IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

and AWARD 996

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the discharge of Grievant Ernie Fontanez. The case was tried in the Company's offices in East Chicago, Indiana on March 19, 2002. Pat Parker represented the Company and Bill Carey presented the case for the Union. The parties submitted the case on final argument.

Appearances

For the Company:

P. Parker.....Section Mgr., Arbitration and Advocacy
N. Shebish.....Section Mgr., No. 3 Cold Strip
R. Hughes.....Contract Admin. Res., Union Relations
P. Boulac.....Union Relations Intern

For the Union:

B. Carey.....International Representative
D. Reed.....Secretary, Grievance Committee
E. Fontanez....Grievant
E. Barrientez..Griever
J. Flores

Background

Most of the facts are not in dispute. At the time of his discharge on November 20, 2001, Grievant had a little more than 27 years of service. In the five year period prior to his discharge, he had been disciplined with days off on at least 13 occasions. In addition, he had five record reviews and, in 1997, was suspended preliminary to discharge. That action ultimately resulted in reinstatement pursuant to a last chance agreement in which both Grievant and the Union acknowledged that the Company had cause for the suspension preliminary to discharge. The LCA outlined several restrictions on Grievant, including a requirement that if he had an absenteeism rate in excess of 5% in the eighteen month period after reinstatement, he would again be suspended preliminary to discharge. The LCA also said that any failure to report off (FRO) within twelve months would justify suspension. This was obviously added because many of Grievant's absences involved a failure to report off.

Following his reinstatement, Grievant's attendance record improved until the first part of 2000, when he again began to experience problems. Between March 22, 2000 and March 7, 2001, Grievant had two record reviews and five separate disciplines involving days off. He twice received three days off, the last step before suspension preliminary to discharge. In record reviews in both August, 2000 and March, 2001, Grievant was told that continued problems with absenteeism or tardiness could result in suspension preliminary to discharge. Between the date

of his last record review on March 7, 2001 and October 12, 2001, Grievant was late for work on nine occasions. The Company's notes from an Absentee Monitoring Interview late in October indicated that Grievant did not really offer a reason for his tardiness, other than to voice concern about the future of the Company. At the hearing, Grievant testified that depression stemming from a divorce and custody problem five and a half years ago contributed to his problem. He said he had lost his "gusto" and his drive to get to work on time.

The Company argues that Grievant's absentee record is quite poor and that Union pleas for a last chance must be ignored because Grievant has already had a last chance. The Company says it is appropriate to consider the LCA as a part of Grievant's record during the past five years and to take that into account in determining whether there are mitigating factors. The Company says, however, that it did not discharge Grievant for a violation of the LCA. In that regard, the Company points to the discharge letter, which says that Grievant had been suspended for five days pending discharge because of "failure to work as scheduled, failure to report off, and overall work record." The overall work record includes the fact of the LCA, the Company says, as well as the Union's acknowledgment in that document that cause existed for the suspension pending discharge at that time.

The Company also says that Grievant had not previously indicated that his absences were caused by depression. There was a mention of personal problems in a 1997 Record Review and

Grievant indicated at that time that he was in contact with an EAP counselor. He also testified that the EAP program had gotten him into counseling, which he found effective. But he made no attempt to re-enter counseling when he began having problems in 2000, even though he was obviously aware of the EAP. In addition, the Company points out that Grievant offered no proof of his claim of depression and no proof that, if he had any such problem, he was now able to work a regular schedule.

The Union does not contest the Company's claim concerning the seriousness of Grievant's absence problem, though it does say that, as a laborer, Grievant's absences might be less disruptive than absences of an employee on a production crew. The Union also argues that Grievant's long service with the Company should be considered in mitigation. The Union's principal argument, however, refers to the Company's use of the LCA in the Third Step Minutes. The Union agrees that the LCA is part of Grievant's record over the past five years and that it can be considered as such. But it says the Company did more than that; the Union argues that the Company erroneously discharged Grievant for a violation of an expired LCA.

The Statement of the Facts in the Third Step Minutes says that two provisions of the LCA continued to be "extant" on November 20, 2001, and, "as such, grievant violated those conditions." The provisions alleged to have survived were paragraph 4, which was a waiver of Justice and Dignity and paragraph 7, in which Grievant acknowledged his obligation to

report to work on time, to give timely notice of an absence, and to be absent or tardy only for "just cause." The Union says the LCA clearly expired after eighteen months - the longest time period mentioned in that document - and that it was no longer in effect at the time of the suspension pending discharge at issue in this case. The fact that the Company obviously relied on the LCA, the Union says, is a fatal error that cannot be undone. Having relied on the LCA, the Company should not now be able to change its position and say that it would have fired Grievant in any event. The Union argues that the only remedy is to reinstate Grievant and make him whole. As noted, the Company denies that it discharged Grievant for a violation of the LCA. But it also says that the obligations outlined in paragraph 7, outlined above, apply to any employee, whether on an LCA or not.

Findings and Discussion

There is no merit to the Union's argument that the Company committed a fatal error in the Third Step Minutes or that a violation of the LCA was the basis for the discharge. The Statement of Facts in the Third Step Minutes does say that two provisions of the LCA were "extant," which was apparently intended to mean that the two paragraphs continued in existence at the time of the discharge. Moreover, the procedure, as I understand it, is for a Company representative to prepare the draft of the Minutes. But there are problems with the Union's argument. Following the Statement of Facts, there is a Brief

Statement of Union Position and a Brief Statement of Company Position. It is these sections - and not the Statement of Facts - that outline the arguments each side presents in support of its position. The Brief Statement of Company Position does not mention the LCA. Rather, it focuses on the arguments outlined just above. That is, it notes the previous absenteeism record, the large number of disciplines and record reviews, and it concludes that Grievant violated the Company attendance program. It also points to the lack of evidence of depression and the lack of any mitigating circumstances. But it does not assert that Grievant's conduct violated the LCA.

There is such an assertion in the Statement of Facts and, as noted, it was prepared by a Company representative. But if the Union disagrees with something in the Statement of Facts, the procedure is for the Union to offer corrections or additions to the Minutes. This is not an uncommon procedure for the Union to use. Here, however, it did not do so. Instead, the Union representative signed the Minutes without comment. The Company does not argue that the Union thereby adopted this statement of the facts as true. But the Union cannot fail to object to a factual allegation and then later claim that the error fatally prejudiced the Company's case. Because the Third Step Minutes do not support the Union's allegation that the LCA was a principal reason for the Company's action, I need not decide whether it remained in effect at the time of the discharge.

The Union's principal defense is that Grievant could not control his actions because of depression brought on by domestic problems. But in a discharge case where the history of absenteeism is so severe, there must be more than a mere unsupported allegation of depression. This is especially so when the defense is raised for the first time after the discharge. Grievant apparently did not offer this excuse at his discipline meeting in November of 2001, which was shortly before his suspension or, apparently, in any other meeting, other than a reference to personal problems in 1997. The requirement of proof is not onerous; if someone has diagnosed Grievant as suffering from depression, he should have been able to obtain a letter from the physician or counselor. Moreover, there is merit to the Company's argument that Grievant has not furnished evidence that he has learned to cope with his condition and that he would be able to work a normal schedule in the future. This is an essential element of proof when an employee claims that a physical or emotional condition caused his absenteeism.

The Union's remaining defenses are Grievant's length of service and its contention that a laborer's absence does not have a critical impact on operations. As to the latter, the Union's claim was contradicted by Norm Shebish, who was Maintenance Section Manager in No. 3 Cold Strip at the time of Grievant's discharge. He said that when someone was absent, he often had to call in employees or hold workers over to insure that necessary work was performed. On the basis of the evidence in the record,

I am not willing to find that absenteeism among laborers is less serious than absenteeism by production employees.

What makes the case difficult is Grievant's long service with the Company. However, Grievant has had many chances to improve and has even had the benefit of a last chance agreement for a previous occurrence that might have justified his discharge. In such circumstances, length of service alone is not sufficient to reverse the Company's discharge decision. Therefore, I will deny the grievance.

AWARD

The grievance is denied.

Terry A. Bethel
April 2, 2002