ARBITRATOR'S AWARD

In the Matter of the Arbitration
Between

International Steel Group,
Riverdale, Illinois

and

An individual grievant, represented by the
United Steelworkers of America, AFL-CIO-CLC, District 7, Sub-District 5, Local 9481

David A. Dilts
Arbitrator

June 17, 2004

APPEARANCES:

For the Company:	Carl H. Hellerstedt, Attorney Kenneth E. Knaga, Human Resources Manager William Pagorek, BOF Maintenance Manager
For the Union:	Rick Bucher, Staff Representative Mike Millsap, Sub-District Director David Banks, Clinical Case Manager, Ingalls Hospital Gary Bender, Local Union President Robert Common, Grievant

Hearings in the above captioned matter were conducted at the Radisson Hotel in Riverdale, Illinois, on Wednesday, June 16, 2004. The parties stipulated that this matter is properly before this Arbitrator pursuant to Article Five of their 2002 Collective Bargaining Agreement. The record in this matter was closed upon completion of the hearings in this matter on June 16, 2004.

ISSUE

Was Robert Common, here in the grievant, discharged for just cause pursuant to the requirements of the parties' 2002 Collective Bargaining Agreement and Company's policies? If not, what shall be the remedy?

BACKGROUND

The facts in this matter are not in substantial dispute. In fact, the parties stipulated the following facts:

1. The grievant reported for work on September 18, 2003.
2. The Company, requested, and the grievant consented to an alcohol breathalyzer test.
3. The Union did not challenge whether the Company had reasonable cause to request the breathalyzer test.
4. The grievant tested .087 at 8:44 a.m. on September 18, 2003.
5. The Union did not challenge the accuracy of the test results.

The grievant was suspended on September 18, 2003, and the suspension was subsequently converted to discharge. The Union filed a timely step one grievance which was denied, as were subsequent appeals through the parties' negotiated grievance procedure.

The record of evidence shows that on September 17, 2003 the grievant consumed significant quantities of beer. The grievant claims that at approximately 9:30 p.m. on September 18, 2003 he stopped drinking. The grievant claims that September 18, 2003 was his regularly scheduled day-off, and that he received a call from his Employer on his answering machine. He presumed that he had been called-in to work on September 18, 2003 and reported for work. No evidence was adduced that the grievant consumed, or possessed alcohol on Company property and time, what this record shows is that the grievant reported for work with a blood alcohol percentage which exceeded the legal limit for the operation of an automobile in the State of Illinois.

The Company promulgated rules proscribing reporting to work under the influence of alcohol, and the use or possession of such materials on Company property, to wit (Company exhibit 2):

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Employees are forbidden to report for work or come onto Company property

under the influence of alcohol, hallucinogens or narcotics. An employee who violates this rule will be subject to discipline. Employees who bring or use alcohol, hallucinogens, narcotics or inhalants on Company property are subject to immediate suspension and discharge. **Company property includes all company parking lots.**

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Company exhibit 3, International Steel Group, Drug and Alcohol Free Workplace Policy describes processes and procedures for drug testing. Company exhibit 3 also states, on page 2, "Any employee who refuses to participate in this mandatory screening or who tests positive for alcohol or a controlled substance will be subject to immediate suspension and discharge (in accordance with the terms of any applicable labor agreement).

Company exhibit 2, the Rules, is dated December 12, 2002; and the International Steel Group, Drug and Alcohol Free Workplace Policy (Company exhibit 3) is dated October 1, 2002. It is clear that Company exhibit 2 was promulgated after Company exhibit 3.

The Union objected to the admission of these rules into the record of these proceeding, contending that these rules violate the requirements of Article Three, Section G of the parties' 2002 Collective Bargaining Agreement (Joint exhibit 1); and, that this "zero tolerance" policy as applied by the Company is unreasonable.

The Company contends that a zero tolerance policy is necessary to the operation of its facility due to the fact that it is a "supervision lean" operation. To permit alcohol abuse to effect the workplace is intolerable to the Company's operating philosophy.

The statement of the Union's grievance protesting this grievant's discharge, states, in pertinent part (Joint exhibit 2):

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Statement of the Grievance: Mr. Common was sent home after failing breathalyser test.

Union's Understanding of the Facts: Mr. Common was at a Funeral & Repass the day before & consummed [sic] alcohol most of the afternoon & evening.

Union's position and reasons therefore: If Mr. Common really understands his

problem, we hope that ISG would show compassion & retain him as an employee.

Remedy Requested: Retain Mr. Common as a probational [sic] employee.

The parties stipulated that this issue was ripe for arbitration. Pursuant to the parties' arbitration procedures and rules, the Arbitrator was notified that a summary award must be transmitted to the parties within 48 hours of the close of the hearings in this matter. Therefore the award is to be transmitted no later than 1:30 p.m. on June 18, 2004.

ARBITRATOR'S OPINION

If the Arbitrator gave weight only to the October 1, 2002 document, then it is clear that the Company intends to suspend and discharge when an employee is found to be under the influence of alcohol. However, the Company promulgated another document more than two months later, which provides for a variation in penalties for alcohol and drug offenses. Had the Company not intended to create a potential for variation in the penalties for alcohol and drug offenses, then the rules promulgated in December of 2002 would have been reasonably expected to have contained the same language as is found in the Drug and Alcohol Policy concerning suspension and discharge promulgated in October of 2002. It is therefore this Arbitrator's considered opinion that the differentiation found in the "Rules," Company exhibit 2 is what the current and proper understanding is that was communicated to the work force, the Union and this Arbitrator.[1] [2]

The record clearly demonstrates that the grievant violated the Company's rules concerning intoxication. The rule is clear, and unambiguous, in this Arbitrator's considered opinion. The rule contained in Company exhibit 2 consists of two specific requirements, and warns of two penalties. In the first case, employees ***are forbidden to*** report for work ***under the***

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[1] Elkouri and Elkouri, *How Arbitration Works, fifth edition,* Washington, D.C.: Bureau of National Affairs, Inc., 1997, Chapter 9 discusses, in general, the role of language in communicating the contract to the parties, workers and arbitrators.

[2] Further supporting this view is the language found in the March 23, 2004 letter entered into this record as Joint exhibit 4, to wit: . . . *If an Employee is determined to be impaired at work, the Employee may be subject* <u>*to discipline up to and including discharge.*</u> [emphasis added] Clearly this language is permissive of discharge, and not obligatory – consistent with the "Rules" of December 2003 and in contravention to the Drug and Alcohol Policy of October 2003.

influence of ***alcohol . . . . An employee who violates this rule will be subject to discipline.*** There is simply nothing in this proscription that is, on its face, unreasonable or, in this Arbitrator's opinion contravenes any provision of the Collective Bargaining Agreement. Of course the reasonable of any such policy is case specific, and in this matter, under these circumstances, with the aggrieved application, the rule is reasonable. The second substantive proscription in this part of the Company's rules concerns "Employees who bring or use alcohol, hallucinogens, narcotics or inhalants on Company property are subject to immediate suspension and discharge."

In this Arbitrator's considered opinion had the Company intended the penalties for each listed offense to be the same, then the language concerning the penalties assessed would have been identical. The parties' permitted the Company to promulgate rules (Management Rights, Article Five, Section J, p. 76 of Joint exhibit 1). It is also axiomatic in arbitration that where the author of the language in question is identified, errors, or ambiguities in that language must be construed against the author in disputes such as this.[3]

The Contract (Joint exhibit 1, p. 32, Article Three, Section G) speaks to alcohol and drug abuse being a "treatable medical condition."[4] In this Arbitrator's considered opinion the language of the parties' Agreement recognizes that corrective action is appropriate for alcoholism or drug addiction. This contract language, read in conjunction with the "Rules" of December 2002 convinces this Arbitrator that a progression of discipline is proper under these facts and circumstances. Therefore discharge is not appropriate without a showing of possession or use on Company property. In this case the use was the day before, and the grievant simply reported impaired.

It is therefore this Arbitrator's considered opinion that the grievance must be sustained based on this record of evidence.

Other Matters Raised at Hearing

As a practical matter the records of Acme Steel are not available to management at ISG and as a matter of policy are not considered by management at ISG (Union exhibit 3) and is therefore not material in resolving this dispute. Therefore, the issue of the grievant's prior disciplinary record is moot. The fact that the grievant was hired by ISG also mitigates against consideration of the grievant's record at Acme, particularly where there are no records available to determine their weight and credibility. The testimony offered by the respective parties, while

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[3] Elkouri and Elkouri, pp. 484-85.

[4] Elkouri and Elkouri cites Arbitrator McCoy's celebrated decision in Huntington Chair Corp., 24 LA 490 *et seq.* in which he identifies offenses so serious as to warrant discharge for the first offense, and those for which progressive discipline may be required.

given in good-faith, and honestly, is simply inadequate as proof in these proceedings and cannot be given weight.

The length of the grievant's service at Acme is not something that gains a bank of good will for him with this successor employer. The length of that service is therefore, in this Arbitrator's considered opinion, not a mitigating factor in this case.

The issue of EAP raised by the Union is also not material in the interpretation and application of the clear language of the Drug and Alcohol Policy (Company exhibit 3) and the "Rules" (Company exhibit 2). Even so, the record shows the grievant did seek assistance – apart and separately from the EAP provided for by the parties' Collective Bargaining Agreement, and the record shows he has admitted he is an alcoholic and is meeting with success in his treatment program. This evidence is appropriate for consideration in determining whether grievant is fit to return to duty with the Company.

Remedy

The Company has made clear to its work force that business as usual will not be tolerated if that includes the use of drugs or alcohol effecting the work environment. Such intolerance is clearly in the interest of best business practices, health and safety, and just plain common sense. Nothing in this award is to be construed as limiting the Company's application of its Rules (December 2002) in circumstances other than those specifically raised here.

The grievant's post-discharge conduct is consistent with the requirements of being drug and alcohol free while at work (Company exhibits 2 and 3). Without a clear and credible record of treatment of his alcoholism, then a return to work order would not be issued by this Arbitrator. Further, without clear evidence of continued treatment of the grievant's alcoholism and a clear demonstration of his commitment to remain alcohol free, no return to work order would be issued by this Arbitrator. These matters are prerequisite to a remedy salvaging the grievant's career with ISG.

Pursuant to the "Rules" the grievant is subject to discipline, and that discipline must be corrective and not extinction under these facts and circumstances. Discipline could have been avoided if the grievant had voluntarily entered an alcohol treatment program prior to a violation of Company Rules. If such an intent was in evidence the Union's complaints about the slow establishment of EAP may have been given weight here, but no such evidence was adduced at hearing.

Reporting for work under the influence is a serious matter and deserving of a long suspension. It is therefore ordered that:

1. The grievant be returned to the position from which he was discharged, but without back pay

or benefits. The grievant, however, shall not lose seniority for the period he was suspended.

2. The discharge be converted to a long suspension for time served – recognizing that alcoholism is a medical condition, and that recovery requires a period of time. Further, the suspension is in addition to that recovery time (which is spoken to in the Collective Bargaining Agreement, "Rules" and Drug and Alcohol Policy if a person voluntarily identified his need for help before discipline becomes necessary).

3. The grievant shall be on probation for a period of one year, during which time any drug or alcohol offense shall be cause for his dismissal from employment at ISG.

AWARD

The grievance is sustained. The grievant is ordered reinstated, but without back pay or benefits, but without loss of seniority. As a condition of reinstatement, the grievant shall be on a one year probationary period (beginning on June 17, 2004), during which any drug or alcohol related offense shall result in his discharge pursuit to the parties' Collective Bargaining Agreement and the Employer's Rules and Regulations.

The Arbitrator shall retain jurisdiction to resolve any conflict arising from the interpretation and application of this award and its remedy with this specific grievant.

At Fort Wayne, Indiana
June 17, 2004:

David A. Dilts
Arbitrator