Award No. 935
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Arbitrator: Terry A. Bethel
January 19, 1998
OPINION AND AWARD
Introduction
This case concerns the discharge of grievant Bertrand Wise for violation of Rule 132-f and for his overall record. The case was tried in the company's offices on November 18, 1997. Patrick Parker represented the company and Mike Mezo presented the case for grievant and the union. Grievant was present throughout the hearing and testified in his own behalf. The parties submitted the case on final argument.
Appearances
For the company:
P. Parker -- Arb. Coord., Union Rel.
E. Knorr -- Sec. Mgr., RM&PO, I&S, OPTech
J. Ebert -- Proj. Eng, RM&PO, I&S, OPTech
For the union:
M. Mezo -- President, Local 1010
A. Jacque -- Chrm., Grievance Committee
O. Cochran -- Griever Area #28
B. Wise -- Grievant
R. Hill -- Witness
Background
Rule 132-f provides, in relevant part:
The following offenses are among those which may be cause for discipline up to and including suspension preliminary to discharge:
f. Unauthorized use of, possession of, or storing of weapons or explosives on company property.
There is no dispute that, on July 5, 1997, the company discovered a box of assorted fireworks in the grievant's car as the result of a routine search of his vehicle. Grievant did not deny putting the fireworks in his trunk, though he said that he had forgotten they were there. Grievant testified that he had taken his children to his brother's home on the evening of July 4th to celebrate the holiday. He purchased about $25 worth of fireworks and used some of them on the holiday. He said he placed the remainder of them in his car trunk in order to keep them away from his children
Grievant testified that he arrived home late and did not get to bed until about 1:30 a.m. on July 5. He was scheduled to report for work at 7 a.m. that same day. Grievant said he was tired when he got up and that he simply forgot the fireworks were in his trunk. There is no allegation by the company that grievant used any fireworks on company property or even that he removed them from his trunk. However, previous cases involving other banned items -- notably guns and alcohol -- have made it clear that possession in an automobile is sufficient to violate the rule, even if the employee does not realize the items were there. See e.g., Inland Award 899.
At the hearing, grievant claimed that he could not have violated the rule because he did not knowingly or intentionally take the fireworks into the plant. Although the union mounts a vigorous defense for grievant in this case, it did not really question grievant's violation of rule 132-f. Rather, the union argues that the discharge penalty was too severe and that I should reduce the company's action to an "appropriate discipline."
The company argues that possession of explosive items like fireworks is an express violation of the rule and that discharge is an appropriate discipline for that offense alone. However, the company argues that the offense does not stand alone. Rather, the suspension letter and the discharge letter both reflect the fact that grievant was disciplined not only for the fireworks incident but also for his "overall work record."
Grievant does not have an enviable disciplinary record. Over the five years immediately preceding his discharge, grievant amassed the following discipline:
9-4-92 -- Absenteeism -- Final warning pass
11-16-92 -- Absenteeism -- 1 day discipline

12-09-92 -- record review
07-06-93 -- Absenteeism -- 1 day discipline
11-12-93 -- Absenteeism -- 2 day discipline
11-07-94 -- Absenteeism -- 2 day discipline
04-26-95 -- Absenteeism -- final warning pass
06-26-95 -- Unsat. work performance -- reprimand
07-25-95 -- Speeding in plant -- 1 day discipline
08-04-95 -- Unsat. work performance -- reprimand
09-21-95 -- Absenteeism -- Final warning pass
10-09-95 -- Speeding in plant -- 3 day discipline
10-12-95 -- Unsat. work performance -- 1 day discipline
12-18-95 -- Speeding in plant -- 3 day discipline
01-11-96 -- Unsat. work performance -- 2 days off
03-12-96 -- Absenteeism -- 3 day discipline
03-12-96 --record review
03-19-96 -- Unsat. work performance -- 2 day discipline
06-03-96 -- Absenteeism -- Final warning pass
06-24-96 -- Unsat. work performance -- 2 day discipline
07-30-96 -- Unsat. work perf. & traf. acc. -- 3 day disc.
07-30-96 -- record review
09-08-96 -- Unsat. work performance -- 5 day discipline

The company says that grievant's disciplinary record was terrible and that the fireworks incident was the straw that broke the camel's back. That action by the grievant, the company says, was simply another example of his disregard for the company's rules and, when coupled with his other offenses, was more than adequate to sustain the discharge.

The parties reviewed grievant's disciplinary record in some detail. It is not necessary to summarize all of that testimony here. Grievant did not grieve any of the previous offenses and did not really contest any of them at the hearing. He did, however, offer some explanation in his direct testimony. Some of his absences, for example, were caused by the death of his brother, who had been injured in an accident. Most of his absenteeism offenses, however, were tardies or early quits, not actual failures to report for work. Grievant said that many of his tardies were caused by his son's medical condition and the need to give him a treatment every morning on a nebulizer machine. The treatment typically took about forty-five minutes, though it sometimes ran longer. The union pointed out that many of the tardies caused grievant's pay to be docked one-tenth of an hour, meaning that he often was less than six minutes late. Grievant said that many of his early quits resulted from the need to take his son to the doctor.

Grievant claimed that some of his work performance problems were caused by domestic problems, some of which resulted from the stress associated with his son's medical condition. He said that he has received counseling and that it has "helped some." However, on cross examination, he acknowledged that he still has some of the same problems and that they could affect his work.

The union does not claim that grievant's personal problems should excuse his previous record. However, the union points out that some of the difficulties that led to those problems have now been solved, making it less likely that grievant would have the same work-related offenses in the future. For example, grievant's son had surgery, apparently in 1996. The union points out that there was no record of any absenteeism problem between June, 1996 and July 5, 1997, the day grievant was caught with the fireworks. His failure to have any such difficulty after his son's condition improved, the union says, suggests either that the reason for the problem has been removed or that the company's progressive discipline worked. In any event, the union argues that it is unfair to consider the absenteeism record in conjunction with the fireworks incident.

The union makes a similar argument with respect to grievant's other disciplines. For example, it points put that after having received a five day discipline for unsatisfactory work performance in September 1996, grievant had no more such incidents prior to his discharge in July the following year. Nor was he cited again for speeding in the plant after December of 1995. In short, the union says that while grievant's disciplinary record may have been bad, he had worked largely without incident for about a year prior to the fireworks incident. Thus, the union argues that it is not fair to include those previous disciplines in the justification for discharge. The union says the discharge must stand or fall on the fireworks incident alone, especially since the company acknowledged in an unemployment compensation hearing that that was the real reason for the discharge.

The union argues, however, that the fireworks incident is not enough to justify the company's action. It points out that other employees have been caught in the possession of fireworks without suffering a discharge. For example, an employee named Cycak was found to be in possession of fireworks in August, 1996, but was given only a five day suspension. Moreover, the union offered credible testimony that employees had sold fireworks in the plant and that some had even used them on company property. However, none of those employees was disciplined, even though supervision was aware of the incidents. The company says that Cycak's previous disciplinary record was not as bad as grievant's, which may have accounted for the difference in the level of discipline. Moreover, the company notes that rule 132-f was reposted in August of 1996 and that this action re-emphasized the importance of compliance with the rule. The union points out, however, that the rule was revised to prohibit possession of switchblade knives because of an arbitration decision (see Inland Award 917) and that no special attention was called to the language concerning explosives.

Discussion

1. Stale Evidence

Following a review of grievant's disciplinary record during the testimony of the company's witness, the union objected and, as it had done in Inland Award 931, requested that I enter a bench decision because of the company's use of so-called stale evidence, citing mp 8.5 of the Labor Agreement:

The company in arbitration proceedings will not make use of any personnel records of previous disciplinary action against the employee involved where the disciplinary action occurred five (5) or more years prior to the date of the event which is the subject of such arbitration.

The union relied on the cases it had relied on in Award 931, namely USS-13,653, where the arbitrator sustained a grievance without consideration of the merits when the company used an incident more than five years old to impeach the grievant's credibility; USS-6610-S, where the Board held that the use of stale discipline warranted sustaining the grievance without consideration of the merits; and Continental Can Co., Inc., Case No. CBM-37 (McDermott. 1979), where a former permanent arbitrator for the instant parties sustained a grievance, commenting that such was required even for the "mere mention" of stale discipline in an arbitration hearing.

As I had done in the hearing of Award 931, I overruled the objection and admitted the evidence, though I said that I would consider the union's objection in the Award. In Award 931, I found that the company's use of two previous arbitration awards concerning the same grievant was improper, since each award was issued more than five years before the incident giving rise to the discharge in that case. However, I held that the company's violation of mp 8.5 did not warrant sustaining the grievance without consideration of the merits because of the peculiar circumstances of that case.

Though it was true that the company used the two previous awards to question the credibility of the grievant, I was already aware of those awards because I had decided both cases. One purpose of mp 8.5 is undoubtedly to protect the grievant by limiting the arbitrator's ability to learn about old infractions which, the parties have decided, are no longer relevant to a contemporary discipline. But that interest was not imperiled by the company's actions in Award 931, because I remembered that grievant and the circumstances of the two previous cases.

This case, however, is different, as the union pointed out in its argument. Unlike Award 931, in this case I did not already know about the stale discipline. Thus, the union contends, the company's action did endanger the policy of mp 8.5, since the company's action alerted me to previous discipline that I am not allowed to consider. The union does not argue that I will consider the stale discipline even though the contract forbids me from doing so. Rather, its argument is essentially two-fold. First, the union says that, having heard the evidence, I cannot totally disregard it, even if I try, thus subjecting grievant to the prejudice from which mp 8.5 was supposed to protect him. Second, and more broadly, the union argues that the company's action will effectively subvert mp 8.5 altogether.

The union argues that if the company is permitted to introduce old record reviews or similar documents that list previous disciplinary action within the five years previous to that document, then it will effectively expand the five year limitation to as much as ten years. For example, in a discharge case it would be proper to include in evidence a record review or a disciplinary notice that occurred four years and eleven months before the discharge. But if that document lists the discipline from the previous five year period, and if the old discipline is not redacted, then the company can effectively introduce discipline up to ten years old simply by tendering a timely record review. The union says the only way to stop this is to send a strong message that it will not be tolerated and that the way to do that is to sustain this grievance without consideration of the merits.

The company's response was that it did not "make use" of the stale discipline, as those words are used in mp 8.5. Rather, it merely included a timely record review and that document, as it is supposed to do, listed the previous discipline which led to the review in the first place. This does not mean, the company pointed out, that it considered the stale material in making its disciplinary decision. Indeed, the company says that its decision was based solely on grievant's disciplinary record for the previous five years.
The company also argued that it had a regular practice of submitting into evidence record reviews that sometimes include mention of discipline that was relevant at the time of the review, but stale as of the time of the discharge, which is the case here. And, the company says that it would be unfair now to, in effect, punish it for conducting business in this case in the same way it has done -- without objection -- in the past.
The union denied that the company had previously introduced stale discipline in the manner used in this case and pointed out that it was the company's burden to do more than make an assertion that it had done so -- it was required to tender proof. The company did not know the union would raise an objection and, therefore, was not prepared to do so at the hearing. It has not offered supplementary evidence since then and it made no representation that it would do so or even that it had old case files available. However, at the hearing, I told the parties that I would look over some of my old files to try and find cases in which the company had introduced the kind of evidence at issue in this case. As I told the parties, I have not retained the files from all of the Inland-USWA cases I have heard. Nor can I represent that the files I have contain all of the evidence submitted to me at the hearings.
I did not make a systematic search. I merely pulled random files and, if the case concerned discipline or discharge, looked through the evidence to see if there was any mention of discipline more than five years old. I found no such evidence in most of the cases I checked. However, I did find a mention of stale discipline in Inland Award 888. In that case, the grievant was discharged effective September 18, 1992. Company Exhibit 2 was a document headed "First Discipline Letter," and was dated July 24, 1990. Included on that document was the previous disciplinary history, which included two disciplines from 1984 and one from 1986.<FN 1> In addition, there were two similar exhibits which also listed some of these same disciplines. Obviously, these were not record reviews, but they were similar documents and were issued for a similar purpose, namely, advising the employee of his disciplinary standing and warning him of the consequences of future rule violations.
In addition to Award 888, at my request Arbitrator Jean Vonhof reviewed some of the discharge cases she has heard for these parties and found two that mentioned stale discipline in an otherwise timely document. These cases, as well as Award 888 support the company's claim that it has introduced similar evidence in the past without objection, though it is not possible to say how often it has done so.
As for the issue itself, I have significant doubts about Arbitrator McDermott's holding that even the "mere mention" of stale discipline in a case mandates that the grievance be sustained without regard to the merits. Moreover, it is not clear to me that the U.S. Steel Board has adopted McDermott's broad approach. In USS-13,653, cited by the union in the instant case, the company actively used stale discipline to try to influence the arbitrator's decision. The employer attacked testimony from the grievant that he had not been disciplined for a certain offense by offering disciplinary statements that were more than five years old. But it does not follow from that case that any mention of stale discipline warrants the same result. The U.S. Steel Board has distinguished cases in which the company's reference to stale discipline was less overt than it was in USS-13,653.
For example, in USS-12,355, also cited by the union in the instant case, the Board sustained a grievance because the employer had used stale discipline, but it did not apply a per se rule as McDermott did in Continental Can Case No. CBM-37. Unlike that case, the Board held that the fact that stale discipline "was merely mechanically recited in the minutes recorded in an earlier step in the pre-arbitration grievance procedure" gave rise to a "rebuttable inference" of prejudice to the grievant.<FN 2> This was contrasted to the use of stale discipline on the notice of the discipline at issue where, presumably, there would be an unrebuttable inference.
In USS-12,355, the Board relied on two other cases in which it had found that the use of stale discipline in the third step minutes did not necessarily prejudice a grievant. For example, in USS-11,390, the employer introduced stale discipline, though the opinion does not specify the manner in which it was received. The Board held that there was no prejudicial effect to the grievant since "the gravity of the offense here made it unnecessary for the company to consider prior discipline." Thus, the Board seems to have held that the company did not "make use of" the stale discipline because it was not necessary to rely on it in order to discharge the grievant. The Board did not address the possibility that reference to stale discipline might influence the arbitrator.

Similarly, in USS-11,759, the Board refused to sustain a grievance solely because the employer had used stale discipline. The Board said that the employer had "mechanically included" reference to two stale incidents in the third step minutes. Relying on USS-11,390, the Board said that use of the stale discipline did not require that the grievance be sustained because "under the circumstances they could have had no perceptible effect on management's decision to discharge grievant." The Board reasoned that in addition to the two stale disciplines, there were six additional -- and timely -- disciplines for the same offense, which included disciplines up to a five day suspension. Thus, the Board thought that the two stale disciplines were not necessary to the employer's decision to discharge. As in USS-11,390, the Board did not mention any possible prejudicial effect on the arbitrator.

None of these cases is entirely satisfactory. It makes no sense to consider only whether the company has used stale discipline in deciding to discharge an employee. Even though stale discipline cannot be part of the record in arbitration, management obviously knows about previous incidents. Nothing in the agreement requires that the company destroy all record of offenses more than five years old. There is no realistic way of insuring that management will not make decisions with some awareness of an employee's old disciplinary history, especially if supervision in the department has remained fairly constant. The fact that the use of records is restricted does not mean that old biases and perceptions are forgotten.

Mp 8.5, then, cannot have been intended solely as a restraint on the company's consideration of a particular disciplinary decision, though it obviously restricts management's ability to prove its case with reference to stale discipline. But part of the rationale for mp 8.5 must have been the possible prejudice that a recitation of old offenses might have on the arbitrator. Any arbitrator who has heard cases in bargaining relationships without an mp 8.5-like restriction knows that it is common practice for employers to introduce evidence of previous disciplinary record, sometimes tracing back many years. No matter how it is explained, one purpose of the exercise is to convince the arbitrator that the grievant is an unworthy employee who does not deserve reinstatement, regardless of his years of service. In bargaining relationships with no restriction, such tactics are obviously permissible, though they may not have much influence on particular arbitrators. But they are not permissible in the steel industry. These parties have decided that there is a limit on the extent to which old offenses can be used to influence either the company's decision or the arbitrator's perception of the grievant. Even so, it is difficult to justify application of a rigid per se test, as the arbitrator did in the Continental Can case. It may be true, as the union argues, that such decisions will insure strict compliance with the proscriptions of mp 8.5. But the same kinds of arguments are often made by employers and vehemently attacked by unions. For example, employers with no-fault attendance plans commonly argue that they can discharge employees without regard to the reason for an absence, merely because the employee has violated the mechanical terms of a plan. But unions commonly complain that such plans are unenforceable because they fail to account for particular circumstances and nullify the concept of just cause.

I cannot say that application of a per se rule is never appropriate. But it is equally true that administration of a collective bargaining agreement is not a game in which parties should be disqualified for any violation of the rules. Indeed, one justification for arbitral enforcement of such agreements is that arbitrators are thought less likely to insist on legal formalities and the injustice that sometimes results from them. I cannot embrace a rule, then, which holds that any mention of stale discipline automatically mandates sustaining the grievance without consideration of the merits. Rather, the inquiry must be whether the company used stale discipline to influence its decision or to prove its case (as happened in USS-13,653) or whether the use of stale discipline was likely to influence the arbitrator improperly.

The first part of this test is not difficult. Evidence of stale disciplinary action should not be introduced into the hearing as part of the company's proof of cause, even for purposes of credibility. More difficult are cases like the instant one and USS-12,355, where notations of stale discipline are included in other relevant documents, especially when, as here, the notations were actually timely when the document was used. In such cases, the inquiry must be broader than merely asking whether the company's case depended on the stale discipline, which was the approach in USS-11,390 and USS-11,759. Rather, the inquiry must broaden to whether the information was of a type that might prejudice the arbitrator.

That does not mean that the arbitrator must determine whether he or she was actually influenced by the information. All of us are capable of rationalizing our decisions so that we exclude improper evidence. But that does not mean the evidence has had no effect. The inquiry must go beyond that level and look at the type of evidence offered. For example, evidence of a stale reprimand for attendance problems might not weigh heavily when an arbitrator views a discharge case alleging theft or insubordination. But evidence of stale discipline for theft or for insubordination very well might.

There may also be some cases in which the use of stale discipline might not have a significant impact. In absenteeism cases, for example, one might question whether stale discipline would have much effect on the arbitrator, since the company typically applies a separate scheme of progressive discipline to such cases. Moreover, it may not be possible to conceal all evidence of prior discipline from the arbitrator. For example, evidence that an employee was given a three day discipline almost five years before a case under review would certainly be admissible. But even without evidence of stale discipline, it will be obvious to the arbitrator that the employee had previous problems with absenteeism. No one starts out with a three day discipline under the disciplinary scheme applied by the company. If, in such a case, the company had inadvertently included one of the previous steps on a record review or in some other document, that fact itself would probably not warrant a refusal to review the merits of the case.

There can, in short, be no per se rule. Rather, the effect of the use of stale discipline must depend on the circumstances of the particular case, including the way in which it is used and the kinds of offenses it includes. This assumes, of course, that the company has acted in good faith and that it does not routinely include stale discipline in records introduced in arbitration.

In the ordinary case, the burden of defending the use of stale evidence should be the company's. Given the broad language of mp 8.5, the appropriate standard is the one applied in USS-12,355. The use of stale discipline should create a rebuttable inference of harm to the grievant. The employer will have the burden of establishing that the nature of the stale discipline was not of a type that would have a prejudicial effect on the arbitrator.

I have some doubt about whether the stale evidence in this case was of a type that could have influenced an arbitrator. Although some of the references are vague, the stale discipline noted on the record reviews appears to be several mentions of attendance violations. Attendance, however, is not the principal issue in this case and, as I will discuss further below, is not an offense which supports the company's discharge decision. However, given the evidence that the company has introduced similar evidence without objection in at least some instances, I decline to apply this test to the instant case.<FN 3> That mandates, then, that I consider the case on the merits.

2. The Merits

The company says that the issue in this case is whether it has the right to prohibit employees from bringing explosive material onto company property. There can be, however, no issue at all about that. Of course the company can prohibit explosive material; indeed, it could no doubt do so even without an express rule. The issue, however, is whether discharge is the appropriate discipline for this violation of the rule prohibiting explosives. It is true, as the company points out, that it has a consistent practice of discharging employees who bring guns onto company property, even if the gun is left in the car and even if it is not used in a threatening manner against other employees. The company obviously feels that fireworks deserve the same treatment.

I have difficulty equating the fireworks at issue here with a gun. It is true, as the company claims, that fireworks explode and it may be that there is some risk of explosion merely from having the items stored in a car. But the risk posed by fireworks is not of the same character as that posed by possession of a gun on company property. Employees who possess guns pose a significant danger to coworkers, even if the gun is left in the car, especially now that employees routinely drive into the plant and park near their workplace. An employee angered by some incident during the work day could easily retrieve the weapon and use it. There is no realistic similar threat posed by bottle rockets and firecrackers.

This case would be different if grievant had actually used the fireworks or even if he had removed them from the car without igniting them.<FN 4> In that event, he would have exposed himself and his coworkers to a realistic risk of harm. The company, however, says that the fireworks posed a significant threat to people and property just by being in the car. It introduced evidence that grievant parks his car in an area in which powdered coal and oxygen might escape into the atmosphere. The powdered coal is extremely volatile and, the company's witness said, it is possible for fireworks to ignite spontaneously in a "pure oxygen atmosphere." If that happened, and if there were powdered coal in the atmosphere, the results could be catastrophic.

Evidence tendered by the union both in its own case and from cross examination of the company's witness muted the significance of this risk. Mr. Mezo solicited evidence from the company's witness that a spark sufficient to ignite powdered coal could be gotten from an automobile, though the company allows employees to park their cars in the area. In addition, the company's witness acknowledged that pure oxygen could ignite grease, also present on the vehicles in the area. And the union offered evidence that employees

routinely use a directional device called a fussee, which is constructed of many of the elements present in fireworks.

It is true, as the company argued, that fussees and vehicles are a necessary part of the workplace and that employees should not be able to possess fireworks just because other employees use fussees or park greasy vehicles near a possible source of explosion. Of course that is correct, but that isn't the point. The company introduced evidence about the risk posed by having fireworks in a vehicle in support of its claim that possession itself justified the discharge decision. The union's evidence about fussees and parked cars merely served to counter the company's claim of a significant risk. Surely, if there was any realistic risk of explosion, the company would not allow the use of fussees in the same area and it would not allow employees to park their cars there.

I found credible grievant's claim that he left the fireworks in his car from the night before and that he had forgotten they were there. Since grievant did not remove the fireworks from his trunk or otherwise use them in the workplace, I have difficulty distinguishing this case from the Cycak incident, in which the company merely imposed a five day discipline. I understand the company's claim that Cycak had a fairly good disciplinary record and that that probably influenced its decision not to discharge him. But the decision also indicates that mere possession of fireworks in the trunk of one's car is not, of itself, just cause for discharge. Moreover, I am influenced in that regard by the testimony of Alexander Jacque, who related other incidents regarding fireworks that had gone without discipline.

The issue, then, becomes whether grievant's disciplinary history and the possession of fireworks can justify his discharge. The union argues that the other discipline is irrelevant, citing Peter Seitz' much quoted passage from Inland Award 313:

The straw that breaks the camel's back (to use the expression commonly employed in this type of case) must itself be related to the kind of straw that already overburdens the camel. The event which furnishes cause for discharge must be capable of standing on its own bottom; that is to say it must be of such a character, itself, which, when considered with the personnel record, justifies discharge.

Those comments might seem especially apt here, where the company's opening statement identified the fireworks incident as "the straw the broke the camel's back." I was faced with the same argument in Inland Award 931, where I noted that Seitz' award could not be interpreted to mean that there had to be a separate disciplinary chain for each type of offense:

I think it is improper to read Seitz' comments to mean that different categories of offenses can never be taken into account. At base, the dilemma addressed by Seitz was whether grievant has previously been disciplined for offenses of the same character, or, as Seitz put it, offenses that are "related" to one another. In that way, there is some basis for predicting whether the employee is actually influenced by the corrective effects of progressive discipline. The more disparate the offenses, the less useful such an inquiry might be. There are different offenses, however, that bear some relationship to each other.

The company says that this standard is met here because the fireworks incident demonstrates grievant's continuing regard for company rules. But if that was the standard, then Award 313 would become meaningless. The company always claims a violation of some rule when it discharges an employee.

In Award 931, I found that the employee's entire disciplinary record for the previous five years was relevant because of its similarity to the culminating incident. That grievant's record demonstrated exceedingly poor work performance (so bad, in fact, that he had agreed to leave the department in return for an agreement to reinstate him) and insubordination. I found those offenses related to the culminating incident, which was that grievant's failure to return to work following a vacation and his failure to apprise the company of his condition for more than three weeks. I found this to exhibit the same kind of "carelessness and indifference" that that grievant had displayed in the past.

I am unable to make the same finding here. It is true that this grievant was disciplined several times for poor performance, and that he has also repeatedly ignored company rules by speeding in the plant. But the fireworks violation is not of the same character. There is no doubt about the fact that grievant violated the rule, even though he had forgotten the fireworks were in his truck. See e.g., Inland Award 899. But there are two distinguishing factors here. First, while grievant's lack of specific intent to violate the rule is no defense to liability, this offense differs from previous ones in which he was indifferent to company rules and expectations. Second, and equally important, is the fact that grievant's work record had improved significantly in the year before his discharge.

No one can deny that grievant's disciplinary history is poor. But, as the union points out, either in response to the progressive discipline or because his son's health had improved, grievant's absenteeism record improved, as did his continuing problem with poor work performance. Based on that improvement, and the

fact that the fireworks incident was a different character of offense, I am persuaded that the previous disciplinary history could not be used to justify the discharge in this case.

The issue now becomes the level of appropriate discipline. As these parties know, I have sometimes reinstated employees without back pay when I have been convinced that their level of misconduct was sufficient to warrant such discipline. I have also sometimes refused to award back pay when an employee's absenteeism record was sufficient to question whether he would have worked regularly even if not discharged. But neither of those factors is present here. The company itself has imposed only a five day discipline for a virtually identical offense that occurred within a year of grievant's. And, though grievant has had problems with attendance, he had no disciplinary incidents for the year preceding his discharge. There is no warrant, then, for denying him the pay that he would have earned, but for the discharge. Accordingly, I will order the company to reinstate the grievant and to make him whole except for a five day discipline for possession of fireworks on company property.

AWARD

The grievance is sustained. The company is ordered to reinstate grievant and make him whole except for a five day discipline for possession of fireworks on company property.

/s/ Terry A. Bethel

Terry A. Bethel

January 19, 1998

<FN 1>The 1984 disciplines were actually stale at the time this letter was issued in 1990. It is not clear why they would have been included on the discipline letter.

<FN 2>The USS-USWA corollary of mp 8.5 was not at issue in USS-12,355. However, the case concerned a similar provision so that previous precedent about mp 8.5 was relevant.

<FN 3>This is not an instance in which the union has waived the provisions of the agreement for all time. The union has now given notice that it will expect compliance with mp 8.5 in the future. But it would be unfair to apply it here since the union's previous actions suggested to the company that strict compliance would not be required.

<FN 4>The fact that grievant did not use the fireworks is what distinguishes this case from the principal case cited by the company, Converters Paperboard Company, 99 LA 430 (David Borland, 1992).