Award No. 936
In the Matter of Arbitration Between:
Inland Steel Co.
and
United Steelworkers of America,
Local Union No. 1010.
Grievance No. 27-V-41
Appeal No. 1547
ARBITRATOR: Jeanne M. Vonhof
DATE OF HEARING: December 19, 1997
APPEARANCES:
For the Union:
Advocate: A. Jacque, Grievance Committee Chairman
Witnesses: C. Jiles, Grievant
C. Alston, Grievant's sister-in-law
Also Present: J. Rosas, Griever
For the Company:
Advocate: P. Parker, Arbitration Coordinator
Witness: D. Maravilla, Section Manager, Fin.&Shp., 12" Bar Mill
Also Present: C. Lamm, Senior Representative, Union Rels.
BACKGROUND:
This is a case involving the discharge of a long-term employee for failures to report off (FRO's). The Grievant has been employed by the Company since 1970 and was employed as a Laborer in the Core Pool 1 at the time of his discharge.
The Grievant was suspended preliminary to discharge via letter dated September 10, 1996.
The letter stated,
You are hereby notified that you are suspended for five (5) days effective September 10, 1996, and at the end of that period you are subject to discharge.
This action is being taken because of your continued failure to report off culminating with your failure to report off for the 12-8 turn of September 8, 1996.
Under the provisions of Article 8, Section 1 of the August 1, 1993 Collective Bargaining Agreement, you may, within five (5) days of the date of this letter, request a hearing before the Manager of Union Relations, and at such hearing you are entitled to Union Representation.
The Grievant testified that his FRO's involved instances when he called in after the start of the turn; he did not fail to call into work at all. Company Witness Maravilla acknowledged that this was usually the case. He testified, however, that his Department has treated as an FRO any instance in which an employee fails to report, prior to the start of the turn, that he or she will be late or absent. He also testified that FRO's are more disruptive to the workforce than calling off before the start of the shift, because employees from the prior turn who may have agreed to work overtime to cover for the absent employee may already have left work by the time the employee calls in. He testified that it was not always easy to get employees to work overtime, because there already was a lot of overtime offered in his department. On cross-examination he acknowledged that if an employee called after the start of the turn, but came in and was permitted to work, that might be better than just reporting off entirely, because the job otherwise might not be filled that turn. He also acknowledged on cross-examination that employees may be up to one half hour late under the current contract without incurring discipline, and that employees on many jobs may not leave until their relief arrives.
There is no dispute that the suspension letter was sent to the address of record provided by the Grievant to the Company. The Grievant testified, however, that he was in the process of moving his residence at the time the letter was issued, that it was sent to his old residence and that he did not receive it within the five-day period. The Grievant's sister-in-law testified that the Grievant was moving during this time so that he could be closer to his daughter, and that he had completed his move by September 8, 1996.
She also testified that the Grievant was mentally "slow," sometimes needed help understanding things, that she lived two blocks from him now and that she helped him. She testified on cross-examination that in discussing the Grievant's mental capabilities she did not mean that he had trouble understanding basic work responsibilities, e.g. that he had to be at work at 7:00. The Union also presented evidence that the Grievant had been classified as a "special education" student during his school days. According to the Grievant's

sister-in-law, he began to go downhill after his wife, her sister, died in 1990, but that he was coming back to himself now.

The Company introduced evidence that the Grievant had a problem in August, 1995 with the Company concerning the address to which his paychecks were to be sent. Company Witness Maravilla testified that on or about September 10, 1996 he had the Grievant's supervisor bring the Grievant to Mr. Maravilla's office so that Mr. Maravilla could tell the Grievant directly that he had been suspended. Mr. Maravilla testified that at that time he discussed with the Grievant that he could continue to work under the Justice and Dignity program even though he was suspended pending discharge, and that he needed to go to the Union hall. Mr. Maravilla also testified that he normally had such conversations with employees once they were suspended pending discharge, and that he gets involved in discipline cases directly when an employee has progressed far into the disciplinary process, even though he is not directly involved at the first stages. In addition he testified that before the arbitration hearing he confirmed with the Grievant's immediate supervisor that the supervisor had brought the Grievant to his office to discuss his suspension.

The Grievant testified that he did not recall this conversation at all, and that the first time he found out about his discharge was when he was at work on September 18, 1996 and was escorted from the mill. Mr. Maravilla testified that the Labor Relations Department had called him on that day and told him that the five-day period for requesting a hearing had expired without the Grievant requesting a hearing, and he was therefore discharged and should be escorted out.

The Grievant testified that after he was ejected from the mill he tracked down the suspension letter sent to him at his old address. He contacted the Union which immediately requested and received a courtesy hearing from the Company on the Grievant's case on the September 19, 1996. The Company did not revoke the discharge as a result of that hearing.

The Grievant's disciplinary record during the five years preceding his suspension pending discharge is as follows:

2/14/92	Absenteeism	Discipline -- 3 days off
2/24/92	Absenteeism	Record review
5/16/95	Absenteeism	Reprimand
5/16/95	Out of work area	Reprimand
6/12/95	Sleeping	Reprimand
11/29/95	Failure to Report to Clinic	Record Review
5/29/96	FRO (5/21/96)	Discipline - 1 Day Off
7/5/96	FRO (6/2,7/2,7/3/96)	Discipline - 2 Days Off
7/9/96	Absenteeism	Discipline - 1 Day Off
8/5/96	FRO	Discipline - 3 Days Off
8/30/96	Attendance	Record Review

Mr. Maravilla testified that at the record review held nine (9) days prior to the Grievant's last infraction, he was told that his job was in jeopardy. The Grievant testified that he did not remember this record review specifically, although he did remember discussing his FRO's sometime before his discharge. Mr. Maravilla also testified that on July 5, 1996, the Company lumped together several FRO's that it could have addressed separately in the discipline process, and therefore gave the Grievant lesser discipline than he might otherwise have received.

The Grievant presented some details regarding his disciplines in 1995 for sleeping on the job, and for being out of his work area. The Company objected that these disciplines were never contested through the grievance procedure.

The Grievant testified that prescription medication makes him sleepy and that is why he overslept and reported for work late. The Union presented a doctor's letter dated April 18, 1997 which lists certain medication he is taking and states that the side effects are headache, dizziness, chest pains and blurred vision. The letter also stated that the Grievant was not currently experiencing headache, chest pains or blurred vision and could return back to work. He testified that the medication he is currently taking still makes him sleepy, but that he has someone living with him now who can help him wake up.

THE COMPANY'S POSITION

The Company argues first that the grievance is inarbitrable because the Grievant failed to request a suspension hearing within the applicable time period. The Company cites arbitration awards stating that time limits promote stability, and are just as important as any other provision of the labor agreement, and that to ignore them is to exceed the arbitrator's authority. Several of these arbitration awards are Inland awards dealing with the provision at issue here.

Here, according to the Company, the Grievant was notified at his address of record that he was being suspended pending discharge and must request a hearing within five days. He also was verbally informed of this development, the Company asserts, and notice was sent to the Union as well.

The fact that the letter was sent to the Grievant's old address should not be given any weight, the Company contends. According to the Company, the evidence shows that the Grievant knew of the procedure for changing his address with the Company and had already completed his move before the suspension letter was sent.

In addition, the Company argues that the request for a hearing is a condition precedent to seeking arbitration. According to the Company there is no savings clause in Article 8 which permits an arbitrator to consider mitigating circumstances for why an employee did not request a hearing within the deadline.

If the grievance were considered arbitrable, however, the Company also asserts that the Grievant has had two record reviews, at which time he was told that he would be discharged if his conduct persisted. The final FRO occurred only nine (9) days after the final record review, the Company notes, and argues that the discharge is justified.

THE UNION'S POSITION

The Union agrees that Article 8 generally states that an employee must request a hearing during the five-day period. The Union argues, however, that there have been other cases in which the time limits have been waived because of mitigating circumstances. In particular the Union notes instances in which employees have been incarcerated or in hospital as cases in which a hearing has been held outside the time limits.

The Company has acknowledged that there are occasions when the strict time limits should not be applied, the Union contends. According to the Union, the Grievant's case should be treated like similar cases where the time limits have been extended.

The Union notes that there is a dispute in the evidence over whether Mr. Maravilla met with the Grievant and told him that he was being suspended pending discharge. The Union argues that the Grievant testified convincingly that he did not know about the suspension letter until he was actually discharged.

The Union also argues that the some of the arbitration cases relied upon by the Company involved short-term employees. Here the Grievant is a long-term employee with more than twenty-six (26) years of service.

As for the merits of the grievance, the Union notes that the Grievant's record is not as bad as others the Arbitrator has seen. In addition the Union argues that his problems did not begin until his wife died, and that there is a difference between someone who calls in late and one who does not report off at all. The Union also notes that the records show that the Grievant is handicapped.

For all of the above reasons the Union contends that the Grievant should be reinstated and paid full back pay.

OPINION:

Arbitrability

This is a case involving the discharge of the Grievant, a long-term employee, for failures to report off. The Company argues as a threshold matter that the grievance is inarbitrable because the Grievant did not request a hearing before the lapse of the five-day "suspension pending discharge" period specified in Article 8.

The language of the Agreement states, in relevant part,

In the exercise of its right to discharge employees for cause, as set forth in Article 3, the Company agrees that an employee shall not be peremptorily discharged, but in all instances in which the Company may conclude that discharge is warranted, he/she shall first be suspended for five (5) days and notified in writing that he/she is subject to discharge at the end of that period. A copy of such notice shall be furnished to such employee's grievance committeeman and the Chairman of the Grievance Committee promptly. During such five-day period, if the employee believes that he/she has been unjustly dealt with, he/she may request and shall be granted during this period a hearing and statement of his/her offense before the Manager of Union Relations, or his/her designated representative, with the employee's grievance committeeman and officers of Union present if the employee so chooses. At such hearing, facts and circumstances shall be disclosed to and by both parties.

If a hearing is requested, the Company shall, within five (5) days after such hearing, decide whether such suspension shall culminate in discharge, or whether it shall be modified, extended or revoked, and the employee and the Union shall be notified in writing of such decision. If no hearing is requested within the five-day period, the discharge shall become final at the end of such period without further notice or action by the Company, unless the Company shall modify, extend or revoke the suspension or discharge.

In the event a hearing is requested and the disposition shall result in the discharge of the employee or the modification or extension of the suspension, a written grievance may be filed, under the grievance procedure of Article 6 hereof, beginning with Step 3 within five (5) days after such decision, contending that the action taken was unwarranted in light of the circumstances.

The Parties concur that the situation which occurred in this case is unusual. The Chairman of the Grievance Committee stated in his argument that more than 99% of the time, upon receiving a letter notifying an employee that he or she is being placed on a suspension pending discharge, the employee immediately contacts the Union, and the Union requests a hearing within five (5) days. Here that did not occur.

The Company argues that requesting a hearing within the five days is a step which must be taken as a condition precedent to arbitration. The Company relies upon the contract language which states that if no hearing is requested, the "discharge shall become final without further notice or action by the Company." The question is, what did the Parties intend by using the word "final" in this contract provision? The Company urges that the Parties meant that passage of the suspension period without a request for a hearing means that the discharge becomes essentially irrevocable, unless the Company decides to modify it, and the discharge cannot be challenged under the grievance/arbitration procedure. However, on its face, the language stating that "the discharge shall become final" could be interpreted to mean that when no hearing is requested during the five-day period, the Company need take no further action, such as a separate discharge letter, in order to transform the suspension into a discharge, but that that action still remains subject to the normal grievance/arbitration process.

Language later in mp 8.3 states that, "[I]n the event a hearing is requested and the disposition shall result in the discharge of the employee or the modification or extension of the suspension, a written grievance may be filed. . ." The earlier language regarding what happens when a hearing is not requested does not contain similar language permitting a grievance to be filed. As early as 1963, Arbitrator Mittenthal, interpreting the same language, concluded that the provisions, read together, indicate that a grievance may be filed only if a hearing is requested. Inland Steel Co., Bristol Mine, Steelworkers Arbitration Awards, Report 169, 8-31-63. Therefore the request for a hearing is treated as a condition precedent to filing a grievance over a discharge, as the Company has argued. In the more recent case of Inland Award 776, Arbitrator Fishgold stated that the failure to observe clear contractual time limitations, including the one at issue here, generally will result in dismissal of a subsequent grievance if the failure is protested.

The Union has cited a Youngstown Sheet & Tube Co. case in which Arbitrator Rolf Valtin found that the failure to request a hearing within the five day suspension pending discharge period did not preclude the employee from proceeding to arbitration. (Decision No. RV-28, 1969). However, that case involved a different employer and different contract language, which omitted any mention of what happens when a hearing is not requested. In fact a close reading of the case shows that Arbitrator Valtin contrasted the language in the Youngstown contract with the language here, and suggested that the language used here does require a request for a hearing prior to filing a grievance.

The practice of the Parties, as described at the arbitration hearing, indicates that they have taken these time limits seriously. According to the Union, in nearly every discharge case, the employee and the Union request a hearing within the five day limit.

Thus, the arbitration awards between the Parties and the evidence of prior practice indicate that this language long has been interpreted to mean that the Parties agreed to a system in which a hearing generally must be requested within a very short time period after receiving a letter informing an employee of a suspension pending discharge. If the employee fails to do so, he or she may forfeit the right to grieve and arbitrate the action. The apparent trade-off for this short time period is the protection that no employee may be summarily discharged without a formal hearing, if he or she requests it, a protection not found routinely in labor agreements.

Although the Union cited the Youngstown case, the Union did not really argue that the contract here does not normally require that a hearing be requested within five days in order to proceed to the grievance and arbitration procedure. The Union argues instead that in other instances mitigating circumstances have been considered, and should have been considered in this case.

In Inland Award 776 Arbitrator Fishgold stated that,

[E]ven if the time limits are clear and there is no express saving clause, the failure to make timely request will not necessarily result in dismissal of the grievance "if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the [A]greement" (citing How Arbitration Works, Elkouri & Elkouri).

In that case Arbitrator Fishgold considered the issue and decided that there were not mitigating circumstances making it unreasonable to comply with the five day hearing request at issue here. The evidence indicates that there are cases in which the Company has considered mitigating circumstances and granted a hearing requested outside the suspension period, even though, as the Company notes, there is no contract language explicitly permitting such consideration.

In support of the position that the grievance should not be barred, the Union argues first that the Grievant did not receive the letter in time, because he was moving his residence during the period in which the letter was sent, and the letter was sent to his old address. It is the employee's obligation to keep the Company informed of any change in address, and the employee generally bears the burden of any miscommunication if he or she fails to do so. However, by coincidence, in this case there were only two days between the date on which the Grievant completed his move, according to his sister-in-law, and the mailing of the letter regarding his suspension pending discharge. This very unusual situation suggests that the Grievant here should not be held to the severe consequence of not being able to arbitrate his discharge, which might otherwise apply if he had failed to notify the Company of his change of address over a longer period.

The Company argues, however, that it did not rely solely upon the mail. The Section Manager testified that about the time the letter was sent, he directly spoke to the Grievant and told him that he was suspended, that he could continue to work under the Justice and Dignity clause, and that he should go talk to the Union. Mr. Maravilla testified convincingly on this point, and I credit his testimony, even though the Grievant stated that he could not recall the meeting.

Having credited Mr. Maravilla's testimony, the question arises as to why the Grievant did not go to the Union and request a hearing immediately, but then did so immediately after he was actually escorted out of the plant. When an employee does not request a hearing during the five-day period, the normal assumption is that the employee does not believe that he or she has been "unjustly dealt with" (a highly unusual situation). That assumption does not appear to be accurate here, however, because the Grievant did request a hearing as soon as he was escorted out of the plant. His behavior is so unusual that it leads me to question whether the Grievant really understood Mr. Maravilla. There was no evidence that the Grievant was given a copy of the suspension letter at that meeting or was informed precisely when his suspension began and would end, probably because Mr. Maravilla assumed the Grievant would be receiving the letter at his home on that day. Of course the Grievant did not receive that letter within the suspension period and the Grievant testified repeatedly that he only discovered that he was being discharged when he was escorted out of the mill.

Given this unusual situation, I conclude that there are sufficient mitigating circumstances that the Grievant should have been treated like other employees who have been granted a hearing upon a request outside the time limits. Therefore the grievance will not be dismissed on procedural grounds.

In reaching my conclusions here I gave some weight to the testimony presented by the Union that the Grievant has some mild developmental disability or learning disabilities. I considered the Company's evidence that the Grievant generally understood the requirements of his job in the mill and had learned specifically, through earlier problems, about the importance of keeping the Company informed of address changes. However, the request for a hearing is usually triggered by the individual employee, even though it remains a Union right. With another employee, lack of knowledge or understanding of time limits might not be a bar to their enforcement. But I think here the Grievant's limitations are due some consideration in assessing the reasons for non-compliance.

There is a danger in finding too many exceptions to this requirement, because it could eventually tend to render meaningless the contract language at issue here. But the evidence indicates that there is little danger of this event occurring because of the unusual circumstances of this case and because the Union, almost without exception, does request a hearing within five days.

The Merits of the Case

The Grievant was discharged for his FRO's. The Grievant's five-year disciplinary record indicates that he had had discipline for attendance problems in 1992, and then had a three-year hiatus during which he had no discipline at all. In 1995 he received several reprimands, one for attendance and three for non-attendance infractions. He went at least another six months without any discipline at all. Then, beginning in late May, 1996 he had six FRO's in a little over three months, leading to his discharge. He also received a one day discipline for attendance during this period and a record review, which covered both absenteeism and FRO's, according to the record. However, the Company based the discharge solely on the Grievant's FRO's, according to the suspension letter. The Company did not rely upon the Grievant's absenteeism rate to support the discharge and therefore did not disclose that rate at the arbitration.

FRO's are tracked separately from other attendance problems under the Company's attendance program and disciplined more harshly. There is a reasonable basis for distinguishing between FRO's and other types of absences. Arbitration awards between these Parties, including some authored by myself, have discussed the particular problems of failures to report off. In Inland Award 904, cited by the Company here, I stated,
[A]n employee who has a string of FRO's is particularly disruptive to an employer's business. When the employee does not appear on any given day and does not call in, the employer never knows whether the employee will be there within the next ten minutes, the next two hours, or not at all. Often the Company has to call someone in or get someone to stay over on overtime to fill the position, a supervisor may be unsure about exactly when to call in someone, and delays may hamper production in a way that does not occur when an employee calls in ahead of turn.
The Section Manager here testified about the particular problems in his department, where it is difficult to retain employees on unscheduled overtime, because there is a lot of overtime work available regularly. Because the Company views FRO's as so serious, an employee may progress much more rapidly from a first discipline to discharge on the basis of FRO's, as compared with other types of absences. Often one FRO serves as the basis for discipline, while a string of other absences are usually necessary to move an employee to the next level of discipline.
The Grievant, with twenty-six years of seniority with the Company, progressed to discharge on the basis of six instances over a little more than three months. The record does not indicate that he has had more than a few other FRO's over the past five years.
The Grievant stated that his FRO's were due to sleeping problems caused by medication. His doctor's letter does not list sleepiness as a side effect of the medications he takes. Nevertheless, something caused a rather sudden change in the Grievant's behavior in regard to FRO's, and therefore I gave some weight to the Grievant's testimony that he was late because he overslept, due to medical problems.
The evidence suggests that the Company has treated other employees with FRO's more leniently. For example, in Inland Award 904, introduced by the Company, the grievant was permitted two FRO's after his fourth and final record review for attendance before he was discharged on the third, whereas the Grievant here was discharged on the first FRO after his record review. In addition, the grievant in Award 904 had a poor absenteeism record, a factor which was not at issue here.
No two disciplinary records or employees are identical, and there must be some flexibility and therefore some ambiguity in determining exactly when one employee's record has reached the discharge level, as compared with another employee's. It appears that in this case the Department was angered by the fact that only a little over a week had passed between the Grievant's record review and the FRO which triggered his discharge. The Department's concern that this demonstrated an attitude of disregard for his attendance problems on the part of the Grievant is legitimate. However, when considered as a whole, the evidence, especially the Grievant's long tenure with the Company and the relatively short period during which he had bad problems with FRO's, lead to the conclusion that the Grievant should have been given a longer period for progressive discipline to have an opportunity to take effect before discharge was imposed.
This opinion should not be regarded as minimizing the seriousness of the Grievant's series of FRO's in the summer of 1996. The Grievant must understand that the Company regards calling in after the shift begins as a much more serious offense than calling in before the turn begins, and that the Company is justified in doing so. Even if there were only a short period between the start of the turn and when the Grievant calls in to report that he has overslept, this behavior may affect production because it may cause difficulty in finding someone to stay over to cover until the Grievant can come in. Given the seriousness of this behavior, the Grievant will not be awarded backpay in this case.
This is a last chance for the Grievant to remain employed by the Company. In order to do so, the Grievant must take whatever steps are necessary to get to work on time. Only the Grievant can determine what he needs to do to achieve that goal. If personal problems are interfering with the goal of arriving at work on time, the Grievant may seek help from the Union or the Company's Employee Assistance Program.
The discharge will be overturned, but with no award of backpay.
AWARD
The grievance is sustained in part. The discharge is overturned and the Grievant is to be reinstated without backpay.
/s/ Jeanne M. Vonhof
Jeanne M. Vonhof
Assistant Umpire
/s/ Terry A. Bethel

Terry A. Bethel
Umpire
January 29, 1998