Award No. 864
In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America,
Local No. 1010.
Grievance No. 20-T-122
Appeal No. 1475
Arbitrator: Jeanne M. Vonhof
October 27, 1992
REGULAR ARBITRATION
INTRODUCTION
The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Thursday, September 24, 1992 at the Company's offices in East Chicago, Indiana. The Company and the Union filed pre-hearing briefs in the case.
APPEARANCES
UNION
Advocate for the Union:
J. Robinson, Chairman, Grievance Committee
Witnesses:
D. Luce, Grievant
P. Nomanson, Construction Electrician, non-employee
R. Ashburn, Pipefitter Welder
L. Arnold, Hotel Waitress, non-employee
J. Cadwalder, Vice Chairman, Union Alcohol & Drug Committee
D. Lutes, Jr., Secretary, Grievance Committee
Also Present:
M. Beckman, Steward
T. Steagall, Grievance Committeeman
COMPANY
Advocate for the Company:
B. Smith, Senior Project Representative, Union Relations
Witness:
A. Verduzco, Section Manager, Shop Services Department
Also present:
W. Peterson, Project Representative, Union Relations
RELEVANT CONTRACT PROVISIONS AND RULES OF CONDUCT:
CONTRACT
ARTICLE 3
PLANT MANAGEMENT
Section 1. Except as limited by the provisions of the Agreement, the Management of the plant and the direction of the working forces, including the right to direct, plan and control plant operations, to hire, recall, transfer, promote, demote, suspend for cause, discipline and discharge employees for cause, . . . and to manage the properties in the traditional manner are vested exclusively in the Company. . . .
ARTICLE 14
SAFETY AND HEALTH
Section 8. Alcoholism and drug abuse are recognized by the parties to be treatable conditions. Without detracting from the existing rights and obligations of the parties recognized in the other provisions of this Agreement, the Company and the Union agree to cooperate at the plant level in encouraging employees afflicted with alcoholism or drug abuse to undergo a coordinated program directed to the objective of their rehabilitation.
RULES OF CONDUCT:
132. The following offenses are among those which may be cause for discipline, up to and including suspension preliminary to discharge:

e. Any employee suspected of being under the influence of intoxicating beverages may be required to submit to a breathalyzer test to determine their fitness to work. Any employee failing to submit to such test will be considered to be under the influence of intoxicating beverages.
o. Entering or leaving the Plant without compliance with Plant rules.
q. Insubordination (refusal or failure to perform work assigned or to comply with instructions of supervisory forces).
BACKGROUND:
The Parties have stipulated to the facts concerning the incident which gave rise to this discharge. On May 19, 1992 the Grievant was scheduled to work the midnight turn. He arrived at the plant at approximately 11:00 p.m. and one of two hourly supervisors on duty told the Grievant that he smelled alcohol on the Grievant's breath. This supervisor directed the Grievant to go to the Inland Clinic for a fitness to work evaluation. The Grievant stated that he would rather go home.
The supervisor refused the Grievant's request to go home and directed him to wait outside the office for a Plant Protection escort to the Clinic. Instead the Grievant left, after telling the supervisor again that he desired to go home. When the supervisor realized the Grievant was gone he notified Plant Protection to stop the Grievant and take him to the clinic.
The Plant Protection officer found the Grievant in the parking lot and asked him whether he was the employee who was supposed to go for a fitness to work evaluation. The Grievant responded that he preferred to go home; then he drove away. The Grievant acknowledges that he had approximately five (5) beers at a birthday party between 9:00 and 10:30 p.m. on the night in question.
On the following day the Grievant was suspended preliminary to discharge for violating the following Company rules:
1. Rule 132(e), which requires employees to submit to a breathalyzer exam to determine fitness for duty if they are suspected of being under the influence of alcohol.
2. Rule 132(o), which prohibits entering or leaving the plant without complying with plant rules.
3. Rule 132(q), which prohibits insubordination. The Grievant was discharged for violating these rules and on the basis of his past record.
The Grievant's record indicates that in July, 1988 he was suspended subject to discharge. On December 7, 1988 the Grievant, his Union representative and a Company representative signed a Last Chance Agreement (LCA). The LCA required the Grievant to develop a personal action plan to alleviate his excessive absenteeism and sleeping on the job and to meet periodically with his supervisor to discuss his progress.
The LCA also called for the Grievant to contact the Company's clinic Counselor J. Bean and to enroll in the Inland Program for Problem Drinkers and Substance Abuse. The Grievant testified at the arbitration hearing that he went through the entire treatment program, but because he believed he did not have a problem with drinking, he did not stop drinking and did not really apply the principles of the program. According to the testimony of his supervisor, Mr. A. Verduzco, the Grievant was absent for several weeks in 1989 and this would have constituted a clear violation of his LCA. However, the Company decided that there were extenuating circumstances regarding his absences, and therefore agreed to modify and extend his original LCA. The Company refers to this as a second Last Chance Agreement, and the Union refers to it as a modification of the first. It was signed on March 6, 1990 and continued essentially the same terms as the original LCA except that the Grievant was required only to continue participating in Inland's Program for Problem Drinkers and was not required to go through the initial treatment program again. The terms of the LCA specifically applied for twelve (12) months.
The Grievant acknowledged at the arbitration hearing that he did not stop drinking, but that he changed his drinking pattern so that he could better meet the responsibilities of his job. The Parties disagree about whether his efforts led to an improved attendance record.
At several record reviews held since the LCA's were entered into, the Grievant was asked by management whether he had a drinking problem. He consistently denied that he did, although he stated that he was participating in various alcohol and stress treatment programs.
The Grievant and his witnesses presented evidence at the arbitration hearing that since his discharge the Grievant finally has accepted that he has a serious drinking problem. He has joined Alcoholics Anonymous and testified that he has attended meetings five or six days per week for the past four months, since his discharge. He testified that he has totally changed his life and habits in order to avoid taking even one drink. The Grievant presented several witnesses to support this testimony.

The Union filed a grievance over the Grievant's discharge. The Parties were unable to resolve the dispute and it proceeded to this forum for final resolution.

THE COMPANY'S POSITION:

The Company contends that the grievance should be denied, for the following reasons. The Company contends first that the Grievant's actions on May 19, 1992 are not in dispute and constitute grounds standing alone for his discharge. According to the Company, when the Grievant refused to follow the supervisor's orders to go to the Clinic for a breathalyzer exam, he violated the Company's rules which require an employee to submit to such an exam, as well as the rule against insubordination.

The Company emphasizes the extreme safety hazards in a steel mill created by an intoxicated employee, who endangers not only his own safety but the safety of those around him. The Company contends that it cannot permit an intoxicated employee to work, and therefore cannot tolerate conduct which would thwart its efforts to determine if an employee is intoxicated or under the influence.

In support of its position the Company cites Award 849, in which the Arbitrator ruled that the Company did not act improperly when it discharged an employee who refused to allow the Company to search his car for a gun. Working intoxicated is like a loaded gun, the Company asserts, and is as serious as possession of a gun on Company property.

Secondly, the Company asserts that the Grievant's overall work record supports his discharge. According to the Company, the Grievant's work record indicates many instances of violating the Company's rules with regard to absenteeism. The Company contends that the Grievant's absenteeism problems continued even after the Company extended great leniency towards him. The Company asserts that the Grievant's record cannot be construed as that of an employee with a serious intention to reform. In addition, the Company argues that the most recent incident involving the Grievant relates to his alcohol addiction, as do the earlier instances of excessive absenteeism.

Third, the Company contends that the Arbitrator should not rely upon the Grievant's post-discharge conduct to modify the discharge. The Company argues that the discharge action should be judged only with reference to the facts which were available to the Company at the time of the discharge. By considering post-discharge conduct the Arbitrator would undermine the deterrent value of the disciplinary procedures as well as the employee assistance program, the Company argues.

In addition, the Company points out that it is difficult to determine whether an employee who enters treatment in this situation is engaging in lasting reform. According to the Company the last four to five years are a better indicator of the Grievant's future conduct than the last four to five months.

The Company asserts that there is a limit to its obligations to employees who have substance abuse problems. Here the Company gave the Grievant two last chances when he was faced with discharge, and the Grievant did not improve, the Company argues. The Company argues that it has no reason to believe that the Grievant is more likely to exert control over his worklife now than previously.

For all of the above reasons the Company contends that the grievance should be denied. If the Grievant were to be reinstated, the Company urges, it may only be done under extremely strict conditions of reemployment.

THE UNION'S POSITION:

The Union contends that the grievance should be sustained and the discharge overturned. The Union argues that the Grievant was discharged for two separate offenses -- the rule violations which occurred on May 19, 1992 and his past record of absenteeism. The Grievant was not fired for violating his Last Chance Agreement, the Union asserts. The Union notes that there would be no discharge if it had not been for the May 19th incident. According to the Union, the Grievant's absenteeism record has shown improvement and is not as bad as that of other employees disciplined for serious absenteeism problems.

As for the culminating incident, the Union notes that this is the only instance in which the Grievant has reported to work under the influence of alcohol. The Union contends that in the past the Company has not discharged an employee for a first offense of reporting to work under the influence.

The Union also disputes the Company's argument that the Grievant's actions in refusing to take the breathalyzer test and leaving the premises so compound the offense of being under the influence that the discharge is warranted. The Union does not dispute that the Grievant cannot escape the consequences of violating the rule against refusing to take a breathalyzer, but argues that those consequences are only that the Grievant is viewed as having been under the influence at the time.

According to the Union, the Grievant's violation of these rules must be viewed in light of the underlying issue of reporting for work under the influence of alcohol. The Union distinguishes this case from Award

849, in that the Grievant in that case was attempting to thwart the application of an underlying rule prohibiting possession of a gun, which could result in discharge on a first offense.
The Union also contends that the arbitration awards cited by the Company involve cases in which an employee had been given another chance after repeated instances of reporting to work under the influence of alcohol, and still was unable to conform to reasonable work standards. In the instant case the Grievant does not have such a history.
In addition, the Union contends that the evidence demonstrates a difference in the Grievant's attitude this time in regards to his treatment than he had at earlier stages. Because alcoholism treatment programs only work for those who accept them, the Union asserts, the persuasive evidence of the Grievant's acceptance of the program after his discharge indicate that he is much more likely to be able to control his drinking now than he has been in the past.
The Union disputes the Company's argument that the Arbitrator should not consider any post-discharge conduct. The Union argues that the Company has introduced no arbitration awards supporting its position which were decided since the Parties included in their agreement the language of Article 14, Section 8, which states that the Parties will treat alcoholism and drug abuse as treatable offenses.
According to the Union, nearly all of the arbitrators used by the Parties since that time have ruled that post-discharge rehabilitative efforts are relevant. Arbitration awards between the Company and the Union are expected to establish precedent, the Union asserts, and the Parties do not contemplate that an arbitrator will ignore such precedent.
Therefore, the Union contends, evidence of rehabilitation is admissible and relevant, in order to determine whether the Grievant's condition is being successfully treated. The same evidence would be relevant, for example, if the Grievant had a severe case of diabetes.
For all of the above reasons the Union argues that the grievance should be sustained, and the discharge overturned.
OPINION
This is a case involving the discharge of the Grievant for problems related to alcohol abuse. Unlike most discharge cases, there is no real dispute over the facts in this case. The Grievant had been employed by the Company for about fifteen years at the time of his discharge. On May 19, 1992 he came to work around 11:00 p.m. for the midnight turn and was immediately ordered to go to the Inland Clinic for a breathalyzer test as part of a fitness to work evaluation, because a supervisor smelled alcohol on his breath. The Grievant refused, stating that he would prefer to go home instead. He was ordered several more times to go to the Clinic and he kept repeating that he wanted to go home instead. The Grievant left the plant and drove away.
The Grievant acknowledges that he had drunk approximately five (5) beers at a birthday party that evening, over a period from 9:00 to 10:30 p.m. The Union does not dispute any of these facts; nor does the Union dispute the conclusion that the Grievant was under the influence of alcohol when he came to work on the evening in question. The Grievant was discharged for refusing to take a breathalyzer exam, insubordination, leaving the plant improperly and on the basis of his past record.
Leaving aside the issue of the Grievant's past record for the moment, the Company asserts that the Grievant's conduct on May 19th was serious enough in itself to warrant discharge. According to the Company, coming to work under the influence of alcohol is extremely dangerous, and any efforts to thwart the Company's control over that conduct constitute very serious violations of the Company's rules.
The Grievant here did engage in insubordinate conduct in that he refused to obey a direct order of his supervisor to go to the Inland Clinic. In this case the Arbitrator views both the
Grievant's insubordination and his leaving the plant without permission as inextricably linked to his refusal to take the breathalyzer test; although the conduct may legitimately be viewed as violations of three separate Company rules, the underlying reason for the Grievant violating Rules 132 (o) and (q) was his refusal to take the test. There is no evidence that he would have violated the other two rules in the absence of an order to take the test.
The Union contends that the result the Grievant sought to avoid by refusing to take the test, i.e. being found under the influence of alcohol at work, does not typically trigger a discharge on a first offense. The Union has contended that a first offense of being found under the influence of alcohol usually generates a one, two or three-day suspension. The Company has not disputed this contention.
From this fact the Arbitrator concludes that the discharge of the Grievant solely for arriving at work under the influence of alcohol would not accord with the Company's past practice. The next question is whether

his refusal to take the test, and the other violations which flowed from this, so aggravated the situation that his discharge was proper on these grounds.

Both Parties cite Inland Award 849, (Bethel, Arb. 1991) to support their positions. In that case Umpire Bethel ruled that the grievant's discharge for refusing to allow Plant Protection to search his car was proper, when the Company had reasonable suspicion that the grievant had a gun in his car. The Company argues here that the underlying conduct is equally serious in both cases and therefore the same result should prevail.

Without minimizing the extreme danger of coming to work under the influence of intoxicants, the Arbitrator notes that the Company has not treated this offense as one which requires discharge the first time it occurs. In contrast, as Umpire Bethel's opinion makes clear, employees have been discharged for a first offense of possessing a gun on Company property. The Arbitrator concludes that this difference is significant because Umpire Bethel evaluated the seriousness of the refusal to allow the search in relation to the underlying purpose of the search.

In addition, Rule 132(e) states that an employee who refuses a breathalyzer test will be considered as being under the influence of intoxicating beverages. Therefore the language of the rule itself establishes certain consequences for failing to comply with it. In this case the Union has not challenged the presumption that the Grievant was under the influence of alcohol which was created by violating the rule.

The Arbitrator does not view this language as mandating that the only consequence of refusing to comply with a test is that the employee is considered as being under the influence. It is clear from the larger structure of Rule 132 that violating Rule 132(e) in itself can submit an employee to discipline since this rule is separate from Rule 132(d), which addresses being under the influence. However, where the rule itself includes in its language a result arising from its violation, the Arbitrator concludes that this was the main concern of the Company in promulgating the rule. It seems clear that in establishing the rule requiring testing the Company was primarily concerned with having a more reliable way to determine if an employee is under the influence.

In addition, the rule requires an employee to submit to a breathalyzer test in order to determine his or her fitness to work. This might be a different case if the Grievant refused a breathalyzer test and then tried to work. But by stating right away that he preferred to go home, and then leaving, the issue of the Grievant's fitness to work was resolved and the danger of his being under the influence of alcohol in the workplace was removed. In contrast, the grievant in Award 849 refused to have his car searched and then went to his car himself, thereby possibly increasing the danger of the conduct the search was intended to prevent, i.e. employees possessing or using guns on Company property.

Under these circumstances the Arbitrator cannot conclude that the Grievant's refusal to take the test so aggravated his misconduct of coming to work under the influence of alcohol that he should be discharged when he would not normally be discharged for being under the influence alone. The Arbitrator does not mean to suggest that the refusal to take the test was justified, or that the supervisor applied the rule unreasonably, under the circumstances present here. The Arbitrator's only conclusion is that the Grievant's refusal to take the test on May 19th, the presumption of being under the influence which arises from that refusal, and his leaving the plant do not, standing alone, warrant discharge, given all the other facts in this case. In reaching this conclusion the Arbitrator has considered the factors stated above, the Grievant's long tenure, the contract language treating alcoholism as a treatable offense and the fact that he had never come to work under the influence prior to this occasion.

The Company also argues, however, that the Grievant's past record, in combination with his conduct on May 19th, warrants discharge. The facts of the Grievant's record are not in dispute, although the Parties disagree as to how that record should be viewed or characterized. It is clear that during the past five years the Parties agreed on two separate occasions that the Grievant would remain employed only subject to the terms of a Last Chance Agreement. Whether the documents arising from these occasions evidence two separate LCA's or one LCA which later was modified, is immaterial. The two documents were addressed to absenteeism primarily, mentioned sleeping on the job as well, and required the Grievant initially to seek and later to continue treatment in the Company's alcohol and drug abuse program.

The Company does not dispute that the Grievant was not terminated for violating a Last Chance Agreement. However, because the Grievant was terminated partly on the basis of his past record, the Company has raised the Last Chance Agreements, and the Grievant's subsequent record, as evidence against him, and the Union does not contest the Company's right to do so.

The record indicates that, after the date of the modified or second LCA, the Grievant had four absences in 1990, eight in 1991, and three in 1992 until the date of his discharge in late May. This is not the kind of

absentee record which normally triggers a discharge. The Company's witness suggested that the record was not acceptable for someone under a Last Chance Agreement, even if it might be acceptable for an ordinary employee. The Arbitrator has not been provided with evidence concerning average absences or even the number of the Grievant's absences prior to the latter half of 1989. However, the Arbitrator notes that the Grievant's attendance record clearly improved in 1990 and although there was some backsliding in 1991, that year's record suggests improvement over 1989. Most importantly, even for an employee covered by a Last Chance Agreement, the Grievant's attendance record was not so poor as to trigger discharge before the incident of coming to work under the influence of alcohol.

Technically the LCA addressed a different disciplinary problem, attendance, than the incident which occurred on May 19th. The Company argues, however, that the two types of conduct should be analyzed together because both were caused by the Grievant's alcoholism and his failure to address it.

Although one of the conditions of the LCA's in 1988 and in 1989 was that the Grievant seek help with alcoholism, he testified that he did not really accept that he had an alcohol problem until after his discharge. The other documents in the case bear this out. As late as his record review of August 12, 1991 the Grievant was denying that he had an alcohol problem, although he also stated that he was receiving stress counseling and trying to involve himself in healthy activities so as to avoid the temptation to drink.

Whether or not the Grievant actually did seek such help, it is clear that it was not enough. There was considerable testimony that, after his discharge, the Grievant did accept that he is an alcoholic, that his alcoholism had interfered with his job and that he needed significant help in overcoming his condition. The Union put on five witnesses to testify of their knowledge of the Grievant's commitment to overcoming his alcoholism since his discharge. The evidence indicates that he joined Alcoholics Anonymous and that he attends meetings five or six nights per week. The evidence suggests that he has changed his lifestyle, habits and friends to avoid drinking, and that he recognizes that he cannot
drink at all.

The Company argued in its pre-hearing brief that post-discharge rehabilitation efforts of the Grievant are irrelevant to the issue of whether the Company's decision violated just cause at the time of the termination. However, Article 14, Section 8 of the labor agreement indicates the Parties' agreement to treat alcoholism as a treatable condition. This section of course does not abrogate the Employer's right to discipline and discharge for just cause. However, as Arbitrator McDermott stated in Inland Award No. 749, p. 12,

> (The grievant's) record is a classic example of the industrial derelictions that are caused by alcoholism. The charge is that because of alcoholism, a treatable condition, he could not be relied upon to be at work. Suppose, however, that his excessive absenteeism had been caused by diabetes or tuberculosis, other "treatable" conditions, as it well might have been. If we were dealing here with a diabetic or a tubercular employee who had been discharged for excessive absenteeism caused by his condition, who would have the temerity to refuse to listen to, and perhaps be persuaded by, medical advice that the diabetic or tubercular condition now was arrested? Thus, evidence of grievant's rehabilitation efforts after his discharge are properly here for consideration.

Other arbitrators also have considered post-discharge rehabilitation evidence in cases involving these Parties, and have consistently ruled that such evidence is admissible and relevant, since the introduction of Article 14, Section 8 into the agreement. In its closing argument the Company really acknowledged this fact, but argued that evidence of post-discharge conduct, standing alone, should not determine the outcome of this or any case.

Of course there is no way for the Arbitrator, or for anyone involved in this case, to be certain that the Grievant will remain sober and maintain a record free of excessive absenteeism or coming to work under the influence of alcohol. When an employee begins serious rehabilitation efforts only after his discharge these efforts may indicate a genuine transformation brought on by the crisis of losing his job -- or they may indicate simply an effort to try to keep that job. The Employer also has pointed out the high rate of recidivism among alcoholics, and the possibility for deception, and even self-deception, which seems to be part of the disease. In this sense alcoholism is somewhat different from diabetes or tuberculosis.

However, the Arbitrator concludes that there is persuasive evidence that the Grievant's rehabilitation efforts are sincere and extend beyond his desire merely to keep his job. He has openly acknowledged that he is an alcoholic, and that he cannot drink at all, whereas in the past he would not admit unequivocally to the Company that he was an alcoholic. Although there is no iron-clad guarantee that his current admission to being an alcoholic and his efforts will sustain him, it is clear that without this kind of recognition and commitment alcohol treatment programs seldom work. The representative from the Union's Alcohol and Drug Committee testified that the Grievant has attended even more AA meetings than the Union

Committee suggested in its plan for him. The fact that the Grievant does seem to genuinely recognize the seriousness of his drinking problem and has so changed his life indicates a good basis for recovery.

On the basis of all the evidence in this case the Arbitrator concludes that the discharge must be overturned. The Grievant's coming to work under the influence is not normally dischargeable on a first offense, and the fact that he refused to take a breathalyzer test did not so aggravate the violation as to make it dischargeable. His past record regarding absenteeism did demonstrate improvement after his modified or second Last Chance Agreement, and was not severe enough in itself to trigger a discharge. He was not discharged for violating any terms of a Last Chance Agreement. And lastly, his impressive efforts at rehabilitation, combined with more than fifteen (15) years of service with the Company, militate against discharge at this time.

The Arbitrator recognizes the danger that a decision like this could undercut the Company's commendable efforts to encourage employees to face and reverse alcoholism problems before they are discharged. Even though the contract regards alcoholism as a treatable condition there are limits to the Company's obligations to employees with that condition. The Employer is not required to retain their services indefinitely when they are unwilling or unable to address their own alcoholism problems. Even employees who, through no fault of their own, are ill with other diseases, may be terminated if they are unable to perform the job because of excessive absenteeism or other problems.

In the instant case the Arbitrator concludes that even though there were not grounds for the Grievant's discharge, there are sufficient grounds for severe discipline. The Grievant's actions on May 19th, and his refusal to seriously address his alcoholism at the earlier points at which the Company offered help suggest that the Grievant not be awarded backpay in this case, and that the period in which he has been off work since his discharge be regarded as a disciplinary suspension.

The Arbitrator also concludes that the Grievant's reinstatement should be conditioned on the following requirements. The Grievant may not come to work under the influence of alcohol. In addition, the terms of the modified LCA dated March 6, 1990 shall be extended. All of these conditions shall apply for the period of one year from the date of his reinstatement. Violation of any of these conditions may provide grounds for discharge.

AWARD

The grievance is sustained in part. The Grievant is reinstated without backpay. The period between the Grievant's discharge and his date of reinstatement is to be regarded as a disciplinary suspension. The Grievant is reinstated subject to the terms discussed above.

/s/ Jeanne M. Vonhof

Jeanne M. Vonhof, Labor Arbitrator

Acting Under Umpire Terry A. Bethel

Decided this 27th day of October, 1992.