were lying in order to prevail in this case. The Grievant is accorded the presumption of innocence and the Union contends that if there is any doubt in this case over what happened, the doubt should be resolved in the Grievant's favor. For all these reasons the Union asserts that the grievance should be granted, the discharge overturned, and the Grievant reinstated with back pay.

OPINION

The instant case involves the discharge of the Grievant under the terms of a Last Chance Agreement. The Grievant had been discharged in December, 1989, for attendance problems. Under the terms of a Last Chance Agreement dated February, 1990, the Parties acknowledged that there was sufficient cause to discharge the Grievant at that time, but agreed that he would be reinstated under the strict terms of the Agreement. As one of those terms the Grievant agreed to participate in the Inland Program for Problem Drinkers. He also agreed to meet at least once per month with the Union's Alcohol and Drug Committee. The evidence at the arbitration hearing indicated that the Grievant has met these requirements.

The Grievant also agreed not to ingest any mood altering substances, defined as alcohol or a drug not prescribed by a doctor. The Agreement states that detection of such substances, regardless of amount, would be grounds for immediate suspension prior to discharge.

In relation to this commitment, the Grievant agreed to submit to random testing, for any mood altering substances for a commitment period of two (2) years following his return to work. On March 6, 1991 the Grievant underwent a urinalysis ordered by the Company under this "random testing" term of the Last Chance Agreement. The urine sample identified as the Grievant's was tested by the laboratory used by the Company, and the laboratory reported the presence of cocaine. The Grievant was suspended and discharged shortly thereafter, and the Union grieved the discharge.

The Union in this case is not disputing the Company's right to test the Grievant under the Last Chance Agreement. Furthermore, the Union concedes that the Last Chance Agreement substitutes for the just cause standard in the Labor Agreement. At the arbitration hearing the Union did not contest the Company's argument that if the Grievant violated the Last Chance Agreement, discharge is appropriate.

Nor is the Union challenging the efficacy of the testing procedure used by the lab hired by the Company, i.e. whether the tests are accurate enough to legitimately indicate the presence of a specific drug, in this case cocaine, in the employee's body. Most importantly, the Union is not questioning the chain of custody procedures established by the Company for handling the urine specimens. What the Union is challenging is whether the Company's personnel followed these chain of custody procedures in this case.

The Arbitrator concludes, therefore, that the only real dispute between the Parties in this case is whether the chain of custody requirements were met. If they were adequately met, then the Arbitrator must conclude that the urine specimen belonged to the Grievant and the presence of cocaine in that specimen would constitute a fatal violation of the Last Chance Agreement.

The dispute over the chain of custody procedure is a credibility issue. The Grievant contends that there was another urine specimen in the room at the time his was taken, and that the paramedic did not follow the prescribed procedures for the sealing and labeling of his own specimen before he left the room. The paramedic and the guard contend that there was no other specimen there, and that the Grievant's specimen was sealed and labeled before he left.

In assessing the credibility of the various witnesses, the Union argues that the paramedic here has as great an interest in his version of the events as does the Grievant, whose testimony may be affected by his desire to save his job. The Arbitrator concurs with the Union that this situation is different from one in which a supervisor, with no apparent animus towards an employee, reports that the employee has engaged in misconduct. In such a case there is no apparent motive, at the time of the incident, for the supervisor to fabricate a story about the employee's actions. In the instant case the Grievant has accused the paramedic of not following the chain of custody procedures during a random drug test, which the paramedic himself testified is a very important duty of his job. In such a case there is more reason for the paramedic to lie than in the other case involving a supervisor.

Nevertheless, other factors suggest that the testimony of the Company witness is more credible. First, there is the supporting testimony of the guard. He also has some job "interest" in this case, because he was familiar with the chain of custody procedures, and if a mistake occurred, perhaps he had some responsibility to detect and report it. However, the proper application of the chain of custody procedures is not primarily the responsibility of the guard, as opposed to the paramedic.

The Union has pointed out several apparent discrepancies in the testimony of the guard, e.g. his testimony that nothing unusual happened during the procedure, when in fact the Grievant's wrong middle initial was originally placed on the form and then changed, at his request. In addition there was some confusion regarding the guard's testimony about whether the paramedic actually said that there were no other urine samples present, or merely gestured to show that there were none. The Arbitrator concludes, however, that these alleged discrepancies in the guard's testimony are simply not significant enough to totally discredit his testimony.

The guard testified that there was no other urine specimen present, and that the paramedic sealed and labeled the Grievant's specimen before the Grievant signed the form and left the room. However, even if the Arbitrator were to disregard totally the testimony of the guard, there are other factors here which do not support the testimony of the Union's witness.

The Grievant testified that he closed the urine specimen bottle himself and the evidence indicated that the bottle is self-sealing. Therefore the Grievant could test positive only if: 1) the seal were broken and his specimen contaminated; 2) his urine specimen sample were switched with another contaminated; or 3) his specimen did contain cocaine traces.

There was no evidence that the seal on the interior of the bottle had been tampered with. The Company pointed out that the laboratory reports any tampering with the seals on the form it uses to report the results of the drug test. <FN 1>

The Grievant testified that there was another urine sample in the room at the time of his test; the paramedic and the guard denied this allegation. The undisputed evidence from the Company indicated that the room in question is used only for obtaining urine specimens for drug testing, and for EKG'S. The evidence also established that no urine specimens had been taken in the room for five days prior to the date in question. There was no evidence that the specimen(s) obtained five days prior were missing.

The behavior of the Grievant at the time of the drug testing also tends to undercut his testimony. The Grievant testified that the chain of custody procedures had been explained to him at an earlier date when he had undergone random testing. The only reason given by the Grievant for why he signed the form and left the room before the specimen was marked was that he trusted the paramedic to do his job properly. However, if the Grievant's story is true, there was already indication that the paramedic was not doing his

job properly, because of the alleged proximity of another unmarked urine specimen. Under these circumstances it does not seem likely that the Grievant would have signed the form attesting to the identity of his specimen before it was marked, when another specimen was in the room and could have been switched with his bottle. This is especially true because he knew that coming up with a "dirty" specimen could cost him his job.

In addition there was no reason given by the Grievant for why he had to leave before the procedures were complete, that there was some urgent reason for him to return to his work station or that the paramedic asked him to leave the office. Furthermore, there was undisputed evidence that out of the hundreds of drug tests performed by the Company, there has never been another case of an employee making the claims against the paramedic that were made in this case. The only other chain of custody violations involved a few instances of failures to sign the form.

In short the Arbitrator concludes that the facts surrounding the testing here lend more credibility to the Company's version of the events. Therefore the evidence indicates that the specimen in question belonged to the Grievant.

In reaching this conclusion the Arbitrator has considered the testimony regarding the Grievant's progress as a recovering alcoholic and the Union's evidence that he did not have a "predisposition" to cocaine use. The evidence regarding the Grievant's recovery is impressive. However, there also was evidence that although substance abusers often have a "drug of choice," they do sometimes turn to other substances. The Grievant admitted he had used cocaine in the distant past, and therefore was somewhat familiar with it. Therefore it is not totally unlikely that the Grievant would turn to it again. Furthermore, the Arbitrator concludes that whatever the evidence about the Grievant's prior predisposition to cocaine use, the evidence indicating that the cocaine-contaminated urine sample was his is compelling.

In reaching this conclusion the Arbitrator also has considered the arguments made by the Parties regarding the proper standard of proof in this case. Of course, the Company has the burden of proof in this case, and that burden is substantial in the discharge of a Grievant with twenty-three (23) years' tenure with the Company. The Arbitrator also concurs generally with the Union's argument that a higher standard of proof should be applied in cases which involve conduct which might subject the employee to criminal sanctions. An employee in this situation may nave a more difficult time obtaining another job than an employee discharged for another offense.

If there were significant doubts about the facts of this case, therefore, the Arbitrator would be inclined to uphold the grievance. But even applying a high standard of proof against the facts of the Company's case here, the Arbitrator concludes that those facts establish that the urine specimen which tested positive was the Grievant's. There is no substantial evidence that the proper testing procedures were not followed, other than the unhappy results of the test itself; those results, which everyone connected with this case no doubt agrees were unfortunate, would also have occurred if the Grievant had ingested cocaine. The only other evidence is the Grievant's own accusations and the facts surrounding the case do not support those allegations.

On the basis of the evidence, the Arbitrator concludes that the Last Chance Agreement was violated. The Arbitrator must enforce the terms of that Agreement made between the Company, the Union and the Grievant. Therefore the grievance must be denied and the discharge upheld.

AWARD

The grievance is denied. The discharge is upheld.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof

Labor Arbitrator

Decided this 28th day of June, 1991.

Chicago Illinois.

<FN 1> The Union argues that just because the Grievant initiated the proper chain of custody procedures by sealing the bottle himself, it does not follow that the rest of the procedures were necessarily followed. The Arbitrator concurs with this argument. The sealing of the bottle indicates only that the specimen itself probably was not tampered with.