IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL CO.

and Award 984

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the Union's challenge to the Company's decision to administer random drug tests to probationary employees. The case was tried in the Company's offices in East Chicago, Indiana on April 16, 2001. Pat Parker represented the Company and Dennis Shattuck presented the case for the Union. The parties submitted the case on final argument.

Appearances

For the Company:

P. Parker.....Sec. Mgr. of Arbitration and Advocacy
R. Cayia.....Manager, Union Relations
E. Cooper.....Manager, Personnel Services

For the Union:

D. Shattuck.....Chair, Grievance Committee
J. Robinson.....Ass't District Director, USWA
B. Carey.....International Representative, USWA
L. Aguilar.....Vice-Chair, Grievance Comm.
J. Cadwaller.....Union Employees Assistance Comm.

Background

Probationary employees are exempted from the requirement that the Company have cause to discharge an employee. Article 13, Section 12 (mp 13.69) says that during their period of probationary employment:

> employees may be laid off or discharged as exclusively determined by management, provided that such layoffs and discharges will not be used for purposes of discrimination because of race, color, religious creed, national origin or sex, or because of membership in the Union.

This case arose when the Company terminated some probationary employees who had tested positive in random drug tests administered during the probationary period. The Union agrees that the Company has nearly unbridled discretion to terminate probationary employees. But it says that discretion does not include the right to administer random drug tests, even to probationary employees.

With few exceptions, the Company had not hired new employees for many years, though it began to do so again in 1999. Eric Cooper testified that before the process began, he met with managers from throughout the plant to determine what kind of employees they wanted. Safety emerged as the dominant concern. Cooper said this influenced the Company's decision to administer random tests to employees during their probationary period. Drug and alcohol abusers are more likely to cause accidents, to miss work, and to submit insurance claims. They also have an adverse impact on the quality of the Company's product, something the

Company says it can never tolerate, but is of particular concern at this time, given the financial plight of the American steel industry.

Cooper said the Company met with promising applicants in Saturday morning information sessions, where they were advised about the jobs, the process, and, in particular, the fact that there would be random drug and alcohol tests during the probationary period. The applicants were also told about the drug tests in the interview process. Cooper said the procedure was to test employees as part of the physical examination required for the job. If the test was positive, applicants could meet with the plant medical director to explain why it might be in error. But if there was not a sufficient explanation, the applicant would not be hired. Similarly, if a random test was positive, probationary employees would be given a chance to explain, but would be terminated if the explanation was not convincing. These procedures and requirements were explained to all applicants.

The Company terminated four probationary employees for positive drug tests in 1999, including one in July and two in August. The Union grieved the practice of random testing On November 1, 1999. The fourth employee was terminated on December 21, 1999. The Company argues that it began testing in July, 1999 and that it continued without challenge for several months, even though there had been three terminations as a result of the policy. Thus, it asserts that the grievance in this case is

untimely. In the alternative, the Company urges that the policy concerning testing for probationary employees is a legitimate exercise of its right to implement reasonable rules to govern the workplace.

The Company notes that it has published numerous versions of its booklet containing General Rules for Plant Safety and Personal Conduct and, it argues, the rules were implemented unilaterally by the Company and without negotiation with the Union. The policy at issue in this case is not contained in the current version of the booklet, which was published in 1998, before the Company began testing probationary employees. However, the Company notes that the booklet itself says that the Company had reserved the right to promulgate additional rules at any time.

In its opening statement, the Union claimed that there was an agreement between the parties that random drug testing could occur only by agreement. Union Relations Manager Bob Cayia testified that there was no such agreement. He also disagreed with the statement of the Company position in the third step minutes, which asserts that there is an "understanding" that the Company will only test regular employees "for cause." Cayia said that the Company has a policy of only testing non-probationary employees for cause. However, he said the policy was not an "understanding" or agreement with the Union and was not the product of negotiations. The drug testing policies and practices were developed and implemented by the Company unilaterally. On

cross examination, he agreed that the Union is sometimes notified in advance of a new rule and that there have been times when the Union has contested the reasonableness of new rules. On occasion, the Union has resorted to the grievance procedure to protest a rule and the Company has sometimes modified the rule and sometimes has not. He disagreed with the Union's claim that the drug testing policy is a protected local working condition under Article 2, Section 2 of the Agreement.

The Union argues that it has had an impact on the content of the Company's rules concerning drug and alcohol testing, as well as certain other rules. Jim Robinson, a former official of the Local Union, testified that the current version of the rule concerning testing was influenced by an arbitration case the Union won resulting in the reinstatement of an employee, Inland Award 727. He said a former Company official told him that as a result of that case, Personal Conduct Rule 135c, which permits testing for employees suspected of drug use, was modified to provide that employees refusing a test would be considered to be under the influence.

Robinson said there were also many discussions between the Union and Company from 1988 to 1994. During that period, the Union argued that the Company did not have the right to conduct random drug tests, absent agreement from the Union. The Union was concerned that, because a drug test standing alone does not necessarily indicate impairment, employees might be disciplined for off-duty conduct unrelated to employment. However, the Union

agreed that for-cause testing was appropriate since, in such cases, the decision to discipline was not limited to the positive test alone. Robinson said he understood that the Union's position concerning random testing was accepted by the Company as the basis for the manner in which drug testing is handled between these parties. Robinson said this understanding did not distinguish between probationary and non-probationary employees. Moreover, he said he understands the Agreement to mean that probationary employees are entitled to all the rights and benefits of the Agreement, except where specifically exempted, as in the language quoted above.

Robinson agreed generally with Cayia that new rules were generally not negotiated on a plant-wide basis. However, he said the Union had negotiated with the Company concerning random testing and that it had also negotiated concerning changes to the Company's absence control program. That program, known as the Attendance Improvement Program (AIP), was implemented unilaterally by the Company. Robinson said the Union objected that it was unfair and that there were discussions that led to changes in its original version. He also said the Union had never accepted the AIP as a rule, in the way it had accepted other rules. This meant that the Company understood that mere proof of a violation would not establish just cause for discipline and that the Company still had the burden of meeting that standard. On cross examination, Robinson agreed that there was no signed agreement concerning random drug testing. Other

Union witnesses testified that the Company had not notified them of its intent to begin random testing of probationary employees and that the Union grieved when it learned the Company was doing so.

On rebuttal, Cayia agreed that the drug testing rule was modified following the decision in Inland Award 727, though he said the Company did so unilaterally and did not discuss the changes with the Union. Cayia also denied that the Company had negotiated any changes in the AIP when it was first implemented. He said that the Union's principal objection to the AIP had been its belief that it was a no-fault plan, but that the Company allayed the Union's concerns. The Company acknowledged that the just cause standard applied and that a mere violation of the AIP did not necessarily establish just cause. There were no changes to the AIP as a result of these discussions, though Cayia agreed that discussions with the Union did result in some changes in about 1986, after the Company had unilaterally modified the failure-to-report-off portion of the plan. He also gave examples of other unilateral changes to the rules.

The Company argues that it has a long history of unilateral implementation of rules not negotiated with the Union. In this case, the applicants were advised that they would be tested. Moreover, the Company urges that the rule is reasonable, citing the need to "purge" the workplace of drug abusers. The Union's principal argument is that there is a local working condition under Article 2, Section 2 which prohibits the Company from

randomly testing employees, absent agreement from the Union, as in last chance agreements. The Union says this practice is a significant benefit to the employees, in part because it insures that the Company does not control their lives outside the plant. The Union also asserts that there has never been any distinction made between regular employees and probationary employees for this practice.

Findings and Discussion

I am not able to conclude that the Company's drug testing policy is a local working condition under Article 2. It may be, as the Union claims, that the policy benefits employees by creating some certainty about when testing is and is not permitted. But the same thing can be said of most rules, at least to the extent that they draw lines employees know they cannot cross. The rule at issue, however, does not create the benefit of allowing employees to use illegal drugs, as long as they do so away from the job and as long as their activity has no effect on their work. The rule is, instead, merely a recognition that the employer's interests in controlling drug use extend only so far. Rules must be reasonable and must be related to the end the employer seeks to accomplish. But an employer's successful effort to fashion a reasonable rule that is not objected to by the Union does not mean that it has become a protected local working condition that the employer cannot change.

No one doubts that arbitrators both in this industry and outside it have required employers to show some justification for compelling employees to submit to drug tests. The requirements are variously stated as reasonable suspicion, reasonable cause or, sometimes, probable cause, though that terminology should not be confused with the stringent requirements that accompany criminal cases. However it might be stated, the requirement is part of the just cause formulation. In general, arbitrators have not permitted employers to accumulate evidence by infringing on an employee's privacy interests unless there has been some justification for the intrusion. This is often described as a "due process" requirement.

The problem in the instant case is that the just cause standard does not apply. As such, probationary employees are not protected by the various limitations that are part of just cause. I understand the Union's argument that other provisions of the Agreement apply equally to probationary and non-probationary employees alike. But the parties have expressly agreed that just cause does not. I also note that the rule at issue here - which permits random drug testing for probationary employees only - was adequately conveyed to the employees and that there is no evidence it is being applied in an unreasonable manner. Moreover, it is reasonably related to legitimate management interests. I must, then, deny the grievance.

AWARD

The grievance is denied.

Terry A. Bethel
July 17, 2001