Award No. 941
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America,
Local No. 1010.
Grievance No. 19-V-36
Appeal No. 1552
Arbitrator: Jeanne M. Vonhof
May 18, 1998
REGULAR ARBITRATION
INTRODUCTION
The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on April 3, 1998 at the Company's offices in East Chicago, Indiana.
APPEARANCES
UNION
Advocate for the Union:
A. Jacque, Chairman, Grievance Committee
Witnesses:
J.B. Nobles, Grievant
M. Florey, Griever Steward
Also Present:
L. McMahon, Area No. 19 Griever
J. Schultz, Assistant Griever
K. McMahon, Griever Steward
COMPANY
Advocate for the Company:
P. Parker, Section Manager, Arbitration and Advocacy
Witness:
C. McGill, Mechanical Supervisor, Manufacturing Maintenance
Also Present:
M. Gronewald, Section Manager, Manufacturing Maintenance
G. DeArmond, Contract Administration Resource, Union Relations
N. Fodness, Human Resources Area Manager
BACKGROUND:
The Grievant has been employed by the Company since November 12, 1974. At the time of his discharge he was established as a Fork Tractor Operator for Field Services of the Manufacturing Maintenance Department.
According to undisputed information provided by the Company, on April 30, 1995 the Grievant was assigned to operate a mobile crane. The Grievant was moving two granite slabs into place in a pit at the No. 4 pickel line, in close proximity of several employees who were guiding him with hand signals. He moved the slabs at such an alarming rate of speed that he was taken out of his crane by a supervisor and directed to go to the clinic for a fitness to work evaluation. He refused to do so, and was escorted out of the plant.
On May 3, 1995 an investigation was held, at which time the Grievant admitted that he had been drinking alcohol before coming to work on April 30th, and that such drinking ran counter to the Inland Steel medical program in which he was participating at that time. On the day after the investigation the Grievant was suspended preliminary to discharge under Rule 132(e), which requires employees to submit to testing when they are suspected of being under the influence of alcohol. On May 18, 1995 the suspension was concluded with a discharge.
The Grievant was returned to work under the terms of a Last Chance Agreement which was signed by the Parties on September 7, 1995. He returned to work on September 26, 1995. By testing positive for alcohol and cocaine on September 9, 1997, the Company alleges that the Grievant has violated the following paragraphs of his Last Chance Agreement:
3. [The Grievant] will not use or permit himself to be exposed to any mood altering substances (alcohol, illicit drugs, or any drug not prescribed by a physician). The detection of the aforementioned substances, regardless of the amount, will be grounds for his immediate suspension preliminary to discharge.

4. During a two (2) year period following [the Grievant's] return to work, (Any absence of over 29 consecutive calendar days will be carved out of the above 2 year random test period and added onto the end of it, with the exception of periods of layoff, excluding medical layoff), the Company may test him at any time for the presence of mood altering substances as indicated in Item No. 3 above. This testing may be by drawn blood, breath or urine analysis. In a layoff situation, the Company maintains the right upon [the Grievant's] return to work to test him beyond the 2-year period for a period of time equal to the layoff period(s) but not more than six months.
5. Any drug or alcohol problem will not be considered as mitigating circumstances with respect to any breach of the terms of this last chance agreement.
12. This arrangement represents a final chance at employment for [the Grievant.] Failure to meet any of the conditions set forth above, any future incidents similar to that which resulted in the discharge of [the Grievant] in this case, or any violation of any Company rule or regulation may be cause for immediate suspension of [the Grievant] preliminary subject to discharge.

The Grievant testified that he was randomly tested on a number of occasions under the Last Chance Agreement. There was no evidence that any of these tests came out positive, until the test giving rise to his current discharge. The Grievant testified that he has had no absentee problems or other disciplinary problems since he returned to work under the Last Chance Agreement.

Mr. C. McGill, the Grievant's immediate supervisor, testified that on or about September 8, 1995 he was in the office of his Section Manager M. Gronewald on a different matter when Mr. Gronewald raised the topic of how the Grievant was doing under his Last Chance Agreement. Mr. McGill testified that he stated that he believed the Grievant was doing well and Mr. Gronewold suggested that the Grievant be tested again, because it had been a long time since the last testing.

On the following morning the Grievant was summoned for alcohol and drug testing. He testified that he did not know that he was being tested under his Last Chance Agreement and that he believed that his Last Chance Agreement had expired. He also testified that he protested the testing and called a Union representative, who advised him to go forward with the testing. Mr. McGill testified that he did not recall the Grievant protesting the testing or calling a Union representative, and that he did not recall speaking to a Union representative on that occasion. Mr. Alexander Jacque, Chairman of the Grievance Committee, stated that he had talked to Mr. McGill on that day about the Grievant's refusal to be tested.

The Grievant went through with the testing. The laboratory reports indicated that the Grievant's breathalyzer tests, taken fifteen minutes apart, demonstrated an alcohol concentration of .083 and .075; the Inland standard is .05. The Grievant's urine test also showed the presence of cocaine in his system.

The Grievant testified that on the night before the testing he was asleep at home at about 2:30 a.m. when his sister-in-law and brother-in-law came over to say good-bye because they were moving to Mississippi. The Grievant testified that his brother-in-law fixed a mixed drink of wine and vodka for him, in a sixteen ounce glass, and the Grievant drank it. The Grievant testified that he never planned to have a drink that night but he thought it was alright for him to do so because he believed that his Last Chance Agreement had expired.

The Grievant also testified that he has never done drugs in his life and has no idea how the cocaine came into his system. He stated that no one was doing drugs at his house on the night in question. He testified that perhaps the drink he keeps at work in the employees' refrigerator might have been spiked. In the third step he stated that perhaps someone had spiked his food.

The Company presented information that it does not conduct random drug or alcohol testing of its general workforce. The Company conducts random testing only of employees working under a Last Chance Agreement. The Company also conducts testing for cause, when there is evidence that an employee may be under the influence of alcohol or drugs. The Company ordered the Grievant to be tested under his LCA.

The Grievant testified that he has been tested for alcohol and drugs twice since the time of his discharge, for a new job, and that the tests have been negative. He also testified that he feels sorry for taking a drink on the night in question and that he has not had a drink since then.

Mr. Florey testified that he used to locker with the Grievant and never saw any evidence that he used drugs, or heard that from other employees. He testified that if the Grievant were reinstated, he would trust working with him. On cross-examination he acknowledged that he had not lockered with the Grievant for several years.

The Grievant was discharged under the terms of the Last Chance Agreement. The Union grieved the discharge and it proceeded to arbitration.

THE COMPANY'S POSITION:

The Company contends that there is only one issue in this case, i.e. whether the Grievant has violated the Last Chance Agreement. If the Arbitrator concludes that the Grievant violated the terms of that Agreement, the Company contends, then it must be enforced and the discharge upheld. According to the Company the continued value of Last Chance Agreements to the Company depends upon their strict enforcement, as indicated by various arbitration awards.

The Company argues that the Arbitrator has no choice but to find a violation of the Last Chance Agreement. According to the Company, Paragraph No. 3 of that Agreement requires the Grievant to refrain from ingesting any mood-altering substances, and there is no specific time limit on that provision of the Agreement. Under the Parties' practice, the general terms of Last Chance Agreements remain in effect for five (5) years, the Company contends, and argues therefore that this provision was clearly still in effect at the time the Grievant admitted that he drank an alcoholic drink.

The Company argues further that the Grievant was allowed to return to work because he claimed that his behavior was due to alcoholism, an addiction which the Parties agree is treatable and for which the Grievant agreed to seek treatment. The Company argues that it expects an employee in the Grievant's position to forbear from using alcohol or drugs for the remainder of his career at Inland. In addition, the Company argues that Paragraph No. 5 of the Agreement prohibits the Arbitrator from considering the Grievant's alcohol problems as a mitigating circumstance in this case.

Furthermore, under Paragraph 4 of the Last Chance Agreement, the Grievant agreed to be tested for a period of two (2) years following his return to work. The Grievant returned to work on September 26, 1995, the Company notes, and therefore the Company had the right to test him until September 26, 1997.

The Company argues further that the issue of whether the random testing period runs from the date of the signing of the Agreement or the date of the Grievant's return to work was settled in Inland Award 912, where Umpire Bethel ruled that the correct date was the date of returning to work. If the Union had misunderstood the terms of this provision of Last Chance Agreements in September, 1995, when the Grievant's Last Chance Agreement was signed, then the matter was cleared up when Award 912 was issued in February, 1996, according to the Company.

The Company notes that the Grievant's alcohol level tested at 1.5 times the Inland standard at the time of his discharge. Although this is less than in some other cases, the Company notes that the Grievant was a crane operator, and that it is too dangerous to ever allow a crane operator to operate under the influence of alcohol.

The Company also notes that in Award 912 Arbitrator Bethel stated that if he believed that the Grievant actually had consulted his Last Chance Agreement before drinking, that evidence would have been damning, because it would have indicated that the Grievant were playing a game. Here the Company argues that the Arbitrator should believe this Grievant on that point, which is another reason for upholding the discharge.

THE UNION'S POSITION:

The Union argues first that the cases cited by the Company all involved instances where there was some addiontal violation of the Last Chance Agreement other than simply failing a random test. In these other cases, according to the Union, the employees were acting erratically, or had consumed much more alcohol than the Grievant, and there was reasonable cause to test them for their behavior. Here the only reason the Grievant was discharged was because of the random testing, the Union asserts, and his alcohol level was not that much higher than the Inland standard.

As for the drug charge, the Union contends that the Grievant credibly testified that he never did drugs in his life. The Union contends that his suggestion that his drink was spiked is reasonable.

In addition, the Union notes that the Grievant is a long term employee, and had clearly been able to live under the strict terms of the Last Chance Agreement for two (2) years. His situation in this regard was like the grievant in Award 912, who was reinstated. Also, like the grievant in that case, the Grievant here believed that his Last Chance Agreement had expired. The Union relies upon the evidence that he did protest his being sent for random testing to support the view that he did believe that his LCA had expired.

The Union also argued that since the issuance of Award 912, employees are informed that the two-year period begins to run with the date of their reinstatement, not from the signing of the Agreement. However, the Union notes that the Grievant's agreement was signed before the issuance of this award, and contends that since this case is identical to the case in Award 912,

The Union argues that there are cases in which employees who technically violated Last Chance Agreements have been reinstated. The Union notes that the Grievant did not go out and seek alcohol in a tavern, but was offered alcohol on a special occasion in his own home. The Union argues that the Grievant

should be given another chance, even if he must be placed under the terms of the Last Chance Agreement again.

OPINION:

This is a case involving the discharge of a long-term employee for violating the terms of a Last Chance Agreement (LCA). As indicated in the Background section of this opinion, the Grievant's drug and alcohol test of September 9, 1997 proved positive for both alcohol and cocaine. The Grievant's alcohol level was about 1 and 1/2 times the limit allowed by the Company.

The Grievant was working under a Last Chance Agreement which permitted random testing for a two-year period "following (the Grievant's) return to work." The Last Chance Agreement was signed on September 7, 1995, but the Grievant did not return to work until September 26, 1995, after being released to return to work by the Inland Medical Department.

In Inland Award 912, dated February 15, 1996, Umpire Bethel ruled that nearly identical language in a similar Last Chance Agreement meant that the grievant could be randomly tested until two years from the date of the grievant's actual return to work. In that case, like the instant case, the disputed test occurred more than two years after the signing of the LCA but before two years had elapsed from the grievant's return to work.

Umpire Bethel reasoned that the LCA went into effect when it was signed, but the agreement itself contemplated that there would be a delay in the grievant's return. He ruled that the plain language of the LCA itself, as well as the genesis of that language, led to the conclusion that the test period begins when the grievant returns to work. The reason behind the language, he found, was to ensure that the Company had a full two-year period in which to evaluate an employee's progress towards commitments the employee has made in order to secure a last chance at employment. As Umpire Bethel ruled,

(I)f an employee has promised not to drink or use drugs, the company secures that right to test that promise. It is worth something to have an employee complete a treatment program. But what the company really wants to know is whether an employee can give up alcohol when he also has the pressure of working every day. That's where paragraph E comes in.

Paragraph E monitors an employee over a specified time when he is actually working. Of course, alcoholism is a day-to-day problem and two years of sobriety is no guarantee that an employee will never drink again. But two years is a reasonable time and, if completed, it helps give the company assurance that an employee is serious about recovery. Obviously, the testing program provides that assurance only if it occurs when the employee is actually working. Paragraph E seems well designed to accomplish that because it says that the testing will occur for two years "following (grievant's) return to work."

The same language appears in the Grievant's Last Chance Agreement here as in Award 912. Therefore, under Award 912 the Company had a right to randomly test the Grievant until two years after he returned to work. The Grievant's random testing period did not expire until September 26, 1997, and the testing on September 9, 1997 was within that period. The Grievant was properly tested and, reading Paragraph Nos. 3 and 4 of the LCA together, as Umpire Bethel did, leads to the conclusion that the detection of any amount of mood altering substances during the testing period provides grounds for immediate suspension pending discharge. <FN 1>

The Company argues that my inquiry in this case ends here, with the Company's proof that the Grievant has violated the Last Chance Agreement. The Company cites several arbitration awards in support of this view, including Inland Award No. 738 in which Arbitrator Luskin stated,

[Last Chance Agreements] lose their effectiveness unless the terms and conditions of "last chance agreements" are respected and given the same full faith and credit that should be given to any agreement. The failure to enforce a "last chance" agreement serves to dilute its effect and to reduce its significance, meaning and usefulness. The elimination of the concept of "last chance" agreements could serve to deny other employees of the opportunity to be restored to gainful employment and to preserve for such employees the benefits they had achieved during their period of employment with the Company.

In many cases, finding a significant violation of the terms of a Last Chance Agreement does end the arbitrator's inquiry. However, Inland arbitrators have, on occasion, permitted an employee to be reinstated even after violating the terms of a Last Chance Agreement, including Arbitrator Bethel in Award 912. The Union contends that since the same situation occurred here as in Award 912, I should reach the same result here and reinstate the Grievant.

The Grievant here was a long-service employee, like the grievant in Award 912; the Grievant here had twenty-three years of service with the Company at the time of his discharge, while the grievant in Award

912 had twenty-eight years of service. This fact is always present in the arbitrator's mind in a case like this, but even long service does not excuse an employee from his obligations under a Last Chance Agreement. present in the arbitrator's mind in a case like this, but even long service does not excuse an employee from his obligations under a Last Chance Agreement.

Like the grievant in Award 912 the Grievant here was randomly tested a number of times under his Last Chance Agreement, and always came up clean until the final time. Both grievants had gone through very nearly the entire two-year testing period without failing any test for drugs or alcohol. This fact is an important mitigating factor in the Grievant's behalf.

Both grievants failed tests just before their two-year period expired. Each claimed that something happened in his home which caused him to have a drink on the day in question. The grievant in Award 912 stated that he drank after having a serious argument with his wife. An argument with his wife does not excuse his drinking. However, it does provide a stronger excuse than the reason given by the Grievant here, who had a good-sized drink several hours before he was scheduled to work, as a farewell to his sister-in-law and brother-in-law who were moving out of the area.

The Grievant argues that he never intended to drink, that his relatives showed up at his house in the middle of the night and roused him from his sleep. He stated that his brother-in-law mixed the drink, and handed it to the Grievant. The Union argues strongly that the Grievant did not go out to a tavern and seek out an alcoholic drink. However, the Grievant still had the choice to take that drink or refuse it. Simply because he did not actively seek it out does not negate his responsibility in regard to drinking.

The Union argues that the Grievant here should be treated like the grievant in Award 912 because, like that grievant, he took a drink believing that his Last Chance Agreement had expired and that therefore it was alright to have a drink. However, when the grievant in Award took his fateful drink, it already had been clear for a year and a half that he was doing so within the testing period. Even if the Union were unclear about the limits of the testing period when the Grievant's LCA was signed in September, 1995, the issue was clarified many months half before it actually arose in the Grievant's case. Therefore the Grievant's belief here that he was "in the clear" was not nearly as reasonable as the similar belief of the grievant in Award 912.

Furthermore, the fact that the Grievant took a drink under these circumstances is an aggravating, not a mitigating factor. Umpire Bethel made clear in Award 912 that if he did believe that the grievant there had checked his LCA before drinking, this testimony would provide an argument against overturning his discharge. As he said,

The company bargained for the right to test grievant for two years because that period gave it some indication of what the future would hold. Presumably, an employee who stays sober for two years has made enough progress and has enough determination to continue the fight. But if an employee checks to see if the agreement has expired before drinking, it suggests that he is merely playing a game, abstaining only during the period in which it would not be safe to drink.

In that case Umpire Bethel did not believe that the grievant had checked the agreement before drinking, in large part because the grievant did not protest when he was taken for testing. However, the situation in this case is different. The Union presented evidence here, including a statement by Mr. Jacque, Chairman of the Grievance Committee, that the Grievant had protested the test on the day he was tested, that he had called Mr. Jacque, and that Mr. Jacque had spoken to Mr. McGill, who had ordered the Grievant to go for testing. There was some conflicting evidence on this point. However, the Union has presented convincing evidence to support this argument, including the statements of Mr. Jacque and the Grievant's consistent testimony that he drank believing that his LCA had expired.

argument, including the statements of Mr. Jacque and the Grievant's consistent testimony that he drank believing that his LCA had expired.

The problem with this argument is the Grievant's assumption, as expressed in his testimony, that he believed that once his random testing provision had expired, he was in the same position as anyone else, and could have a drink occasionally. However, the Grievant is not in the same position as any employee. He already has been discharged once for coming to work and operating a crane under the influence of alcohol, in a dangerous manner. The Union agreed that there were grounds to discharge him at that point. The Employer allowed him to be reinstated because he claimed his problems were due to alcoholism, and the Parties have agreed to consider alcoholism as a treatable condition. He went into treatment for alcoholism and was reinstated under a Last Chance Agreement in which he promised not to ingest mood altering substances, including drugs and alcohol.

Thus, in regard to the consumption of alcohol or drugs, the Grievant's situation is very different than the average employee. Even if he reasonably believed that his two-year random testing period had expired, he should not have assumed that it was okay for him to have a large drink in the middle of the night, several hours before he was supposed to report to work, two days after he believed that the period expired. This conduct implies that the Grievant thought it was okay to drink again as soon as he could no longer easily be caught drinking, through random testing, and suggests the "game playing" to which Arbitrator Bethel referred.

I need not decide in this case whether the Grievant's obligation not to ingest mood-altering substances under Paragraph 3 of the LCA lasts at least five years, or whether employees in the Grievant's situation must forbear from ever having an alcoholic drink again while employed by the Company, as the Company argues. It is sufficient to say that the Grievant should have recognized that even if the two-year period had expired, he could not casually take a drink, like any other employee. Everyone makes mistakes, but the Grievant was in a position with the Company where he could not afford to take the risk of a making another mistake with regard to his drinking. The fact that he made the decision to drink without much thought or provocation, only two days after he believed that his agreement had expired, and thinking that it was okay to do so, suggests a cavalier attitude towards his employment, his alcoholism and his rehabilitation. <FN 2> In addition, the size of the drink and the fact that it was taken several hours before the Grievant was to go to work are also aggravating factors. This conduct does not reflect the evidence of change and responsibility which the Employer had a right to expect from someone reinstated under the Grievant's conditions.

In addition, the Grievant's contention that he was not responsible for the cocaine in his system requires the Arbitrator to believe that someone spiked his food or drink with cocaine in the day or two before he was tested. The Grievant was adamant on this point and it is, of course, possible. However, it seems much more likely that a person with a history of substance abuse who admits that he was drinking alcohol during the same period as the cocaine was ingested was responsible for the presence of cocaine in his system.

In a case like this the Arbitrator always is aware of the Grievant's long tenure with the Company. And I have considered the periods during which the Grievant has tested negative for alcohol or drugs. But in order to reinstate the Grievant here I would have to overlook too many factors: the violation of the Last Chance Agreement, the Grievant's claim that he thought he could drink only two days after he believed that the Company's testing provisions had lapsed, the circumstances under which he drank, and the cocaine which showed up in his system.

In Inland Award No. 743 Arbitrator Luskin stated,

This arbitrator has adopted the same position as have numerous arbitrators in basic steel with respect to the need for honoring final chance agreements. If they are to serve any useful purposed, final chance agreements must be respected and the terms and provisions thereof must be honored. Although this arbitrator has pointed out in other awards that unusual mitigating circumstances may be present that might justify the setting aside of a termination for violation of a last chance agreement, the facts and circumstances would have to be so compelling in nature as to warrant a departure from what must be considered to be a general rule that agreements between the parties should be honored and respected.

The mitigating circumstances in this case are not compelling enough to justify not honoring the Last Chance Agreement. Furthermore, the facts of this case are sufficiently different from those in Award 912 that the result there does not control the result here. Therefore I conclude that the discharge must be upheld.

AWARD:

The grievance is denied.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof

Labor Arbitrator

Acting Under Umpire Terry A. Bethel

Decided this 18th day of May, 1998.

Chicago, Illinois.

<FN 1> Having found that the Grievant was tested properly during the two-year period, there is no need for me to decide whether Paragraph No. 3 extends for five years, as the Company contends. Umpire Bethel came to the same conclusion in Award 912.

<FN 2> Even if he believed that it was okay to drink under the terms of the Last Chance Agreement, he was told in his alcohol treatment programs, that alcoholics can never have another drink safely, without the possibility of relapse.