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In the Matter of Arbitration Between:	)	
	)	
Ispat Inland Steel Company	)	**Gr. No. 7-W-003**
	)	**Appeal No. 1590**
	)	**Award No. 979**
and	)	
	)	
	)	
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 January 12, 2001 at the Company's offices in East Chicago, Indiana.

APPEARANCES

UNION

Advocate for the Union:

D. Shattuck, Chairman, Grievance Committee

Witness:

J. Lee, Grievant
R. Howze, Administrative Assistant, 2A/ 21" Mill

COMPANY

Advocate for the Company:

P. Parker, Section Manager, Arbitration and Advocacy

Witnesses:

G. DeArmond, Contract Administration Resource
J. Sadler, Section Manager, 2A/ 21" Mill

BACKGROUND:

The Grievant was established as an Overhead Crane Operator for the 2A/ 21" Mill at the time of his discharge. He loads rail cars with finished product, and performs other functions as required. The Grievant had been employed for more than twenty-six (26) years at the time of his discharge for attendance problems.

The Section Manager for the 2A/ 21" Mill testified that he does not schedule extra people on turns. If an employee does not show up, Management must find a replacement, or modify the work to be done. If a crane operator does not come to work, a supervisor must hold over an operator from the prior turn, or call in an unscheduled operator. This takes time away from the supervisor's work.

The Section Manager presented evidence of the Grievant's disciplinary record, with regard to attendance, since 1995. The record shows many missed days and tardies, for a variety of reasons, resulting in a series of disciplinary measures taken against the Grievant. On March 4, 1999, the Grievant was suspended preliminary to discharge for excessive absenteeism. The Company and the Union agreed that cause existed for his suspension and discharge, but brought him back to work under the terms of a Last Chance Agreement (LCA) dated April 29, 1999. The Last Chance Agreement required the Grievant to meet with the Clinic Counselor at the Inland Medical Department and develop an Action Plan to correct his attendance problems. The Agreement noted that the Grievant denied having any alcohol or drug problems. The LCA also required, under Paragraph No. 3,

3. Should Mr. Lee, within a period of eighteen (18) months from the date of his return to work (layoffs, vacation, leaves of absence, and any extended absence of greater than twenty -nine (29) consecutive calendar days being carved out of the eighteen (18) month evaluation period and added to the end of it), accrue an absenteeism rate of five percent (5%) or greater during any rolling ninety (90) day evaluation period, or violate any other provision of the Company's Attendance Improvement Program or any other Company Rules or regulations with respect to absenteeism, cause will exist for his immediate suspension preliminary to discharge.

...

7. This arrangement provides a **final chance at employment** for Mr. Lee. Failure to meet any of the conditions set forth above, any future incidents similar to that which resulted in the discharge of Mr. Lee in this case, or any violation of any Company rule or regulation may be cause for immediate suspension of Mr. Lee preliminary to discharge.

On May 26, 2000 the Grievant was notified that he was being suspended for violating the Company Attendance policy as stated in his Last Chance Agreement. The suspension was converted to a discharge via letter dated June 7, 2000. The Grievant was discharged on the basis of his attendance record from January 27, 2000 to May 18, 2000, which included one tardy and four failures to report off. The final two failures to report off were for the same date, May 18, 2000, when the Grievant was scheduled to work a double shift, both second and third turns.

The Grievant testified about the circumstances surrounding these final absences. He testified that he lives in Joliet, Illinois, and that he had a traffic problem getting into work on time on February 7, 2000. On February 10, 2000 he said that his lady friend, who normally wakes him to begin working at midnight, failed to do so that night. He said that he was so upset when he finally woke up at 3:30 a.m. that he left the house. He returned later and reported off at 5:00 a.m. His lady friend also was upset and called Mr. Sadler to explain that she normally wakes the Grievant but had fallen asleep that night.

On May 4, 2000 the Grievant said that on his way to work the engine light on his car started coming on. He finally turned back home and discovered that the problem was that the

fuse for the fan motor had melted. On May 18, 2000 the Grievant bought a pecan roll on the way to work and broke a tooth. He said that the pain was so bad that he could not see out of his right eye. He contended that the pain also was related to a root canal he had had fifteen (15) years earlier. The Grievant showed the Arbitrator that he still has a very loose front tooth, which prevents him from being able to eat. He said that when he reported off that day, he reported off until further notice, having taken some heavy pain medication, and that he lost the call-off number the Company call-off operator gave him at the time he telephoned. The Grievant said that he called Administrative Assistant R. Howze in the 2A/ 21" Mill and that she stated that she could not find any record of his having reported off.

The Grievant said that he lives in Joliet because he has a son with sickle cell anemia, and when the boy was younger he wanted to live close to him, because sometimes his son had medical emergencies at school. He provided evidence that although his son lived with his ex-wife, he had provided medical care for the boy in years past. His ex-wife became a member of a religious sect which discourages her from taking their son to the doctor. He said that certain medical expenses for his son had left him seriously in debt, causing him to file a bankruptcy. This prevents him from buying a good car, the Grievant said. He said that he does try to follow his Action Plan, leaving for work two (2) hours before his shift and keeping his car well-maintained. On a good day it takes him 45 minutes to drive from his house to work, but on a bad day it can take 1.5 to 2 hours.

On cross-examination he acknowledged that his ex-wife's health care plan was the primary insurer for his son. He also acknowledged that although Management representatives told him about the Family and Medical Leave Act and gave him the forms to claim it, he never submitted

the forms. He admitted that his ex-wife lived on the South Side of Chicago, not in Joliet, and that his son is now 19 years old and attending college in Florida.

On cross-examination, the Grievant also acknowledged that the Company went over each part of the Last Chance Agreement with him and he understood it when he signed it. The Company attempted to show on cross-examination that the Grievant had not lived up to his Action Plan, because he had not had his teeth fixed, and had not kept his car in good running order. The Company also questioned why he would start another business, a lawn care business, when his department at Ispat Inland required so much overtime. The Union presented evidence that the Clinic Counselor had not discouraged him from pursuing this business, as part of his Action Plan.

The Company presented evidence that the Grievant's absences totaled 6.08% during the rolling 90 day period at issue. The Union contests the way that this figure was calculated, contending that the rules for calculations were changed after the Last Chance Agreement was signed. The Company's Contract Administration Resource person described changes made as part of a Y2K initiative. She testified that the procedure for calculating absentee rate always has been to compare the number of turns missed (the numerator) to the number of scheduled turns (the denominator). Failures to report off are counted as one turn, just as any other absence. Tardies are counted as 1/2 of a turn. The Company changed the computer program for calculating absentee rates as of January 1, 2000 as part of its Y2K program. One of the changes was in the counting of double shifts. Under both the old and the new system, the Company counted a scheduled double as two (2) turns in the denominator. However, prior to January 1, 2000, if an employee called off for a double shift, it was counted as one (1) absence. After the Y2K

changes, missing a double shift was counted as two (2) incidents, in the numerator. The Grievant's absence rate would have been below 5% on May 18, 2000 under the old system, and was calculated at 6.08% under the new system. The Company's Witness testified that some changes made under the new system benefitted the employees.

Ms. Howze presented a record showing that the Grievant reported off at 3:49 for transportation problems on May 4, 2000, suggesting that the absence should not count as an FRO. She also said that there have been other instances of employees claiming that they reported off, but their call-offs were not recorded. She presented written documentation showing that there had been complaints against the outside vendor which provides the call-off system. The complaint described in the document refers to the fact that call-off reports were not being issued on a weekly basis.

THE UNION'S POSITION:

The Union argues that the Grievant may not be discharged for his record prior to the Last Chance Agreement, but only for his absences since then. Furthermore, the Company has not made an issue of the fact that some of those absences are Failures to Report Off. The Company discharged him solely on the basis of a failure to maintain an absence record below five (5) percent.

The Union argues that for over one year after the Grievant was reinstated under the Last Chance Agreement, he did not "kick out" of the attendance system for excessive absenteeism. His record had improved dramatically, the Union asserts, and in all likelihood he would have

completed the 18 months of low absenteeism required by the Last Chance Agreement, if he had not kicked out on May 18th.

The Union contends that the record shows that the Grievant had taken steps to improve his attendance and tardiness. The Company may not argue that the Grievant should have lived closer to the mill, the Union argues. Many employees have moved away from East Chicago. The Grievant was giving himself lots of time to arrive at work. In addition, even though he has an old car, he was doing the necessary repairs to keep it up, as he planned to do in his Action Plan. One tardy is not egregious, the Union asserts.

The Union contends that the causes of the Grievant's absences in the 90 days prior to his discharge were highly unusual and could not be anticipated. He blew a fuse, he cracked a tooth when biting into something. His absences were not caused by his efforts or lack thereof.

In addition, the Union argues that how the 5% is calculated is a fundamental issue in this case. The Company does not negotiate with the Union in general over the absenteeism policy, and the Union has argued that each case of discipline under the policy, including those arising under Last Chance Agreements, is subject independently to examination under just cause principles. However, the Union negotiates with the Company over these Last Chance Agreements, and generally agrees to stricter standards of conduct which make it difficult for the Union to establish just cause if they are violated.

When an employee signs a Last Chance Agreement, the employee is committed to the obligations in that Agreement. But the Company incurs obligations as well. The Union argues that the Company breached its obligations in this case when it adopted a new standard for calculating absence rates after the Last Chance Agreement was signed.

When the parties negotiate a Last Chance Agreement, the Union, the Company and the employee have an understanding about how the attendance program works. Employees generally know that all turns count, for example, so that if an employee works a lot of overtime, more turns will be counted in the denominator. Employees also knew, at the time this LCA was signed, that if an employee called off on a double shift, that constituted one instance in the numerator. These standards had been in effect since the Company instituted the attendance improvement program 20 years ago.

The Company has the obligation at least to inform the Union and the employee that the methodology for calculating the absenteeism rate has been changed, and may have to renegotiate before applying those changes to Last Chance Agreements, the Union argues. Here if the methodology had not been changed, the Grievant would not have kicked out of the system. All the Parties must abide by the letter of the Last Chance Agreement, the Union argues, including the Company. Therefore, the Union contends that the grievance should be sustained, and the Grievant reinstated with full backpay because he did not violate the Last Chance Agreement.

THE COMPANY'S POSITION:

The Company agrees that the standard here is just cause. However, the Company contends that the facts indicate that there is just cause for the Grievant's discharge. The Grievant has violated Paragraph 3 of the Last Chance Agreement by exceeding the 5% limit for absences, which provides cause for discharge. The Company argues that the Grievant has been treated just like everyone else under the changes instituted at the beginning of the year 2000. Furthermore, there is no requirement in the language of Paragraph No. 3 that the rate has to be calculated in a

certain way, as long as the system is fair, and does not single out the Grievant. According to the Company, the technicalities of how the rates are calculated were not negotiated between the parties at the time the LCA was entered into.

The Company also takes issue with the Union's arguments that the Grievant's absences after the Last Chance Agreement were justified. The Company cannot dictate where an employee lives, but the standards of attendance are no different if an employee lives far away or close to the plant. Furthermore the Grievant did not address some of the issues causing his absences which he agreed to address at the time the Last Chance Agreement was entered into. The Company argues that some of these items caused the absences at issue here. The Arbitrator has no choice but to enforce the terms of the Last Chance Agreement, the Company contends, and to uphold the discharge of the Grievant.

DECISION:

This is a case involving the discharge of a long-term employee for violation of a Last Chance Agreement. The Company argues in particular that the Grievant violated Paragraph No. 3 of his Last Chance Agreement, which requires him to maintain an absence rate below 5% for a period of 18 months. Because he violated this provision, the Company argues that the Arbitrator must uphold the discharge.

When an employee signs a Last Chance Agreement, that employee agrees to very strict standards of conduct, as a condition of reinstatement. The scope of what constitutes just cause for discharge is significantly narrowed under such agreements. Thus, the primary question in

arbitration when an employee is discharged under a Last Chance Agreement is whether the employee has violated the terms of that agreement.

Because the employee working under a Last Chance Agreement is held to such strict standards, the situation calls upon the Arbitrator to examine carefully whether the standards have been violated. Here the Union and the Grievant signed an agreement basically stating that cause for discharge exists if the Grievant's absenteeism rate falls below 5%. The Union argues essentially that the rules were changed in the middle of the game, with regards to calculating that percentage. The evidence establishes that under the rules of the attendance policy which existed at the time the Last Chance Agreement was signed, the Grievant would not have reached the 5% absenteeism rate on May 18, 2000.

Evidence in this and other cases between these parties has established that in general the parties do not negotiate over the details of the Company's attendance improvement plan. However, the parties do negotiate the terms of Last Chance agreements which in turn include standards based in part upon the attendance improvement program. The Arbitrator credits the Union's argument that when the Union negotiates a specific rate of absence in a Last Chance Agreement, the Union is aware of the way in which the Company has calculated that rate over the past 20 years. Furthermore, it makes sense that employees, especially those who are in the disciplinary process over attendance issues, probably would have at least some awareness of how the Company calculates their absentee rate.

The Company argues that any changes in the attendance improvement plan applied to every employee uniformly and therefore the Grievant has not been treated any differently than any other employee under the program. However, most employees have not signed special

agreements with the Company which permit them to be discharged based upon a 5% rate over 90 days. Therefore, even if the policy is applied even-handedly on its face, the new calculation had a stronger effect on employees working under Last Chance Agreements, like the Grievant, than on other employees.

Thus, the Company's interpretation of the "5%" clause changed after the Last Chance Agreement was signed. The Grievant would not have been discharged after the absences of May 18, 2000 under the interpretation which was in effect at the time the Last Chance Agreement was signed. The Arbitrator concludes that the Company at least had an obligation to inform the Grievant and the Union that new attendance standards were being applied to determine the 5%. Absent that notice, the Company has not established that there was just cause for discharge. Therefore, the discharge must be overturned.

The Arbitrator has considered the Company's arguments that the Grievant's reasons for his absences were poor, and therefore discharge is appropriate. The Last Chance Agreement sets out specific grounds for discharging the Grievant, and even if Paragraph No. 3 were technically violated, there is not just cause for discharge, for the reasons discussed above. However, the Grievant missed work at a higher rate than he should have, for someone on a Last Chance Agreement. The Union has argued that the Arbitrator should look specifically at those absences and the reasons for them, and not simply at his absentee rate, in order to determine whether there was just cause for discharge. Under this argument, the Arbitrator concludes that it is appropriate to examine whether some lesser discipline is appropriate in this case.

The blown fuse is something largely outside the Grievant's control, because it is not something that would normally show up even during regular car maintenance check-ups.

However, the Grievant's other absences do not fall into this category. By now he should know that he may need more than one system in order to wake up and get into work on time. His suggestion that someone else was responsible for his absence on February 10th is troubling. In addition, although it is true that weird tooth accidents can happen, the Arbitrator is not convinced that this dental emergency could not have been prevented by pursuing a course of treatment, as the Grievant had agreed to do in his Action Plan, before this incident. Similarly, he had agreed to leave in enough time to arrive at work on time, despite traffic problems, which would have prevented his tardy.

It is true, as the Union suggests, that there has been improvement in the Grievant's attendance record. It was particularly good from April, 1999, when he signed the Last Chance Agreement, until about December, 1999. However, he began to slip at that time. The absences discussed above suggest that the Grievant is still not exerting the type of control necessary to make sure that he will maintain good attendance. Furthermore, nearly all of the Grievant's absences after he signed the Last Chance Agreement are Failures to Report Off (FRO's).[1] FRO's are especially serious because Management does not know immediately whether to seek a replacement for the employee. The Union agreed as an element of the Grievant's Last Chance Agreement that there were grounds to discharge him in 1999. He was given one more chance to show that he could maintain good attendance. Under these circumstances, the Grievant's string of

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[1] The Union presented evidence that there were some problems with the reporting off system. There was convincing evidence that in one instance the Grievant was charged with an FRO when he reported in on time. However, the evidence regarding the other instances, or general problems with the reporting off system was not so credible as to convince the Arbitrator that the Grievant's other absences were not usually FRO's. In reaching this conclusion the Arbitrator has considered several additional FRO's in December, 1999, which fell outside the 90-day period for figuring the 5% absenteeism rate.

FRO's after signing the Last Chance Agreement are sufficiently serious that no backpay will be awarded. Furthermore, the period between his second discharge and reinstatement will be carved out of the 18 month period required under Paragraph 3 of the Last Chance Agreement.

AWARD:

The grievance is sustained in part. The Grievant is reinstated under the terms of his Last Chance Agreement, but without backpay. The period between the Grievant's discharge and his reinstatement will be carved out of Paragraph No. 3 of his Last Chance Agreement.

Jeanne M. Vonhof
Labor Arbitrator

Decided this 9th day of March, 2001.

Under the authority of Umpire Terry Bethel.