Award No. 960
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America
Local Union No. 1010.
Gr. Nos. 7-V-075
Appeal No. 157
Arbitrator: Jeanne M. Vonhof
December 18, 1998

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on October 30, 1998 at the Company's offices in East Chicago, Indiana.

APPEARANCES

Advocate for the Union:
D. Chaotic, Chairman, Grievance Committee
Witnesses:
M. Mezo, Former President, Local 1010
A. Gutierrez, Grievant
B. Santana, Witness
R. Krumrie, Overhead Crane Operator
A. Dunlap, Jr., Assistant Griever
S. Wagner, Griever
L. Morales, Interpreter
Also Present:
L. Aguilar, Assistant Griever
Advocate for the Company:
P. Parker, Section Manager, Arbitration and Advocacy
Witnesses:
L. King, Day Supervisor, Ispat Bar Company
R. Cayia, Manager Union Relations
D. DeMichael, Plant Medical Director

BACKGROUND:

The Grievant in this case had been employed by the Company for twenty-seven (27) years at the time of his discharge. At that time he was employed as a Craneman, a position which he had held for the prior ten (10) years.

Via letter dated August 14, 1998 the Grievant was suspended pending discharge for violating the following rule:

Reporting for work under the influence of drugs not prescribed by a licensed physician for personal use while at work: being in possession of or use of such drugs while on company property, or bringing such drugs onto company property.

The notice stated that the offense was one which may be cause for discipline up to and including suspension preliminary to discharge. After a suspension hearing the Grievant was discharged.

Mr. Larry King, Day Supervisor at the 21" Finishing Mill, testified that on the day in question he assigned a crew to load seven or eight trucks at the start of the turn. About twenty (20) minutes later he received a telephone call from a Loader stating that he did not have a Crane Operator. The Loader put Crane Operator A. Feliciano on the telephone, who stated that he was supposed to service the saws, not load trucks. Mr. King agreed with him and told him to go service the saws.

Mr. King testified that the Grievant was scheduled as the Crane Operator on a roving or flexible crew that turn, and this crew was assigned to unload the trucks. Mr. King told the Loader to wait there and he would get a Crane Operator. King then proceeded to the shanty and found the Grievant in the shanty alone. Supervisor King testified that he told the Grievant to go load the trucks, and the Grievant said something like, "I'm tired of getting f____, Angel (Feliciano) should go load the trucks and I go take care of the saws." Mr. King stated that he told the Grievant that it was his job to load the trucks, and that it was alright if Mr. Feliciano wanted to trade jobs with him, but since Feliciano had not agreed, the Grievant would have to load the trucks. Mr. King testified that he told the Grievant three times to do the job, warned him several

times that he would be sent home if he refused to do it, and the Grievant refused several times, saying that it was not his job. Mr. King also testified that he told the Grievant he should do the job and grieve it later. After the Grievant refused several times, Mr. King told the Grievant that he was calling plant security and the Grievant should stay put. The Grievant left the shanty, saying that he was going to look for his Griever. Mr. King said that the Grievant seemed agitated at that time.

The Grievant returned about five or ten minutes later, according to Mr. King, without his Griever. While waiting for the security guard to arrive, the Grievant accused Mr. King of being prejudiced towards Mexicans. Mr. King stated that he did not respond to this comment, and the Grievant said, "I have high blood pressure" and left the office. Mr. King followed him out, attempting to talk to him and the Grievant said, "Don't talk to me." Mr. King testified that these statements seemed disjointed. He also stated that the Grievant's behavior and conduct seemed out of character for him, because he is normally very cooperative. According to Mr. King, Plant Protection arrived and the Grievant got into the back seat of the vehicle. He pointed his finger at Mr. King and said something which Mr. King did not hear. Mr. King testified that the Plant Protection officer said to the Grievant, "There's no call for that." According to Mr. King, when he called Plant Protection he intended to have the Grievant simply sent home for insubordination, but the Grievant's unusual behavior convinced him that the Grievant should be sent first to the clinic for a fitness to work evaluation. Mr. King said the Grievant never seemed belligerent, but he did seem agitated.

The Grievant's version of the events does not differ significantly from Mr. King's version. He testified that he was assigned to work the No. 13 crane that day, which was normally assigned to service the saws. When Management changed the Grievant's assignment, he was assigned to the No. 3 crane to load the trucks, and he testified that he never worked on that crane, and that he believed that it was Mr. Feliciano's job to load the trucks. His version of his first conversation with Mr. King is similar to Mr. King's, except that he stated that Mr. King pointed his finger in his face when giving him the order.

The Grievant also stated that when he was in the back seat of the Plant Protection car he did not point his finger at Mr. King. He stated that he did ask why he was being sent for a fitness to work evaluation.

The Grievant was sent to the clinic where he was examined by a paramedic. He testified that he took a breathalyzer examination, that he walked a straight line, and had his pupils checked. The paramedic's report stated that the Grievant's behavior was normal, that he was calm and his speech was not slurred. The report also stated that the Grievant's thinking was normal, with good recall, a logical flow of thought, and content pertinent to the conversation. The report said, however, that the Grievant's blood pressure was high, he had an elevated pulse rate, and his skin was warm and moist. The form noted that the Grievant had high blood pressure, which was being treated with unknown medicines. The form also stated that the security officer stated that "[the Grievant] was sent to the clinic by his super. L. King for Insubordination," and that the Grievant stated to the paramedic that his supervisor "wanted to move his job to another job and told him to go home." The report went on to say that the Grievant had failed the fitness to work evaluation and that Plant Protection was told to "make arrangements" apparently to get the Grievant home safely. The Grievant was first sent for a urine analysis, and then sent home.

The Grievant's urine analysis tested positive for cocaine metabolite. The Company's Medical Department received the results of the test on August 13, 1998.

Dr. DeMichael made a determination on August 13 that the Grievant had been under the influence of cocaine on August 10, 1998. Dr. DeMichael had not seen the Grievant on the 10th, and based his decision on several documents and factors: the positive urine test, the patient assessment form filled out by the paramedic, and evidence of the Grievant's behavior on the date in question, as described in the paramedic's report. Dr. DeMichael stated that since the Grievant's discharge, the doctor has learned that the Grievant's conduct was not really out of the ordinary, that incidents like this "happen all the time" on the shop floor. He stated that if he had had the assessment to do over again, he would not have concluded that the Grievant's behavior was "maladaptive," without at least speaking to the supervisor about the insubordination incident. He also testified that if he had spoken with the supervisor, he probably would have concluded that the Grievant's comments demonstrated the type of "hypersensitivity" or "hypervigilance" common among people in the acute stages of cocaine use.

According to Dr. DeMichael, there is no correlation between the amount of cocaine metabolite in the urine and the amount in the blood stream. In addition, he testified that the amount detected here, while very small, does not indicate how much cocaine the Grievant took, or when. He also testified that he considered the Grievant's high blood pressure, but concluded that it probably did not explain his blood pressure on that day, because it should have been controlled by his medication. The Grievant testified that he does not always take his medication. In response to a question, Dr. DeMichael acknowledged that stress can raise

blood pressure, even if the employee were taking medication. He testified that the combination of physical symptoms, combined with the Grievant's behavior, led him to conclude that the Grievant was under the influence of cocaine.

The Grievant acknowledged that he had ingested a small amount of cocaine on the Saturday night prior to the Monday in question. He testified that he had done cocaine only three times in his life. He acknowledged that during the investigation he stated that he had ingested the cocaine one month prior to his discharge, and claimed that he forgot the incident several days earlier. He also testified that he knows that he should have followed the supervisor's order, and he is not contesting the discipline for insubordination.

Mr. B. Santana testified that he saw the Grievant right after the Grievant had been told he was being sent home, while the Grievant was looking for the Griever. He testified that the Grievant appeared angry and frustrated by his inability to communicate with Mr. King. The Grievant speaks English with some difficulty and used an interpreter at the hearing. Mr. Krumrie, another Crane Operator in the department, testified that it is the practice for the No. 13 crane to service the saws and the No. 12 crane to load the trucks.

Mr. Dunlap, the Union Griever, testified that he talked to Mr. King after the incident and that Mr. King told him that he sent the Grievant to the clinic because the Grievant had mentioned his high blood pressure problem, and Mr. King was concerned about that. This testimony was also given by Mr. Wagner, the Grievance Committeeman, concerning his post-incident conversation with Mr. King. Mr. Wagner testified that when an employee is sick and sent to the clinic, he usually does not undergo a fitness to work evaluation. Mr. King testified that he does not send employees for fitness to work evaluations when they complain of being sick.

Mr. R. Cayia, Manager, Labor Relations, testified that employees found under the influence of drugs at work are routinely discharged on a first offense, unlike employees found under the influence of alcohol. He testified that the Company treats the two offenses differently in part because drugs are illegal and because it is easier to detect alcohol than drugs. In addition, he testified that there is no difference in treatment between employees caught in possession or use of drugs at work, and those caught under the influence. While the Company may permit an employee to return to work on a Last Chance Agreement, following a violation of this rule, that determination is made on a case-by-case basis, depending upon the employee's length of service, prior record, the severity of the incident, and the employee's demonstrated efforts to address an addictive problem.

Mr. Mezo, former President of the Local, testified that although the Company at one time did treat alcohol and drugs differently, Inland Aw. 788 altered that difference by reasoning that the two should be treated the same. The Company objected strenuously to the introduction of the award in this hearing because of language in the award stating that the award was limited to the facts in the case. Mr. Mezo acknowledged on cross-examination that employees have routinely been discharged when the Company concludes that they have been under the influence of drugs, even after Inland Award 788. He stated, however, that not all of those discharges have been upheld. He also stated that some employees who test positive have not been discharged, because the Company has determined that they were not under the influence of drugs.

At the hearing, the Union presented testimony that the Union had requested the results of the GC/MS confirmatory test for the drug screen, but the Company refused to provide it. The Company replied that it does not routinely ask for such information from the testing lab.

THE COMPANY'S POSITION:

The Company argues that it has met its burden that the Grievant was under the influence of cocaine. According to the Company, it would have taken more than an order to perform a specific job to transform the Grievant from the low-key employee he normally was to the agitated person he was on August 10th. The Company argues that cocaine was the factor which made the Grievant act as he did. The use of cocaine is the common denominator which explains the Grievant's behavior and his physical symptoms, the Company argues.

The Company also argues that discharge is the appropriate penalty for employees found under the influence at work. According to the Company, arbitrators at Inland Steel have consistently upheld the right to discharge employees found to be under the influence of drugs on a first offense. In addition, there is no distinction in how the Company treats employees found to be in possession or use of the drugs at work, as opposed to being found under the influence: all three result in immediate discharge. In addition, the Company urges that employees found to be under the influence of drugs at work deserve to be discharged, regardless of their post-discharge conduct. Here, however, the Company notes that the Grievant did not even engage in post-discharge rehabilitation.

THE UNION'S POSITION:

The Union contends that the Company discharged the Grievant under the flimsiest diagnosis of being under the influence. The Union argues that the Company has the burden of proof, and that that burden should be higher in this case, if discharge results from a first offense of the rule.
The Union contests the Company's argument that the only conclusion which can be reached from the facts of the case is that the Grievant was under the influence of cocaine. The Grievant's behavior should not be judged by a different standard than someone like Mr. Feliciano, just because the Grievant is normally more cooperative than the other employee.
The Grievant made a mistake, the Union acknowledges, and should not have refused to perform the job. However, that action should not be enough to send an employee to the clinic for a fitness to work evaluation. At the clinic the paramedic, who did not testify at the hearing, found nothing that could not be explained by some reason other than cocaine intoxication. The Union particularly relies upon the doctor's testimony that he would not conduct his investigation the same way again.
The Union also objects to the fact that the Company refused to provide the GC/MS screen to the Union, as the Union requested. The Union argues that the grievance should be sustained on this basis alone.
The Union also disputes the Company's contention that arbitrators have consistently upheld the Company's right to discharge employees on a first offense of being under the influence of drugs. The Union points particularly to Inland Award 788, which, although limited to its own facts, clearly states that alcohol and drugs should be treated the same way.
OPINION:
The Grievant was discharged primarily for being under the influence of drugs at work. The Union argues that there is not sufficient evidence that the Grievant was under the influence, and even if he were, discharge was too severe a penalty.
At the outset, it is important to note that the Company did not base its decision that the Grievant was under the influence of drugs solely upon the positive drug screen. The judgment that he was under the influence was made by the Company's Medical Director several days after the incident, and he stated that he based his decision on several factors, including reports of the Grievant's behavior and physical symptoms. Dr. DeMichael stated that the drug screen itself did not indicate how much cocaine the Grievant ingested, when he did so, how much remained in his blood at the time of the test, or what effect it would have on him. The test results indicated only that at some point before the test was taken the employee had ingested some amount of cocaine.<FN 1>
Dr. DeMichael did not examine the Grievant on the day in question. Before reaching his decision on August 13 that the Grievant was under the influence of cocaine several days earlier he did not talk to the Grievant, to his supervisor or to the paramedic who examined the Grievant. Thus, his decision was made solely on the basis of the written documentation provided to him. The evidence indicates that he based his decision upon the paramedic's written report and the positive drug screen.
The evidence indicates that the Medical Director considered two primary factors in the paramedic's report in reaching his conclusion that the Grievant had been under the influence of cocaine on August 10th: the notations regarding insubordination and the Grievant's physical symptoms. Dr. DeMichael stated that in making such a decision, evidence of maladaptive behavior on the job was one factor which led him to conclude that the Grievant was under the influence of cocaine on that day. There was little written on the paramedic's form about the incident which caused the Grievant to be sent to the clinic. The doctor stated that he would not reach the same conclusion today regarding maladaptive behavior based solely upon the notations on the form. His testimony that had he known all the facts, he would have drawn the same conclusion is not persuasive either. I cannot see how he could have concluded, without more knowledge of the Grievant, that his comments exhibited behavior which was "hypersensitive," "hypervigilant," or "maladaptive," and therefore indicative of the acute stages of cocaine use. The conclusion that the Grievant's comments were disjointed or not related to what was going on at the moment was contradicted by the paramedic's assessment of the Grievant's speech and thought processes. Moreover, the Grievant's comments were not so out of the ordinary for an employee who feels he has just been treated very unfairly, and who has high blood pressure.
As for the Grievant's physical symptoms, the doctor concluded that the Grievant's elevated blood pressure resulted from cocaine use, rather than from other causes. It is not clear why the doctor ruled out the Grievant's pre-existing high blood pressure condition, or the effects of stress, as explanations for these symptoms. Even if the doctor made the (not unreasonable) assumption that the Grievant's hypertension was being treated, he stated that even medically-treated blood pressure could rise during a stressful incident. Perhaps he did not know enough about the situation to understand that the Grievant probably was

undergoing significant stress at that moment. At any rate, all three of the physical conditions relied upon by the doctor could have been affected by stress, and there clearly was evidence the Grievant was upset and feeling stressed in the half hour before the paramedic's examination.

The doctor's conclusions form the basis of the Company's determination that the Grievant was under the influence of cocaine on August 10th. The facts relied upon by the doctor to determine after the fact that the Grievant had been under the influence of cocaine on August 10 do not support the conclusion of cocaine intoxication with sufficient certainty. The Company has not established that the Grievant was under the influence of a drug at work on that date, and therefore in violation of the rule.

Having reached this conclusion, there is no need to examine whether the Company violated just cause by discharging the Grievant for a first offense of the rule against being under the influence of drugs in the plant.<FN 2> Nor is there any need to examine any post-discharge rehabilitation or the lack thereof.

Nevertheless, the Grievant did admit to ingesting cocaine on a number of occasions. Given its highly addictive nature, the danger of an employee coming to work under its influence, and the evidence submitted at the hearing that the Grievant has had attendance problems in the past, the Grievant's reinstatement will be conditioned upon his setting up a meeting with the EAP for an assessment of whether he does have a drug or other problem. The Grievant must comply with any recommendations of the EAP. In addition, he will be assessed ten (10) days' suspension for the insubordination.

AWARD:

The grievance is sustained in part. The discharge is reduced to a ten-day suspension, and the Grievant is to be made whole for all time lost, except for the suspension period. The Grievant is to contact the EAP for an assessment and comply with the recommendations of the program.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof

Labor Arbitrator

Dated this 18th day of December, 1998.

Approved by Umpire Terry A. Bethel.

<FN 1>Of course, for the cocaine to show up at all in the Grievant's urine, he probably ingested it within a number days, rather than weeks before the test, as he originally claimed.

<FN 2>The parties presented facts and arguments in this case on this issue with much more detail than were presented to this Arbitrator in the hearing leading to Award 951, where the issue also was addressed. This question is not at issue here and therefore this is not a proper point in time to revisit it. The Parties may, of course, raise the same arguments in an appropriate case.