IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

and AWARD 968

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the discharge of grievant Arthur Fulford. The case was tried in the Company's offices on November 16, 1999. Pat Parker represented the Company and Darrell Reed presented the case for grievant and the Union. Grievant was present throughout the hearing and testified in his own behalf. The Company contested the Union's claim that the case was properly in arbitration and asserted that I am without jurisdiction to consider this case on the merits. I will discuss that issue below. The parties submitted the case on final argument.

Appearances

For the Company:

P. Parker.....Section Mgr., Arbitration and Advocacy
J. Spear.....Staff Rep., Union Relations
D. Perez.....Area Mgr., Human Resources
E. Arnold.....Section Mgr., Utilities Dept.

For the Union:

D. Reed.....Secretary, Grievance Committee
L. Aguilar.....Vice President, Grievance Comm.
A. Fulford.....Grievant
Alex Fulford....Witness
M. Johnson.....Assistant Griever

Background

As noted above, the Company raises a procedural issue. In particular, it claims that grievant did not request a suspension hearing within the five day period permitted by Article 8, Section 1, mp 8.2. Other language in section 1 indicates that employees will not be "peremptorily discharged," but, rather, will be suspended for five days and notified that they are subject to discharge. A copy of that notice is to furnished to the employee, as well as to the griever and the Chairman of the Grievance Committee. During that five day period, the employee "may request and shall be granted ... a hearing," at which the facts and circumstances are to be "disclosed." If a hearing is requested, it is to be held during the five day period and the Company will then decide whether the suspension will be converted to discharge. Then comes the language the Company relies on in this case:

> If no hearing is requested within the five-day period, the discharge shall become final at the end of such period without further notice or action by the Company....

There is no dispute that neither grievant nor the Union requested a suspension hearing with five days of the time the suspension notice was delivered to grievant's last known address. Thus, the

Company says the discharge is final, that it was not possible to file a grievance, and that I have no authority to hear this case on the merits.

Grievant went off on sick leave on or about September 30, 1998. The Company sent him its Form 18 -- essentially a statement concerning physical condition to be completed by a physician -- on October 30, 1998. The letter included an instruction to return the form within seven days. On November 10, grievant called the Company's clinic to indicate that he had received the form but that his doctor was out of town and he would not be able to see him until November 13. Grievant saw his doctor on that date. The record does not indicate whether he returned the form 18 to the Company. Grievant had an appointment with the Company's medical clinic on November 16, which he missed. He was examined on November 19 and told to return on December 15. He missed the December 15 appointment and then called on December 17 and said his doctor was out of town. The Company says it verified grievant's claim that his doctor was out of town, but also learned that he had not seen his doctor since November 13. Thus, the Company notified grievant that he was to report to the clinic on January 4.

Grievant apparently did not report to the clinic as instructed on January 4. He called on January 5 and reported that his doctor was out sick. The Company says it called the doctor and learned that he was back to work, but still had not seen grievant since November 13. Thus, on January 5, grievant

was instructed to report to the clinic immediately. Grievant did not do so and that fact was communicated to grievant's department on January 21, 1999. On that same day, the department sent grievant a seven day letter, directing him to report to the medical department to verify the reason for his absence. The letter included the following sentence: "Failure to respond to this directive within seven (7) calendar days from the date of this letter may result in your being suspended prior to discharge."

The seven day letter was delivered to grievant's last known address on January 26, 1999. The Company still had heard nothing from grievant as of February 10, two weeks after the letter was delivered. At that point, the Company sent grievant a letter notifying him that he had been suspended for five working days and informing him that he could request a suspension hearing during that five day period. The suspension letter was delivered on February 12, 1999. The Company had not heard from grievant by February 16 and, on February 19, it converted grievant's suspension to discharge. The Union grieved the discharge on March 24, though a Company witness said a copy of the grievance may have been faxed to him on March 23. On March 24, the Company notified the Union of its position that, due to the failure to request a suspension hearing, the discharge was final and not subject to arbitration. Subsequently, the Union requested a courtesy hearing for grievant, which was held on April 14.

Following that meeting, the Company again notified the Union of its position.

The Union does not claim that grievant asked for a suspension hearing within the appropriate time. Nor does it contest the Company's interpretation of mp 8.2 quoted above. That is, the Union does not deny the Company's assertion that failure to request a hearing within the appropriate time is fatal to an employee's right to arbitrate a discharge. Rather, the Union claims there are mitigating factors to be taken into account in this case, including its assertion that grievant did not even see the seven day letter or the suspension letter until after the time for requesting a hearing had already passed. The Union acknowledges that the Company sent those letters to grievant's address of record, which was grievant's brother's house. Grievant's brother testified that he and grievant had had a falling out in early January, 1999 and that he had asked grievant to leave. From that point on until May, 1999, grievant lived in a shelter operated by Roseland Christian Ministries Center, except for a four day period in February, when he was hospitalized. Grievant submitted a statement from the shelter indicating that residents were not allowed to receive mail at that address. Thus, grievant left his mailing address at his brother's house.

Grievant said his sickness and accident benefits ran out in December, 1998 and that after that, he had no money. He said he was only able to get to his brother's house to check his mail

about once a month. Grievant's brother acknowledged having signed for the suspension notice because the post office had left a note indicating that there was a certified letter for "A. Fulford." Grievant's brother is Alex Fulford and grievant's name is Arthur Fulford. Once grievant's brother obtained the letter, he realized it was for grievant, but he said he did not know where grievant was.

Grievant was hospitalized for an ulcer from February 18 to February 22. He said he did not get the suspension letter until he got out of the hospital. Had he gotten it sooner, he said, he would have requested a hearing. The Company points out, however, that grievant did not contact the Company at all from February 23, when he says he learned of the letter, until March 24, when the Union filed a grievance. And this is true, the Company says, even though grievant testified that he went to the Union hall on February 23, after having learned of his discharge when he tried to go to the clinic on the same day.

Luis Aguilar testified that he was unaware of the Company's action against grievant until late February or early March, when he learned about it from the area griever. Aguilar said the grievance committee had not received a copy of the suspension letter, though the Company claims that it sent one. In addition, a Company representative said he faxed Aguilar a copy of the letter after a telephone call on March 4. The Union also questions whether grievant's area grievance committeeman received a copy of the letter. Unfortunately, the griever was not

available to testify at the hearing. The assistant griever testified about his conversation with the griever, but he did not say the griever had claimed that he did not get a copy of the letter.

The Company cites several cases, including Inland Award 776, in which former permanent arbitrator Herbert Fishgold found that requesting a suspension hearing was a "condition precedent to filing a timely grievance." In the absence of mitigating circumstances in that case, Arbitrator Fishgold found the failure to request a hearing to be determinative and he dismissed the grievance. The Company also criticized Arbitrator Vonhof's opinion in Inland Award 936, which I approved. The Union places significant reliance on this same case.

In Award 936, Arbitrator Vonhof thought there were sufficient mitigating circumstances to excuse that grievant from the requirement of requesting a suspension hearing within the five day window. In particular, she noted that he was moving his residence at the time the letter was sent and that he suffered from a mild developmental disability, causing her to question whether he understood the circumstances. She also commented that the Company had sometimes applied mitigating circumstances to similar cases. The Company takes issue with this latter assertion, arguing that it has only extended the time limit when an employee was unavailable for hearing, as when he is hospitalized or incarcerated. In addition, the Company says it has granted extensions only in those cases in which a request for

an extension has been requested within the five day period. Thus, the Company says that Award 936 proceeds from a mistaken premise and that it should not be regarded as authoritative.

The Union, however, points to Award 936 as an example of mitigating circumstances excusing a failure to request a hearing. In addition, it submitted evidence of a third step grievance settlement in which an employee was reinstated even though he failed to request a suspension hearing in a timely fashion. The Union asks me to consider grievant's 27 years of service, his poor health, and the fact that he was not available to receive the suspension letter at the time it was sent.

Findings and Discussion

Arbitrator Vonhof's opinion in Award 936 did not break new ground when she found that mitigating circumstances could sometimes excuse a failure to observe a time limit. Indeed, Arbitrator Fishgold's opinion in Award 776 says the same thing; he merely found that there were insufficient mitigating circumstances present in his case to justify the employee's failure to request a hearing.

Arbitrator Vonhof's opinion should not be read to mean that an employee can easily avoid the requirement of requesting a suspension hearing. Her opinion, in fact, said that the circumstances she faced were unusual. In particular, she questioned whether that grievant had the mental faculties to understand the nature of the requirement. There is no similar

contention in this case. I agree with the Union's claim that the circumstances are unfortunate and that the result is harsh for this grievant, a long service employee. These factors are sometimes given weight in just cause cases. But those are not the standards at issue when the claim is that the arbitrator does not even have jurisdiction over the dispute. I cannot overlook a collectively bargained mandatory procedure, at least not in the absence of significant and compelling equitable circumstances.

It is hard to understand what else the Company could have done in this case. The Company had a legitimate interest in understanding why grievant was off work. He repeatedly failed to furnish information as requested and to report to the clinic. One might doubt whether the Company really wanted to discharge grievant when it sent him the seven day letter on January 26, 1999. That seems merely to have been a way of getting grievant's attention. Unfortunately, it did not work. Grievant did not respond to that letter even though he was given an additional week and, after getting the suspension letter, he again did not contact the Company. By this time it was February 16 and the Company had not heard from grievant since January 5, when he disregarded the Company's direction to immediately report to the clinic.

I recognize that grievant had a problem finding a place to live. His brother had asked him to leave and, without money, he was apparently relegated to a shelter. But he chose to keep his brother's residence as a mailing address and the Company was

justified in sending his mail there. Surely, grievant had some responsibility to check on his mail more than once a month. If he was unable to do so, he could have notified the Company of the problem and alerted his superiors to the possibility that mail might not reach him immediately. After all, grievant's sickness benefits had been discontinued by the Company and he might have expected some communication from the Company about that. When he elected to do nothing except check his mail monthly, he chose to take the risk that he might receive some communication that needed a swift response.

I also understand that grievant was hospitalized from February 18 to February 22. However, the five day period in which to request a hearing had already expired by the time he went to the hospital. He did not testify that he had health problems prior to his hospitalization that would have precluded him from asking for a hearing, had he checked to see if he had mail. And, even after his release from the hospital, grievant did not contact the Company and, in fact, did nothing at all until the Union filed his grievance on March 24.

Frankly, I have some doubt about grievant's claim that he was not aware of the suspension letter in time to ask for a hearing. I have trouble believing his testimony that he only checked his mail once a month. The Union argued that he would not have ignored the hearing requirement had he been aware of the letter, but grievant had not done a good job of communicating with the Company during his absence and his failure to respond to

the suspension letter is similar conduct. However, even if he did not know about the letter, I find that the circumstances are not sufficient to justify excusing that requirement. Grievant was not misled by the Company and he was not put in a position where it would have been impossible for him to obtain the letter. Nor is there any evidence that the Company has treated similarly situated employees differently. To the contrary, the Company introduced unrebutted evidence that it has only extended the time period for a suspension hearing in limited instances not present here and when the request is made within the five day period. The Union's evidence of a grievance settlement does not rebut this claim, since it does not indicate the circumstances present in that case. It may be, for example, that the employee involved in that case was unable to attend a hearing in the initial five days and that he requested a delay within that period. Finally, there was no evidence that grievant's griever did not receive the letter.

Arbitrator Vonhof's opinion in Award 936 correctly construes the contract, which is the reason I expressly noted my approval. The language at issue, taken in context, indicates that an employee who does not request a suspension hearing cannot file a grievance. The grievance in the instant case, then, must be dismissed.

AWARD

The grievance is dismissed.

Terry A. Bethel
January 2, 1999