Award No. 827
IN THE MATTER OF THE ARBITRATION BETWEEN
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 11-T-44
Appeal No. 1438
Terry A. Bethel, Arbitrator
May 28, 1990

BACKGROUND

The hearing in this case was held at the company offices in East Chicago, Indiana on May 14, 1990. Both sides filed prehearing briefs. Grievant Darcus Jefferson was present throughout the hearing and testified in her own behalf.

APPEARANCES

For the Company
B.A. Smith, Project Representative, Union Relations
R.V. Cayia, Section Manager, Union Relations
D. Mills, Section Manager

For the Union
J. Robinson, Arbitration Coordinator
D. Jefferson, Grievant
W. Henderson

Background

This case involves the discharge of grievant Darcus Jefferson from her position as a line inspector in the Coated Products and Continuous Heat Treating Department, Plant 1 Galvanizing Section. The suspension letter indicates that the company took this action "because of [grievant's] excessive absenteeism and [her] overall unsatisfactory personnel record."

The facts of the case are not really in dispute. Grievant was suspended preliminary to discharge on November 6, 1989, following her report off on October 26, 1989 due to sickness. The company's action, of course, was not due to this one absence. Rather, the company reacted to grievant's absence history over the previous 5 years. During that period, grievant failed to work as scheduled on a total of 221 turns (including extended absenses), broken down by year as follows:

1984 (from 10/26)	
daily absence	1
tardy	1
early quit	1
1985	
daily absence	11
tardy	27
early quit	2
	40
1986	
daily absence	9
tardy	21
early quit	1
	31
1987	
daily absence	8
tardy	12
early quit	2
extended absence	40
	62

1988	
daily absence	3
tardy	6
early quit	1
	10
1989 (to 10/26)	
daily absence	4
tardy	1
early quit	1
extended absence	67
FRO	2
	75

In addition, the company claims that its action was prompted by grievant's overall work record. That record, for the past 5 years, is as follows:

1-8-85	Left job without relief	discipline 1 turn
6-18-85	absenteeism	record review
8-22-85	absenteeism	reprimand
10-13-86	poor work performance	reprimand
11-18-86	sleeping	discipline 1 turn +
4-10-87	absenteeism	discipline 1 turn
9-25-87	absenteeism	discipline 2 turns
10-26-87	out of area	discipline 1 turn
2-12-88	poor work performance	reprimand
7-21-88	absenteeism	discipline 3 turns
9-12-88		record review/final warning
8-23-89	FRO	discipline 1 turn
11-6-89	absenteeism and overall unsatisfactory personnel record	suspension
11-17-89	absenteeism and overall unsatisfactory personnel record	discharge

Also implicated in the company's decision to discharge grievant is the company's Attendance Improvement Program, referred to by the parties as AIP. This is the company's version of a so-called no fault attendance program. The AIP monitors certain absences, including sickness of employee or family, transportation problems, failure to report off (FRO), off the job injury, and unexplained absence. Also monitored are tardies and early quits, each incident of which counts as a one half day absence for purposes of the plan. The plan does not take account of certain other absences, including military leave, funeral leave, union business, jury duty and on the job injury.

The plan monitors both daily and extended absence, although it accounts for them in different manners. For daily absence, the company counts monitored absences over a rolling 90 day period or from the employee's last absence related discipline. Initially, the plan sanctions only those employees who miss more than 6% of their scheduled turns in any rolling 90 day period. The first incident of excessive absence results in a reprimand and the second warrants a 1 turn suspension. The third violation causes a 2 turn suspension. Thereafter, employees are disciplined if their absence rate exceeds 5% in the rolling 90 day period or in any shorter period from the last absence related discipline. The next 2 steps provided for are a 3 day suspension with record review and then a 5 day suspension preliminary to discharge. The plan treats extended absences somewhat differently, again providing a system of progressive disciplinary steps. Finally, it also includes a separate schedule of penalties for FRO.

The parties agreed before the hearing that the plan itself is not at issue. That is, although the company implemented the AIP unilaterally, the union has not, in this proceeding, contested the company's right to do so. Nor, as I understand it, has the union necessarily conceded the company's right to implement the plan. It is simply not an issue in this case. That does not mean, however, that the parties are in agreement about the plan's effect.

Both in its prehearing brief and at the hearing, the company stopped short of asserting that a violation of the plan's terms -- in particular, the 5% absence rate -- was in itself adequate cause for discharge. Dennis Mills,

Section Manager, Plant 1 Galvanize, and the company's only witness, testified that the AIP is not set in stone and that he, as supervisor, has control over whether to discipline employees for absenteeism. Nevertheless, it is clear that the company attributes great significance to employee violations of AIP guidelines, at least when the employee progresses to the absence level achieved by grievant. By contrast, the union contends that the plan is merely an internal tracking mechanism the company uses to monitor employee absence. It therefore denies that the absence percentage of an employee over any period of time has controlling significance in deciding whether cause existed for discharge.

My responsibility is to determine whether grievant was discharged for cause. In making that determination, I must necessarily consider the AIP and the reasonableness, both of the plan itself and of its application to grievant. I need not consider whether violation of the plan in any regard is itself proper cause for discharge because the company has advanced no such argument. Indeed, Supervisor Mills testified at some length about the factors he takes into account in arriving at a disciplinary decision. Moreover, the plan description given to me at the hearing says expressly that "issuing the disciplinary letter is not automatic if, in your opinion and following your discussion with the employee, you feel the best course of action is to give the employee a pass." (emphasis in the original). Obviously, the AIP is not truly a no-fault plan. It allows for at least some discretion and for consideration of the particular circumstances of individual cases.

Discussion

In his testimony, Mills said that in making a disciplinary decision, he looks for trends and for evidence that an employee has shown some improvement or made some progress. There is no trend in grievant's absence history. That is, she apparently does not report off as a way of extending weekends or other unscheduled time. Mills also claimed that grievant's record showed no improvement, a matter I will address below.

There was some disagreement at the hearing about the extent to which grievant's two extended absences should have counted against her. There was no contention by the company that the extended leaves were for other than legitimate purposes. Indeed, the union submitted medical records to substantiate grievant's most recent extended absence, which was from 1-23-89 to 5-12-89.

The company argued that it is appropriate to consider such absences, citing as authority Arbitrator Fishgold's opinion in Inland Award 773. The union countered with assertions by other arbitrators that because extended absence can be planned for, it is less serious than intermittent daily absence. It is not clear to me that there is any conflict between the various authorities cited. I need not, however, determine the extent to which the company can consider extended absence in this case because Mills' testimony unambiguously revealed that he did not consider the extended absences at all in making the decision to discipline grievant. Rather, he said it was grievant's day to day problems that caused him to act. Company representative Smith alertly readdressed the matter on redirect and got Mills to say that the extended absences were, in fact, part of grievant's overall record and that the discharge was based in part on that record. Nevertheless, it was clear from cross examination that Mills took action against grievant for her daily absence record, not her extended absence experience.

I also agree with the union's observation that grievant's other disciplinary experience had little to do with the company's decision. As noted above, grievant has been disciplined on other occasions within the past 5 years. Mills said he was most impressed with the discipline for sleeping and being out of the work area, offenses which he thought revealed the same lax attitude indicated by an attendance problem. I agree that such instances can be relevant and that they could have been used by the company here in its consideration of whether mitigating circumstances existed. It is also significant, however, that grievant had experienced no similar problems in the 2 years preceding her discharge, a fact that Mills conceded showed improved performance. In short, I think the company's action here must stand or fall on grievant's daily absence record.

There is no question that grievant's attendance record is poor. Ignoring extended absences, in 1985 she had 40 occurrences, in 1986 she had 31 and in 1987 she had 22. Although, those figures show some improvement, her record was still quite bad. I think her record in 1988 and 1989, her final two years of employment, was significantly better. She had only 10 occurrences in 1988 and 8 through the end of October in 1987. Granted, this still cannot be characterized as a good record. Contrary to Mills' assessment, however, there is improvement. Most striking is the reduction in the number of tardies.

Most of grievant's occurrences are tardies. She was tardy 27 times in 1985, 21 times in 1986, 12 times in 1987, 6 times in 1988 and only once in 1989. Grievant testified credibly that her tardies were due principally to her problem with substance abuse. I understand the company's position that grievant was slow in admitting her problem and that her early efforts at reform amy have only been half hearted. I also understand its argument that her recent attempts to rehabilitate herself are self serving and intended only to

secure her job. That may be the case. In my view, however, that is not necessarily damning. For whatever reason, she seems finally to have addressed her problem.

In her testimony, I thought grievant discussed her problem of substance abuse with some reluctance. Obviously, she has had some difficulty recognizing the problem at all, either because she was embarrassed by it or perhaps because she was not yet willing to reform. Whatever the case, she testified credibly that she began attending group meetings before her discharge and has continued to do so since then in an effort to stay free of drugs. That determination seems to have been reflected in an improved, though still defective, attendance pattern in the last year of her employment.

In addition, grievant also testified that she was under some stress, not only because of surgery in early 1989, but also because of her bankruptcy. This apparently exacerbated her drug abuse problem. It is true that grievant did not furnish documentation about this matter to the company prior to her discharge. Nevertheless, the documents submitted at the hearing appear genuine and reveal that grievant's bankruptcy petition was filed on August 22, 1989, within a few months of her discharge.

I do not mean to minimize grievant's absence record. I realize that, if one calculates according to the rolling 90 day period of the AIP, grievant's absence rate is slightly over the 5% barrier. Moreover, I agree with the company's claim that it was foolish for grievant to compound her problem by leaving work early on October 23, 1989 because someone had stolen her son's baseball cap. I believed grievant's assertion that she was more worried about her son's safety than the value of the cap. Nevertheless, he was apparently in the custody of grievant's mother and sister and not in any danger. Grievant could easily have attended to the police report after work.

Grievant was not discharged, however, for this one display of bad judgment. Nor was she fired solely because her absence rate slightly exceeded the 5% limit. Mills testified that he could no longer tolerate grievant's absences because she had failed to show improvement. I think there was, however, significant improvement. As already noted, her tardiness improved dramatically, dropping from a high of 27 in 1985 to only one occurrence in 1989. Moreover, her other absences also improved. In addition, grievant has now admitted her substance abuse problem and, perhaps for the first time, seems committed to dealing with it. If, as she claims, many of her absences were due to this problem, then she shows the potential for significant improvement, some of which has apparently been realized.

Other arbitrators have also recognized that the potential for rehabilitation is an appropriate factor to consider in excessive absence cases. For example, in Inland Award 666 Arbitrator Luskin reinstated an employee without back pay who had a worse record than that at issue here. He noted, however, that she had apparently corrected a medical problem that caused many of her absences and concluded that "she should be afforded an additional opportunity to demonstrate that her physical problems have been corrected and that she can report for work on a regular basis." Similarly, in Inland Award 775 Arbitrator Fishgold indicated that one issue was whether rehabilitation of the grievant was feasible. Sometimes the answer to that question is "no" as it was in Inland Award 137, where the arbitrator noted that the grievant had neither regret nor contriteness and had demonstrated no determination to do better. Moreover, in McClouth Steel Corporation the arbitrator noted that there was no indication that, if reinstated, the grievant would reform. There is, of course, no guarantee that grievant Jefferson will reform either. She has, however, finally admitted her substance abuse problem. Admittedly, the recognition was belated but, as Justice Frankfurter once said, "Wisdom too often never comes and so one ought not to reject it merely because it comes late." Given the additional fact that her attendance record improved in her last two years, I think the discharge penalty was too severe.

Grievant has recognized her problem and she has improved. But she should understand that she will have to improve much more if she is to keep her job. My decision should not be understood by her as an endorsement of her conduct. Although improved, her absence rate is still too high. Moreover, the incident with the ball cap reveals that she needs to reevaluate where her job falls on her list of priorities. Although I think she deserves one more chance, she should understand that she has about pushed mitigation to the limit.

I will, therefore, order that grievant be reinstated without loss of seniority. Even though she has improved, I do not think her record warrants back pay.

AWARD

The grievance is sustained in part. The company is ordered to reinstate grievant without loss of seniority but without back pay. The period from November 6, 1989 until the date of reinstatement shall be converted to a disciplinary suspension.

/s/ Terry A. Bethel

Terry A. Bethel
Bloomington, IN
May 28, 1990