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| **In the Matter of Arbitration Between:** | ) | |
| **Inland Steel Company** | ) | **Gr. No. 11-V-013** |
| | ) | **Appeal No. 1575** |
| **and** | ) | **Award No. 964** |
| **United Steelworkers of America Local Union No. 1010.** | ) | |

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## INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on May 21, 1999 at the Company's offices in East Chicago, Indiana.

## APPEARANCES

**UNION**

Advocate for the Union:

J. Gutierrez, 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
F. Brown, Senior Maintenance Planner, Steelmaking Dept.
R. Hughes, Contract Administrative Resource

**BACKGROUND:**

The Grievant, G. Fogle, has worked for the Company for about twenty-five (25) years. The Grievant was first discharged in 1997 for excessive absenteeism, including failures to report off (FRO's) prior to the beginning of his shift. The Parties agreed at that time that there were grounds to discharge the Grievant; nevertheless, they agreed to reinstate him under a Last Chance Agreement, signed by the Grievant and representatives of both Parties on April 2, 1998. At the time of the signing of the Agreement, it was read to the Grievant and he was given the opportunity to ask questions about it.

The Grievant returned to work and on April 18, 1998 he failed to report off. The Company discharged the Grievant again, on the grounds that he had violated his Last Chance Agreement. The case went to arbitration with the undersigned Arbitrator, the grievance was sustained in part and the Grievant was reinstated, primarily on the grounds that he was not forewarned that a single FRO could trigger discharge under his Last Chance Agreement. However, because the Arbitrator found that the Grievant's FRO was serious, especially as it was committed so soon after signing the Last Chance Agreement, the Grievant was not awarded backpay.

The Grievant was reinstated again under the terms of his original Last Chance Agreement and a record review was held with him when he returned to work on September 29, 1998. His Last Chance Agreement was reviewed with him again in detail at that time.

The Grievant was absent from work on four instances over the next several months: November 13, November 18, and December 15, 1998 and January 12, 1999. The first absence was for personal sickness and the latter three absences were for transportation problems. By letter dated February 1, 1999 the Grievant was notified that he was being suspended pending discharge for violating his Last Chance Agreement. On February 15, 1999 the suspension was converted to a discharge, on the grounds that he had violated the provision of the Last Chance Agreement which prohibited him from accruing an absenteeism rate of 5% or greater during any rolling 90-day evaluation period for a period of two (2) years from the date of his return to work.

The evidence indicates that immediately after returning to work, the Grievant worked an eight-day stint, had one day off, and worked seven more days straight. He worked five (5) double shifts in October and a few in November and December as well. He also was scheduled for nine (9) consecutive days just before Thanksgiving, but was absent on one of those days. In determining the Grievant's absentee rate, the actual number of shifts he worked was taken into consideration. He had a 6.15% absenteeism rate at the time of his discharge.

The Section Manager testified that the Grievant's schedule during this period was not unusual for an employee in the department. He testified that he has not encountered unusually high absenteeism, running this schedule. The Griever contradicted this statement, testifying that there have been

problems with absenteeism in the Department, due to the high number of hours scheduled, and the number of days scheduled consecutively without days off. There was testimony that the Parties have been engaged in negotiations over an overtime policy for the Department.

The Grievant testified that he attempted to come to work every day that he was scheduled, and accepted all the overtime the Company requested during this period. He stated that he did not understand the concept of the rolling 90-day period, and thought that after every three month period, he would get a clean slate. Although his Last Chance Agreement was explained to him, he said that the rolling ninety day period never was explained to him. On cross-examination, he stated that knowing that the ninety day period extended back from his most recent absence would not have changed his behavior, because he did not willfully miss work on any of the four days that he was absent. He also stated that he just became aware of the Attendance Improvement program several years ago, although the Company showed that he had been disciplined under the program as far back as 1988.

The Grievant testified about the circumstances of his absences. He said that on November 13, 1998 he ate dinner and became nauseous after dinner, possibly in relation to something he ate. He reported off for the turn beginning at 11:00 p.m. Five days later his sister was giving him a ride to work when her car broke down near the airport. He did not want to leave her stranded in a remote area, he said and so he solicited the help

of a friend who works at the fire station at the airport. They took his sister home and then towed her car. She submitted a letter supporting this version of the events.

The Grievant said that he then bought an older car for about $800 - $900 and paid for some preventive maintenance on it, including a tune-up, oil change and brake work on December 5, 1998, for which he presented documentation. On December 15, 1998, however, he missed work because his car stalled and broke down as he was leaving the expressway at Cline Ave. He walked to a gas station and called a friend, and eventually had the car towed. He presented a receipt from an auto repair place, showing that the car was towed from 94 and Cline Ave. and that the starter motor was replaced. The Company presented a witness who testified that the car would not have stalled from a bad starter motor. He also acknowledged, under cross examination, that it is not unusual for older cars to break down on the highway.

On January 12, 1999 the Grievant had car problems again. He was scheduled to work the 11:00 to 7:00 shift, and said he left the home of a friend in time to make it to work. He said that his car stopped and he walked to a service station and called the friend whom he had been visiting. She had left to pick up her daughter from work, and did not receive his call. She submitted a letter supporting this version of the events.

The Grievant testified that he bought the best car he could afford at the time, and had performed preventive maintenance on it to make sure that it operated properly. He stated that his

car is now in good working order and that he can return to work reliably at this time. He also testified that he has continued to attend meetings regularly in order to address the narcotics addiction which led to his excessive absenteeism. According to the Grievant, the only time he did not attend meetings regularly was the period in which he first returned to work and did not have his own car, and that he was excused from frequent attendance at that time by the Inland drug and alcohol program. He said that he is an Associate Minister and pastoral assistant at his church, conducting a nursing home and prison ministry. He submitted letters supporting his participation in a recovery program, and two character reference letters.

The Labor Relations Contract Administrator for the Department explained that the rolling ninety day period is used to calculate all employees' absenteeism rates, and the five (5) percent over ninety rolling days is standard language in Last Chance Agreements. He also testified that of ten employees who have violated similar attendance provisions in Last Chance Agreements, all ten have been suspended and discharged. Two employees were reinstated after arbitration, (one of them being the Grievant in this case), one case is still pending, and in the other seven (7) cases either there was no suspension hearing requested, or the Union dropped the case later in the grievance process.

**THE UNION'S POSITION:**

The Union argues that the Grievant did not violate the terms of the Last Chance Agreement, and therefore should not be discharged. According to the Union, under Paragraph 10 of the Agreement, absences must be for just cause. That paragraph states,

> [The Grievant] 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.

The Union argues that the Agreement does not state that the Company alone is to determine what is just cause for an absence. If the Arbitrator decides that there was just cause for even one of the absences for which the Grievant is charged, then his absenteeism rate falls below 5% and the discharge should be overturned, the Union contends.

According to the Union, the Grievant did have just cause for each of the absences, and he made an honest effort to come to work on each occasion. When he returned to work he worked many extra hours, at the Company's request, and worked different shifts during the same week. This was not an employee who was trying to shirk his attendance responsibilities, the Union urges. When people are working this kind of a schedule, higher absenteeism is likely to occur.

This is an employee who cares about himself and others, the Union urges. He has overcome his drug problem and continues in a recovery program. He is useful to his community, and a very good

employee at work. According to the Union, he should be given another chance.

**THE COMPANY'S POSITION:**

The Company contends that the role of the Arbitrator in a case like this is solely to determine whether the Grievant has or has not violated the terms of the Last Chance Agreement. If the employee is found to have violated those terms, then the Last Chance Agreement and the discharge must be upheld. To do otherwise would cause the Company to make Last Chance Agreements less available to other employees.

Here the Company argues that the evidence establishes that the Grievant's absences exceeded the 5% limit set in Paragraph 8. That paragraph states,

> Should [the Grievant], 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 provision 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.

The language of Paragraph 8 does not state that it relates only to unexcused absences, the Company notes. The paragraph permits the discharge of an employee even for excused absences. Paragraph 10 means that any time the Grievant is absent without good cause is a violation of the Last Chance Agreement. Employees working under such agreements have been discharged for violating Paragraph 10, even though they have not reached the 5% limit.

The Company argues that the Grievant has worn out the transportation excuse. His inability to find reliable transportation is inexcusable. He should have left for work earlier if he knew that he had an unreliable car.

In addition, the Company argues that the Grievant's testimony that he did not understand the ninety day rolling period is not believable. The Griever and other Union representatives understood the concept, and the Grievant's Last Chance Agreement was read to him and explained several times. He has been working under the system since 1987, and has been disciplined under it on a number of occasions. But even if he did not understand the concept, he still would have missed the days, according to his own testimony. The Company contends that there is no reason to overturn the discharge.

**OPINION:**

This is a case involving the second discharge of a long-term employee for violation of a Last Chance Agreement. There is no question that the Grievant was absent on the days in question, nor that these absences established an absentee rate of 6.15% over a rolling ninety day period. Nor is there any question that this rate is in excess of the 5% absenteeism rate which was imposed upon the Grievant in Paragraph 8 of the Last Chance Agreement.

The Union, however, relies upon Paragraph 10 of the Last Chance Agreement, which states that the Grievant's absences may

be "only for just cause." According to the Union, all of the Grievant's absences were for just cause, and he must be reinstated if the Arbitrator concludes that even one was for just cause, since one less absence would lower his absenteeism rate below 5%.

Thus the Union argues, in essence, that if the Grievant had a good reason for any of these absences, then he has not violated the Last Chance Agreement. Here the Grievant and the Union specifically agreed, after the Grievant's discharge for excessive absenteeism, that he could return to work only if he maintained an absenteeism rate under 5%. Paragraph 8 does not specifically define what type of absences may be counted towards the 5% rate.[1] Through Paragraph 10 it appears that the Parties intended to remind the Grievant of his general attendance responsibilities, and to set a minimum standard for any absences. Under Paragraph 10, the Grievant generally cannot have an absence for which he offers no justification.[2] However, the language does not suggest that Paragraph 10 modifies Paragraph 8, so that an absence for which the Grievant provides a reason, would not be counted under Paragraph 8. This is standard language under Inland's Last Chance Agreements, and employees working under these agreements

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[1] The provision does not say that only absences for which the employee has not offered a good excuse will be counted. The lack of any limiting description of the absences suggests that all absences will be counted.

[2] The paragraph also probably was included to permit the discipline and discharge of an employee for a particularly serious absence or series of absences, which do not exceed the 5% limit.

have been held to a 5% rate which included absences for which they offered excuses similar to the Grievant's. Thus, I conclude that the Parties agreed, through Paragraphs 8 and 10, that any absence must at least be for a good reason, and that even ones for which a reason has been offered will be counted under Paragraph 8, except in very unusual circumstances, not present here.

The Grievant, therefore, has violated the terms of Paragraph 8 of that Agreement, which states that if the Grievant exceeds this 5% limit, "cause will exist for his suspension preliminary to discharge." As I stated in Award 948, there are circumstances in which non-compliance with a Last Chance Agreement will not trigger discharge, but they are unusual and must be compelling. The Union argues here that the Grievant did not understand the ninety day rolling period and that he offered very good reasons for his absences.

In response to the Grievant's statement that he did not understand the rolling ninety day period, the Company presented evidence that he had been disciplined, using the same period, on a number of occasions, over a period of at least ten (10) years. The specific phrase, "rolling ninety day period" was used in both the discipline documents leading up to his original discharge, and in the Grievant's Last Chance Agreement, which was read to him paragraph by paragraph. It is a sufficiently unusual phrase that, if he did not understand it, one would expect him to ask questions about it, but he never did so.

Most importantly, the Grievant testified that he would not have acted differently, during the period prior to this most recent discharge, had he understood the rolling ninety day period correctly. Instead, he stated that all of his last four absences were beyond his control, and that he was fully willing to work on each of those days, but for the unfortunate circumstances which prevented him from doing so. Therefore, even if it is true that the Grievant did not understand the ninety day period, he has not suffered any detrimental effect in regard to this discharge from such a lack of understanding. This argument does not provide a compelling reason to overturn the discharge.

The Grievant's reasons for missing work on the four days in question here are not unlike the reasons he has offered the Company in the past. As I said in the earlier opinion in which I reinstated this Grievant, "(w)hen 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." The Grievant's behavior in the instances leading up to this discharge did not exhibit this kind of vigilance. His transportation problems offer a pattern in which, once a breakdown has occurred, the Grievant has shown a great deal of concern about the car or the car's owner, and far less concern about his own very important responsibility to get to work. If he had made it into work on even one of these four occasions, he might not be discharged today.

The Union notes that the Grievant was working a lot of double shifts and long sequences of days without a day off at the time these absences occurred. However, the evidence shows that the absences here occurred in November, December and January, but the heaviest period of scheduling the Grievant for long hours occurred in October. In addition, there is no evidence that any of the Grievant's absences were related to working long hours. Even his absence for sickness on November 13 he attributed to a food problem, rather than getting sick from working too much. The rest of the absences involved transportation problems, which he has not tied to working long hours.

On the basis of all the evidence, there is no reason for the Arbitrator to overturn the discharge of the Grievant. He violated his Last Chance Agreement, and there is no compelling reason for setting aside the discharge for which the Agreement provides, as a consequence of such a violation.

**AWARD:**

The grievance is denied.

Jeanne M. Vonhof, Labor Arbitrator

Acting under Umpire Terry A. Bethel.

Decided this 13th day of June, 1999.