****

In the Matter of Arbitration Between:	)	
	)	
Ispat Inland Steel Company	)	**Gr. No. 4-W-5**
	)	**Appeal No. 1606**
	)	**Award No. 995**
and	)	
	)	
	)	
United Steelworkers of America	)	
Local Union No. 1010.	)	

****

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on March 8, 2002 at the Company's offices in East Chicago, Indiana.

APPEARANCES

UNION

Advocate for the Union:

D. Reed, Secretary, Grievance Committee

Witnesses:

D. Moore, Steward, Area # 4
L. Aguilar, Vice Chairman, Grievance Committee
G. Strauch, Griever, Area # 4
A. Franco, Grievant

COMPANY

Advocate for the Company:

P. Parker, Section Manager, Arbitration and Advocacy

Witnesses:

J. Grattan, Section Manager, #4 BOF/CC
R. Mazalan, Plant Protection
D. Dziewicki, Supervisor of Medical Services
K. Allen, Paramedic, Medical Department
R. Cayia, Manager, Union Relations

BACKGROUND:

This is a dispute over the Grievant's discharge for violation of Rule 135(c) and (e), which require an employee to submit to alcohol or drug testing if the employee is suspected of being under the influence of either drugs or intoxicating beverages. The Grievant had more than 23 years of service at the time of his discharge. He was assigned to work as a Slab Craneman at the #4 BOF. The crane to which he was assigned moves slabs and crops (the cut-off ends of slabs) from the exit end of the caster.

A pulpit with glass windows (the Expediter's pulpit) sits at one side of the area in which the Grievant makes his lifts. At 11:45 p.m. on the day in question the Grievant was moving the crane to unload a crop when a part of the crane hit, bent and broke the railing outside the pulpit. The Expediter complained to Management about the incident.

The Grievant was sent to the clinic for a fitness-for-duty test. The Section Manager for the #4 BOF testified that in 1997 a new Manager (the Section Manager's superior) was appointed, who instituted a policy that any employee who causes equipment damage is to be sent for a fitness-for-duty examination. Employees are considered "qualified" on the crane only after they have shown that they can operate the crane in a controlled fashion. If they do not operate the crane in such a manner, they may be sent to the clinic for a fitness-for-duty test. Although the damage to the guard rail was not extensive, the Manager testified, there was a possibility of deadly consequences if the crop had entered the pulpit where the Expediter worked, only three (3) feet away.

A Senior Paramedic testified that on the night in question he began to examine the Grievant at the clinic, taking his blood pressure, pulse, respiration and checking his pupils. When

it came time to take the Grievant's temperature, the Grievant balked and asked to see a Union representative. The Paramedic told him that Union representatives were not present at the assessments. The Grievant said that he was not refusing to be tested, but that he wanted Union representation. The Paramedic told the Grievant that if he were refusing to have his temperature taken, he was refusing the test. The Paramedic called the Plant Protection Turn Supervisor, who, in turn, read the Grievant a statement that if he failed to submit to a breathalyzer or drug test, "you will be considered in violation of the plant rule regarding being under the influence of (alcohol or drugs.)" The statement continues, "[y]ou will be immediately removed from the plant and you will later be subject to possible disciplinary action up to and including suspension preliminary to discharge." The Plant Protection Officer stated that he has been giving this notice to employees for at least 12 years, and possibly longer. He said that other employees have requested Union representation over the years and have been told that they were not entitled to representation at the time of testing.

The Supervisor of Medical Services stated that if an employee refuses to be tested, Plant Protection is called back to provide the warning stated above. He stated that in the past he has advised employees that they may contact the Union representative once the fitness-for-duty investigation is completed. The Witness presented a compilation of disciplinary documents of employees who refused to submit either to a breathalyzer or drug test in 2001. Six employees other than the Grievant refused to be tested. One resigned and the other five (including one who requested Union representation) were discharged and later returned to work under Last Chance Agreements.

On cross-examination the Union asked several of the Company's Witnesses whether the clinic staff or Plant Protection permits employees to drive home, if they are believed to be under the influence of drugs or alcohol. The Witnesses agreed that they do not do so. The Grievant was permitted to drive home by himself on the night in question.

The Manager of Union Relations testified about why the Company imposes the ultimate penalty of discharge when an employee refuses to be tested. The Company takes the maximum steps necessary, he said, to ensure that employees are not present in the plant under the influence of intoxicants -- for their own safety, that of other employees, and the Company's property. The penalty for refusing to submit to a test is structured for maximum deterrent value. It is the same penalty as if there were a positive test result. If there were a lesser penalty, employees would refuse to take the test, the Manager said. The safety situation would be catastrophic, because employees who are using drugs or alcohol would not receive needed care and treatment, and might risk showing up for work under the influence of intoxicants.

The Manager testified about other employees who refused to take a drug or alcohol test in the past. The Last Chance Agreements under which other employees have been returned after refusing a drug or alcohol test recognize that cause existed for the suspension and discharge of the employee. They typically require the employee to make an appointment with the Company's EAP Director for the purpose of enrolling in the Company's Alcohol and Drug program. Normally the Agreements also require the employee to develop an action plan, to fully comply with the program and the plan, and to meet regularly with the Union Members Assistance Committee. Random drug and alcohol testing is usually mandated, for a period of two years. If

the employee is caught using mood-altering substances during that time there is cause for immediate suspension preliminary to discharge, under the Agreements.

The Manager testified that Management always maintains discretion regarding whether an employee will be offered a Last Chance Agreement. Management looks at the employee's years of service and prior record, and whether the employee acknowledges that he has a substance abuse problem and is prepared to do what is necessary in order to rehabilitate himself. Typically the employee meets with the EAP Director before the Last Chance Agreement is signed and the Director weighs in on whether the employee is a good risk for a Last Chance Agreement. The terms of the Last Chance Agreement are carefully reviewed with the employee before the employee signs the Agreement. On cross-examination the Witness stated that for at least the last 20 years employees had been sent for fitness-for-duty examinations when they cause equipment damage. He also stated, on cross-examination, that he could not recall anyone who had refused to take a test and been returned to work with a lesser penalty than a Last Chance Agreement.

The Vice President of the Grievance Committee testified that there have been instances in the past when employees have refused to be tested and they were not discharged. He presented a document from the Union's files dated 1979 in which entrance to the plant was refused to an employee who was at the clockhouse in an apparently inebriated state, and refused to go for a breathalyzer test. The Company raised the issue of whether Rule 135 was in effect at that time. The Vice President also offered verbal testimony about one more recent case of which he was aware. He acknowledged that employees have been discharged for refusing to take a test, but said that some departments cover up for employees.

The Union Steward in the Grievant's department testified that on many occasions he had seen the effects of damage done to the guard railing which the Grievant is accused of damaging. He stated that employees are not always sent to the clinic when there is equipment damage. The Witness testified that it is difficult to control the crane because the slabs swing in every direction. He said that he had been given 10-14 weeks of training as a Craneman in the department before assuming the job. On cross-examination of the Section Manager the Union had questioned the training received by the Grievant. The Section Manager testified that the Grievant was trained for 6 weeks, the normal amount of time.

The Griever in the #4 BOF testified that guard railings have been bent on other occasions, without employees being tested. He said damage to the RHOB guard rails is so common that extra guard rails are kept readily available. He acknowledged on cross-examination that if he had been called by the Grievant that night, he would have told him to take the test. The Witness said that the Union does not condone employees working under the influence of intoxicants, and employees damaging equipment are sent to the clinic for fitness-for-duty tests, depending upon the extent of the damage.

The Grievant testified that he received only six (6) weeks training on the crane in question before assuming the job. He said that it was especially difficult to move things along the left lane and that he hit the railing with the tongs, as he was concentrating on moving the crop with the magnet. He had only been working alone on the job for a few days before he hit the guard rail. He said that in his 23 years with the Company he never has been in trouble before.

The Grievant testified that he did not refuse to take the test, he just wanted the Union Representative present. He said that the clinic personnel were giving him forms to sign, and he

does not trust the Company in such matters. In addition, he said that he was not familiar with Rule 135. On cross-examination he stated that he was not under the influence of drugs and alcohol that night, although he had had an alcoholic drink at dinner before his shift began. He said that he had no reason not to take the test, that he just did not know what to do. The Grievant testified that he does not remember the warnings being read to him, although he knew that his refusal to take the test resulted in his being sent home.

The Section Manager testified that in one case raised by the Union a Craneman who damaged a guardrail did go home without being tested because the Section Manager did not find out about the damage until the employee had left for the day. He stated that a lot of equipment damage is never reported and a supervisor can only take action if he knows of the incident. Here the Expediter reported the incident -- he was upset and afraid of being injured. The Section Manager believed that the Company would be in trouble if they ignored his complaint. As for the RHOB guard rails, the clearance is so narrow in that location, that Management understands that the guard rails are likely to be hit, and would not send an employee who hit them to the clinic for a fitness-for-duty evaluation in that situation. On cross-examination he acknowledged that there is some discretion in determining whether an employee will be sent for a fitness-for-duty evaluation.

The third step minutes state that the Company offered the Grievant an opportunity to be evaluated by the Company's EAP Coordinator to ascertain whether a substance abuse problem existed. The minutes note that the Grievant refused this offer.

THE COMPANY'S POSITION

The Company contends first that the Grievant should have expected to be sent to the clinic when he hit the guard rail. The Grievant's job is moving 20 ton slabs and an employee works inside the pulpit very close to the guard rail. The incident here was serious and could have been life-threatening.

There has been a consistent practice in which employees have not had the right to Union representation when they are being tested for drugs or alcohol. The Company cannot wait for a representative, because as time passes, the drug or alcohol may wear off. The Union has not objected in the past to the absence of Union representation in this situation, and is therefore estopped from making that argument now, the Company contends. The Company points out that even the Union Griever who testified said that he would have told the Grievant to take the test.

The Company contends that Article 8, Section 2 of the labor agreement gives an employee the right to Union representation only when an employee is called in for the purpose of discussing possible disciplinary action. Disciplinary action is not discussed when an employee is taken to the clinic for a fitness-for-duty examination.

The Company also disputes that the Grievant did not understand the ramifications of his refusal to take the test. The Plant Protection Officer testified credibly that he read the warning to the Grievant, according to the Company. Furthermore, every employee who refused to take the test in 2001 was discharged. Under the Company's rule an employee who refuses to submit to testing must be considered to be under the influence, and the same penalty must be imposed as if the Grievant had tested positive -- discharge. The parties have essentially agreed that discharge is the penalty for refusing a drug test, according to the Company.

THE UNION'S POSITION

The Union contends that the Grievant's right to Union representation was violated on the night in question. When an employee is summoned to discuss possible discipline with a supervisor other than his immediate supervisor or with a Plant Protection Officer, he has a right to a Union representative, according to the Union. Here the Paramedic with whom the Grievant met is not his immediate supervisor, and he did meet with a Plant Protection Officer as well, and therefore Union representation should have been provided.

The Union argues that the Company must show by clear and convincing evidence that the employee had knowledge or should have had knowledge of the rule in question before discharge is appropriate. The Grievant has testified credibly that he did not have knowledge of the rule. Because the Company was negligent in enlightening the Grievant of the existence and consequences attached to this rule, the Company must be held accountable for the Grievant's lost wages here, the Union argues.

The Grievant has an immaculate work record, with no discipline of any kind, according to the Union. The Union questions why the Grievant should be required to agree to a Last Chance Agreement, with its stringent testing, when he has never shown any propensity for drugs or alcohol. The other employees who agreed to Last Chance Agreements all had drug or alcohol problems. The Union argues further that the Company has not shown that employees who cause damage to Company property or equipment are consistently sent to the clinic for fitness-for-duty tests. For all of the above reasons, the Union argues, the Grievant should be reinstated and the discharge overturned.

FINDINGS AND DISCUSSION

This is a case involving the discharge of a long-term employee for refusing to take a drug test after hitting a guard rail with his crane. The Union contests the discharge on several grounds. The Union disputes that there was cause to send the Grievant for a fitness-for-duty evaluation in the first place. According to the Union, other employees who have committed similar infractions have not been sent for testing. The evidence demonstrates that there is some discretion in determining whether an employee is sent for a fitness-for-duty test. However, there was substantial evidence demonstrating that the situations raised by the Union are different than the incident in which the Grievant was involved. In one case the guard rail was so close to the location where other equipment had to pass that it was considered likely that the guard rail would be hit periodically. The Union did not establish that the guard rail hit by the Grievant was similarly situated. In other cases the evidence showed that Management was not notified of an incident on the day on which it occurred. A fitness-for-duty evaluation conducted after an accident or equipment damage is generally intended to measure the employee's fitness as close to the time of the incident as possible. The Union argues that even a day later the test would still be useful to detect high blood pressure or other continuing health problems which might affect an employee's physical performance of his job. However, in most cases the test would not demonstrate whether the Grievant was under the influence of intoxicants a day later.

The evidence does not show that the Grievant was treated differently than other employees who engaged in similar conduct of which Management was notified. In particular, the Union has not demonstrated that there were other cases in which an employee placed another employee in danger comparable to the danger here, and was not sent for testing. Here the

Grievant broke the guard rail which protects the Expediter's pulpit with a very heavy object which could have seriously threatened the Expediter, working only a few feet away. Under these circumstances there was sufficient cause to send the Grievant for a fitness-for-duty test, and there is not sufficient evidence that other employees were not sent for testing under similar circumstances.

The Union also has suggested that the Grievant did not receive sufficient training for the job. The Steward testified that he received training for about twice as much time as the Grievant. The Company presented evidence, however, that Cranemen typically train for 6 weeks in this department, the same amount of time that the Grievant was allowed, and that Cranemen are not allowed to work alone until they have shown sufficient proficiency. The Union did not refute the Company's evidence about the general practice in the department regarding training. Furthermore, the Grievant never requested additional training. Therefore, the Arbitrator concludes that this argument does not provide a basis for overturning the discharge.

The Union also argues that the Grievant did not refuse to be tested, but simply requested Union representation at the time of testing. The Grievant did refuse to continue to submit to the testing. The Union argues that under Article 8, Section 2 of the agreement, the Grievant had a right to refuse until Union representation was provided. That section states,

> An employee who is summoned to meet in an office with a supervisor other than his/her own immediate supervisor or a plant protection officer for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by his/her grievance committeeperson, or his/her assistant grievance committeeperson or his/her steward if he/she requests such representation...

The Union argues that this section entitled the Grievant to Union representation, and the failure to provide such representation means that the discharge must be overturned. The Company argues

that the Grievant was not being summoned to discuss possible disciplinary action when he was sent for a fitness-for-duty examination. The evidence establishes that the Union has not demanded that a Union representative be present at such testing in the past, even though many employees have been tested after accidents or equipment damage. In addition, the evidence shows that employees have been discharged for refusing to be tested, even when they have requested Union representation. Thus, according to the evidence presented to the Arbitrator in this case, the parties have not treated this situation as one which triggers the protections of Article 8, Section 2. The Grievant was told that he did not have a right to Union representation at the time he was tested. This discharge will not be overturned on that basis.

Employees who refuse drug or alcohol testing are considered to be under the influence of intoxicants. At the time the Grievant refused the test, there is credible evidence that he was warned that he would be in violation of the rule against being under the influence, and also that he would be subject to discipline up to and including discharge for refusing. He refused to continue with the testing anyway. The evidence shows that employees who have refused to take drug and alcohol tests have been routinely discharged by the Employer. Many have been returned to work under Last Chance Agreements. However, Last Chance Agreements are not automatically offered to employees. Other employees have demonstrated that they are committed to making a serious effort to address whatever problems caused the misconduct in the first place. Employees who refuse drug or alcohol tests, and, according to the rule, are presumed to be under the influence of drugs or alcohol at work, have demonstrated that they have sought treatment or have been willing to address a substance abuse problem, before Last Chance Agreements are offered.

The Union argues that the Grievant has a clean disciplinary record and never has demonstrated any propensity for drug or alcohol problems. According to the Union, the Grievant should not be required to submit to a Last Chance Agreement which requires random drug and alcohol testing for two years, and participation in the Company's program for substance abuse, when he never has demonstrated any problems with substance abuse. However, the Grievant, while lifting part of a steel slab with his crane, was responsible for breaking a guard rail, and thereby endangering the employee who worked several feet behind the rail. He admitted that he had a drink before coming to work that evening. The Grievant's conduct created a situation in which the Company had a legitimate interest in determining whether drugs or alcohol were involved in this incident, and whether the Grievant has a substance abuse problem. Yet the Grievant refused to take a drug or alcohol test, and also refused, according to the third step minutes, the Company's offer to be evaluated by the EAP Coordinator to ascertain whether a substance abuse problem exists.

The Union argues, in essence, that the Company should bear the risk of whether the Grievant does or does not have a problem, on the basis of the Grievant's assurances alone. The Company has a responsibility to provide a safe workplace for all employees. Rules 135(c) and (e) do not require the Company to bear the risk and uncertainty of whether the Grievant was working under the influence on the night in question; by failing to take the test he is presumed to be under the influence. Nor should the Company be expected to bear the risk that an employee has a substance abuse problem, when the employee has an accident while using heavy machinery, admits that he drank alcohol before coming to work, and then refuses to be tested, treated, or even assessed for substance abuse problems. The Union has not established that the Grievant was

treated more harshly than other employees who have refused to take the tests and were discharged. Therefore there is no basis for overturning the discharge.

AWARD

The grievance is denied.

Jeanne M. Vonhof
Labor Arbitrator

Decided this 25th day of June, 2002.

Under the authority of Umpire Terry A. Bethel.