Award No. 948
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America
Local Union No. 1010.
Gr. No. 11-V-012
Appeal No. 1559
Arbitrator: Jeanne M. Vonhof
September 18, 1998

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on July 9, 1998 at the Company's offices in East Chicago, Indiana.

APPEARANCES

UNION

Advocate for the Union:
A. Jacque, Chairman, Grievance Committee
Witnesses:
G. Fogle, Grievant
R. Guevara, Griever

COMPANY

Advocate for the Company:
P. Parker, Section Manager, Arbitration and Advocacy
Witnesses:
T. Mulcahy, Section Manager, Operations & Maintenance -- Plant 1 Galvanize
P. Parker, Section Manager, Arbitration and Advocacy
Also Present:
R. Hughes, Contract Administrative Resource

BACKGROUND:

The Grievant, G. Fogel, has worked for the Company for nearly twenty-four (24) years. At the time of his discharge he was working in the Plant 1 Galvanizing Department. The record indicates that beginning in at least 1994 the Grievant was disciplined for attendance problems. His attendance problems included excessive absenteeism and failures to report off prior to his shift, which are tracked and disciplined somewhat separately under the Company's attendance improvement system.

Via letter dated September 10, 1997 the Grievant was suspended pending discharge due to excessive absenteeism. The Parties agreed that there were grounds to discharge the Grievant at that time but that he would be brought back under a Last Chance Agreement, which was signed by the Grievant and representatives of the Parties on April 2, 1998. The Last Chance Agreement required the Grievant to maintain certain standards of attendance. In addition, the agreement required the Grievant to enroll in the Inland Alcohol and Drug Program, and complete any course of treatment in that program. The evidence indicates that the Grievant was a recovering drug addict who was recommended for a Last Chance Agreement by both the Union Members' Assistance Committee and the Inland Drug and Alcohol Program. Messrs. Parker and Mulcahy testified that at the time the Grievant signed the Last Chance Agreement, the agreement was read and explained to him paragraph by paragraph. Mr. Parker testified that at this meeting the Grievant's problems with FRO's were discussed, and the Grievant stated that he would purchase a cellular telephone as one part of his plan to avoid FRO's.

The Grievant was charged with a failure to report off about two weeks after signing the Last Chance Agreement, for a turn he was scheduled to work on April 18, 1998. The Grievant was sent for a drug test when he returned to work, which proved negative. Via letter dated April 23, 1998 the Grievant was suspended pending discharge for violation of his Last Chance Agreement. Via letter dated May 5, 1998 the Grievant was discharged.

Mr. Mulcahy testified that on April 18, 1998 the Grievant was scheduled to work 6:30 a.m. to 2:30 p.m. and was supposed to be at work no later than 7:00 a.m. There is no dispute between the Parties that the Company received one telephone call from the Grievant before the shift began, that he did not show up for work that day, and that he made no later telephone call. There is a dispute over the timing of the first call and what was said. According to Mr. Mulcahy the Grievant called in at 6:45 a.m. to say that he would be

late. The third step minutes state that the Grievant called in at 6:15 a.m. with that message. The Grievant testified that he called in at 5:30 a.m. to say that he might be late.
The Grievant testified that on April 18, 1998 he agreed to give a ride before his shift began to his cousin who was going to the south side of Chicago. He stated that she was in Gary to attend the funeral of their mutual cousin, her transportation to Chicago fell through, and he agreed to take her because this was something he could do in relation to the funeral. The Grievant testified that he did not attend the funeral, even though he was very close to the person who died, because he did not want to have another absence. The Grievant testified that he left his house at about 4:00-4:30 a.m., with plenty of time to go to Chicago and return before his shift. He testified that he dropped his cousin off and called in at about 5:30 a.m. to say that he might be late, just to protect himself in case he was late. Shortly after that, he testified, the car he was driving broke down on the highway with radiator problems. He did not leave the car immediately because the car was smoking, he did not want anyone to think that it was on fire, and he did not want to get it towed away because he had borrowed it. Once he decided that the car was okay, he stated, he walked one and a half hours' back to where his cousin was staying. He testified that it was too late to call in and not get an FRO by this point, so he did not call in at all.
The Union presented evidence that the person who lent the car to the Grievant knew that it had radiator problems but had neglected to tell him. According to the Union this person was available to testify at the initial investigation, but was not permitted by the Company to speak. <FN 1> In addition, the Union presented a receipt showing that a radiator was fixed on a car several days after April 18th. The Griever testified that during the suspension hearing the Company representative indicated to the Grievant that if he brought in evidence regarding the breakdown of the car, the information would have a lot of bearing on whether the Grievant was discharged. The Grievant was discharged, the Parties were unable to resolve the dispute and it proceeded to arbitration.
THE COMPANY'S POSITION:
The Company argues that the Grievant's version of the events of April 18th is not credible and shows a disregard for his obligation to be at work on time. The Company suggests that the Grievant jeopardized his ability to be at work on time by giving a ride to his cousin just before his shift. The Company also argues that the Grievant's timing of events is not credible, because there would have been no reason for him to call in at 5:30 to say that he might be late, since he had plenty of time to make it at that time. The Company also argues that he changed his story from the third step, which hurts his credibility, and that he had no good excuse in any event for not calling after the car broke down.
The Company contends that the Grievant understood the terms of the Last Chance Agreement and that his failure to report off constitutes a clear violation of the following paragraphs of that agreement,
8. Should Mr. Fogle, within a period of two (2) years from his return to work, accrue an absenteeism rate of 5% or greater during any rolling ninety (90) day evaluation period or violate any other provisions of the Company's Attendance Improvement Program (especially the Failure to Report Off Provisions) or any other Company rules or regulations with respect to absenteeism, cause will exist for his suspension preliminary to discharge.
10. Mr. Fogle fully acknowledges an understanding of his basic employment responsibility to report on time for scheduled work, to give timely notice when he is unable to do so and that absence, tardiness or failure to work a completed turn may be only for just cause.
11. This Arrangement represents a final chance at employment for Mr. Fogle. Failure to meet any of the conditions set forth above or any repetition of the conduct which led to this suspension/discharge action or violation of any other Company rules or regulations will be cause for Mr. Fogle's immediate suspension preliminary to discharge.
The Company contends that the Grievant and the Union agreed that his continued employment was dependent upon his strict compliance with terms of the Last Chance Agreement. Here there was no compelling reason why the Grievant violated the Last Chance Agreement, according to the Company, and therefore the Arbitrator has no choice but to enforce the agreement and uphold the discharge.
THE UNION'S POSITION:
The Union contends that the evidence does not show that the Grievant had no concern about his job; he did call in to say that he might be late that morning. The Grievant was not barred from going places under the Last Chance Agreement. While his decision to make the trip before work might have been foolish, the Union argues, he left enough time to go there and back and he had no control over the car breaking down. He brought in proof of the car breaking down, and the Company refused to hear his witness who lent him the car originally, thereby failing to conduct a full investigation, according to the Union.

The Union argues that the reference in the third step minutes to the Grievant calling at 6:15 in the morning was a typographical error, which the Union did not catch. The person who actually received the call did not testify, the Union noted, and therefore the Grievant should be believed on this point.
The Union does not agree that the Grievant violated the Last Chance Agreement. The Union disputes whether a single FRO constitutes a violation of the Last Chance Agreement, because usually there must be a pattern of attendance violations before there is a violation of the Last Chance Agreement. Neither the Union nor the Grievant has been made aware that the first incident of an FRO under a Last Chance Agreement constitutes grounds for discharge. The Union contends that they always have believed that the cycle of 5% over 90 days was the relevant standard in such Last Chance Agreements, unless they are specifically written, as some are, prohibiting a single attendance violation in the first month after the LCA is signed.
The Union claims that it would not have taken this case to arbitration if the Grievant's car had not broken down. But because he had a good reason for his FRO, the Union argues that the grievance should be sustained and the discharge overturned.
OPINION:
This is a case in which a long-term employee was discharged for violating the terms of his Last Chance Agreement. Attendance problems over a number of years led to the Grievant being placed under a Last Chance Agreement on April 2, 1998. These attendance problems included failures to report off (FRO) before his turn began, and the Company argues that the Grievant's failure to report off two weeks after signing the Last Chance Agreement constituted a violation of that agreement which supports his discharge. The scope of just cause for a discharge is much narrower when an employee is working under a Last Chance Agreement than for an employee who is not working under such restrictions. In a Last Chance Agreement the Union and the employee have agreed with the Employers that compliance with the terms of that agreement will determine whether the employee continues to remain employed. When an employee is discharged under an LCA, that agreement itself becomes the primary source to determine whether the employer had proper cause to impose discharge. There are circumstances in which non-compliance with the agreement will not trigger discharge, but they are unusual, and, as I stated in Award 941, must be "compelling."
The threshold question in this case, therefore, is whether the Grievant's conduct on April 18th constituted a violation of his Last Chance Agreement. Paragraphs 8 and 10 of the agreement are most relevant, since they address the Grievant's obligations regarding his absenteeism problems. Section 8 states that the Grievant must maintain an absenteeism rate of less than 5% for any rolling ninety-day period, for two years, and also states that the Grievant must not "violate any other provisions of the Company's Attendance Improvement Program (especially the Failure to Report Off provisions) or any other Company rules or regulations with respect to absenteeism." Paragraph 10 acknowledges the Grievant's "responsibility to report on time for scheduled work, [and] to give timely notice when he is unable to do so." It also states that the Grievant's absences "may be only for just cause."
There is conflict between the third step minutes, the testimony of Mr. Mulcahy and the testimony of the Grievant over exactly when the Grievant called in that morning, and whether he said that he would be late or that he might be late. However, there is no dispute that the Grievant never called in that day to state that he was reporting off from work for the day, and the Union has not argued that he reported off with the earlier call. Therefore the evidence establishes that the Grievant did commit an FRO on the day in question. The issue in this case then is whether that FRO is a violation of the Last Chance Agreement which justifies discharge.
The language of Paragraph 8 states that an absenteeism rate exceeding 5% over 90 days will be cause for suspension pending discharge. The Parties presented information that they do sometimes write Last Chance Agreements in which an employee is subject to discharge for a single absence in the first month of the agreement, two in two months, etc. The failure to include such language in this Last Chance Agreement suggests that the Parties did not intend generally to submit the Grievant to discharge for any single absence. The Company argues, however, that it did not discharge the Grievant under the 5% absenteeism rate provision, but rather under the more general language of Paragraph 8 which states that the Grievant is subject to discharge if he violates any other provision of the Company's regulations regarding attendance, including the FRO provisions. This language refutes the Union's suggestion that only a violation of the 5% absenteeism rate could trigger discharge. If that were the case, the sentence in Paragraph 8 regarding other violations of the Company's attendance policy would have little or no meaning. Thus, I conclude that, under this LCA the Company need not establish that an employee has exceeded the 5% absenteeism rate in order

to impose discharge for attendance violations. However, the question still remains whether a single FRO supports provides cause for discharge under the Agreement.

I have commented in other cases about how FRO's create particular problems for Management not caused by other absences, because a supervisor does not know whether the employee is going to be absent or just late. An FRO causes a supervisor to have to make difficult decisions, at the busy beginning of a turn, about whether to wait for the employee to show up, to hold over employees from the prior turn, to call in employees on overtime, or simply to sacrifice productivity. Because of the special problems associated with FRO's, the Company's attendance plan may result in an employee receiving progressive discipline for each instance of an FRO, even though he or she would not typically receive a discipline for each absence of another kind. However, that is not always the case. The Grievant's history of discipline for FRO's indicates that the Company did not always apply another step of progressive discipline for each FRO. <FN 2>

Messrs. Parker and Mulcahy testified convincingly that every paragraph of the Last Chance Agreement was read and explained to the Grievant. However, they also testified candidly that he was not told that a single FRO would lead to his discharge. The Last Chance Agreement does not state that a single instance of an FRO would be regarded as a violation of the Company's attendance policy that would trigger immediate discharge. When an employee is working under the very strict conditions of a Last Chance Agreement, every effort must be made to make these terms clear to the Grievant. The evidence indicates that the Parties routinely try to do this, and that they attempted to do so in this case as well. However, the evidence also shows that the Company's interpretation of the agreement -- that one FRO would trigger discharge -- was not clearly communicated to the Grievant at the time of the signing. And his past disciplinary experience with FRO's would not necessarily have led him to this conclusion.

I have considered whether the facts of this particular single FRO were so egregious as to constitute a sufficiently severe violation of the absentee policy so as to justify discharge under the LCA. The Grievant presented credible evidence that he was absent from work on April 18th because the car he was traveling in broke down on the south side of Chicago. I have no reason to disbelieve his story that he was engaged in an act of kindness related to his cousin's funeral when the car broke down and that he did not know of the faulty condition of the car's radiator. I also note that he did not fail completely to call in on the morning in question. And there is no evidence that his FRO was caused by a relapse into drug use. These circumstances surrounding the Grievant's absence indicate that this single FRO was not so egregious as to warrant immediate discharge.

Nevertheless, the Grievant's conduct was sufficiently serious that no back pay will be awarded. When working under a Last Chance Agreement involving absenteeism, an employee has a particular responsibility to be vigilant in his obligations to report to work, to be on time and to call in ahead of the shift if he cannot come to work. Those obligations were spelled out in the agreement. The Grievant risked violating them when he agreed to take his cousin to Chicago prior to the beginning of his turn in an old borrowed car, even if his motives were good and he sincerely believed he had enough time to get to work. Furthermore, even if he had a good reason for his absence, I am not convinced that the Grievant could not have called off prior to the beginning of his shift, after the car broke down. In addition, even if he knew he was calling too late to avoid an FRO, he should have let the Company know that he would not be at work at all that day, so that they could plan for his absence over the whole turn.

The Grievant was not put on notice that a single FRO would trigger his immediate discharge under the Last Chance Agreement and this particular FRO did not provide grounds for such discharge. However, the Grievant engaging in any FRO so soon after signing the Last Chance Agreement was a very serious offense. The Grievant will be reinstated under the terms of his Last Chance Agreement, without backpay. Any time in which he was not working, due to being discharged, will be added onto the effective period of the Last Chance Agreement.

AWARD:

The grievance is sustained in part. The Grievant is to be reinstated under the terms of his Last Chance Agreement in effect at the time of the discharge, under the time constraints described above. No backpay will be awarded.

/s/ Jeanne M. Vonhof
Jeanne M. Vonhof
Labor Arbitrator
Approved by Terry A. Bethel, Umpire
Decided this 18th day of September, 1998.

<FN 1> According to the evidence she also appeared at the original suspension hearing, which was postponed. She was not available for the suspension hearing or the arbitration, but provided a written statement that the car had radiator problems and that she had neglected to inform the Grievant about them.
<FN 2> The Grievant was permitted to have several FRO's without any discipline. This has occurred with other employees as well.