

Award No. 952  
IN THE MATTER OF THE ARBITRATION BETWEEN  
INLAND STEEL COMPANY  
and  
UNITED STEELWORKERS OF AMERICA  
LOCAL UNION 1010

Arbitrator:  
OPINION AND AWARD

Introduction

This case involves the Union's claim that the Company violated the seniority rights of grievant Carmen Morales when it placed her on medical layoff on December 24, 1997. The case was tried in the Company's offices on August 18, 1998. Pat Parker represented the Company and Alexander Jacque presented the case for grievant and the Union. Grievant was present throughout the hearing and testified in her own behalf. The parties submitted the case on final argument.

Appearances

For the Company:

P. Parker -- Section Manager, Arbitration and Advocacy  
J. Bradley -- Section Manager, Steel producing, No. 2 BOF  
C. Lamm -- Senior Representative, Union Relations  
T. Niemiec, M.D -- Medical Doctor, Inland Clinic  
W. Boos -- Senior Representative, Union Relations

For the Union:

A. Jacque -- Chairman, Grievance Committee  
C. Morales -- Grievant  
E. Harvey -- Griever  
A. Trevino -- Witness

Background:

On May 22, 1997, grievant injured her knee as she was going down a ramp in No. 2 BOF to the second floor. She went to the clinic but, apparently, neither the clinic personnel nor grievant thought her injury was particularly serious. She returned to her job May 22 and worked the remainder of her turn. However, she was unable to work the following day and did not return to work until some time in June, 1997, when she returned with medical restrictions. Grievant had surgery on her knee on July 10, 1997 and remained off work until September, 1997, when she returned with the temporary medical restrictions that create the issue in this case. As noted in the Third Step Minutes, the restrictions placed limitations on grievant's ability to perform the following tasks:

1. Squat
2. Stand longer than 30 minutes
3. Walk more than 1-2 blocks at a time
4. Climb more than 1-2 flights of stairs at a time
5. Climb ladders or equipment
6. Kneel

In addition, grievant had a lifting limitations which allowed her to occasionally lift up to 20 pounds overhead or, if not overhead, 30 pounds.

The record is confusing about whether the restrictions originated with grievant's physician or after testing by the Inland Medical Department. There is no dispute, however, that both the Company's physicians and the grievant's physician agreed with the restrictions. In addition, grievant acknowledged in her testimony that the restrictions were necessary

Grievant continued to work until late December, 1997, at which time she was no longer scheduled as a laborer at No. 2 BOF. Section Manager Jim Bradley said he directed that grievant no longer be scheduled because the department did not have work available consistent with her limitations. The Union does not attack the limitations in this case, though it does argue that grievant regularly worked outside the limitations with the knowledge of the Company. The Union's position here, however, is that there was work available consistent with grievant's limitations and that she had been performing such work between September and December with no difficulty. Thus, the Union claims that the Company had no right to place her on a medical layoff, pending continuation or improvement in her condition.

Most of the hearing was devoted to the work available for laborers at the No. 2 BOF and whether grievant was able to perform those tasks. Bradley said the number of laborers scheduled in the department varies from as few as 8 to as many as 35. Some of the employees apparently fill in for absent coworkers who are on vacation or are ill. The two main functions of the laborer classification, however, are to work in the ladle reline area and to work in clean up. Bradley described the ladle reline job in some detail, including the need to lift 80 pound buckets of mortar (either alone or in conjunction with a coworker) and to stack brick for the masons. There are different kinds of brick that weigh from 20 to as much as 50 pounds. The laborers also dump bags of castable mixture into the mixer, with the bags weighing between 50 and 80 pounds. The laborers also perform some clean up work in the ladles before the masons begin their work. This requires gaining access to the ladle from a ladder and removing debris from the bottom of the ladle with a shovel. Bradley said that the "next biggest job" for laborers is in clean up. The department covers about 6 to 8 acres, and has five main floors with some intermediate floors. Some areas can be reached only by stairs. Laborers clean many areas, including under the conveyer galleries, which involves shoveling spilled material. The clean up responsibilities also involve removing scrap and other material from certain areas, some of which would exceed grievant's lifting restrictions. Bradley said that grievant worked with her restrictions for about 3 months, though he was initially unaware of their scope. When he inquired about the restrictions to his subordinates, Bradley said he was told that grievant had initially been returned to assist other laborers and to perform minor cleaning that was consistent with her restrictions. When grievant's condition came to his attention, Bradley said he called the clinic and asked for an update. The clinic informed him that her condition had not changed. Although the department had created work for grievant, Bradley said he made the decision that it would no longer do so after December 24. He said he often creates work for employees with temporary restrictions, and that he had done so for grievant. However, Bradley said he could not continue to create work for her indefinitely and, since grievant showed no improvement, he decided to lay her off.

On cross examination, Bradley said he was not aware of grievant's medical restrictions when she first returned to work because he had not been responsible for the laborers at that time. He also said he had some concerns about grievant because the mason supervisor had complained that productivity was down because grievant wasn't pulling her weight. Bradley said he had thought grievant had been assigned to the ladle crew as an extra person. Bradley also said that day supervisor Roche complained that grievant was incapable of doing the job and that he had just been giving her make-work. Bradley acknowledged that labor leader Gwen Townsend had complained about Grievant's work in the ladle area, though Bradley also said that Townsend often complained and that he knew she wanted men in the ladle assignment because of all the heavy lifting. Bradley denied that he testified at the third step hearing that he laid off grievant because Townsend complained. He acknowledged that Townsend had complained, but said the timing of the layoff was just coincidental. Bradley also denied that grievant ever worked outside her medical restrictions or, if she did, that he was aware of it.

Dr. Ted Niemiec testified that he was familiar with grievant's medical restrictions and that he went to the BOF to observe the work grievant would have to do. He has also examined grievant. Dr. Niemiec said that, in his opinion, the work in No. 2 BOF is "substantially beyond grievant's restrictions." Dr. Niemiec also said that grievant's condition has not improved since her layoff. If anything, he said, it has gotten worse. He also explained that her condition at the time of layoff and now was not the result of the on-the-job injury. Rather, grievant had a pre-existing problem with osteoarthritis. Grievant agreed with Dr. Niemiec's assessment of her current condition and said that one of her physicians has told her that she needs knee replacement surgery.

The Union called Eddie Harvey, a labor leader for whom grievant worked during her restrictions. Harvey said grievant was assigned to him and that he used her to paint a pulpit. According to Harvey, grievant was not an extra employee but was part of the crew. He said she did as much work as anyone else. However, Bradley said she was assigned to the painting as an extra employee since, typically, only one person would be assigned to the job. In addition, he said the work was so poor that he had to have it done over again. Harvey countered that there was work available in the BOF that grievant could perform with her restrictions, especially janitorial work. He also said that at the third step, the Company claimed that it had laid off grievant over complaints from the labor leaders. The Union asked to continue the hearing so the labor leaders could testify. When the hearing reconvened, two labor leaders said they had no complaints about grievant. At that point, the company changed its story and said the layoff was because the Company did not know how long the restrictions would last and it could not afford to carry grievant indefinitely.

Angelio Trevino, another labor leader, also testified for grievant. He said grievant worked for him most of the time and that she was assigned to cleaning jobs. He said she was not extra, but was a part of the regular crew. He said there were some jobs she could not do, but that there was work available she could perform. Grievant testified that she performed many jobs that were outside her restrictions, including work in the ladle reline area. She said he was able to do the job and that she could have continued with it, had she not been laid off. Grievant said she had never complained to anyone about problems with her leg during the time she worked between September and December. Grievant claimed that she was laid off because of problems with Townsend, the labor leader, and not because of any physical problems she had. She said, however, that she does not want to work outside the restrictions. She also acknowledged that there were at least two janitorial assignment she could not perform, including the one at the caster and the one that required stocking of materials.

On redirect, Bradley addressed the Union's claim that grievant could have been assigned to janitorial jobs. The Union claimed, without rebuttal, that these assignments are made at the discretion of the Company and that they are not bid jobs. He noted that janitors have to empty trash cans and recycling cans, that some jobs require the use of a ladder to clean walls, that janitors have to carry equipment and materials up stairs, that they must empty mop buckets, and that they use heavy floor cleaning machines. He acknowledged on cross examination that grievant had been assigned as a janitor from time to time, but he said those assignments were usually just to do sweeping work that the janitor hadn't completed on the night turn.

As noted above, the Union argues that grievant was laid off because of a personality conflict with a labor leader and not because she was unable to perform the work. The Union also claims that there is work available within grievant's restrictions - including janitorial work - and that she has worked without complaint outside her restrictions. The Union says the Company had no right to lay off grievant in these circumstances. The third step minutes also claim that the layoff was improper because the Company had an obligation to send grievant to a plantwide labor pool and hold a placement meeting. There was, however, no testimony about this at the hearing except for Bradley's assertion on cross examination that once he decided not to schedule grievant, he did not think it was his responsibility to take further action.

The Company says that it cannot work grievant outside her medical restrictions and that there is no work available for her within her restrictions, except for make-work. The Company says it should not be punished for trying to accommodate grievant's condition by allowing her to work temporarily to see if her condition would improve. The Company says its resources are not limitless and that it does not have to keep grievant on make-work indefinitely.

#### Discussion

The parties agree that grievant's medical restrictions are temporary -- or, at least, that they had not been made permanent by the time of the hearing. The only claim raised by the Union, then, is that the Company violated grievant's seniority when it laid her off when there was work available for her. The Company's defense to the seniority argument is that, while grievant apparently had enough seniority to hold a job, she could not perform enough of the functions of the job for the Company to justify scheduling her.

I appreciate grievant's claim that she performed work outside her restrictions. I believe she probably did, though without the knowledge of supervision, other than labor leaders, who are members of the bargaining unit. The fact that she may have done such work, however, is of no particular relevance in this case. The Union has not contested the restrictions and grievant, in fact, said that she agrees they are necessary. There is no real contention, then, that the Company can or should assign grievant to work outside her medical restrictions. Grievant, indeed, said that she does not want such work. Nor do I see great relevance to the Union's claim that grievant's difficulties were caused by a personality conflict with Gwen Townsend.

Townsend, after all, is a bargaining unit employee, and it is not readily apparent why the Company would favor her over grievant or why the Company would press a case to arbitration because of a dispute between two bargaining unit employees. Moreover, even if Townsend complained about grievant because of some personal disagreement, she still raised a legitimate question about grievant's ability to do the work. Grievant does, after all, have medical restrictions and the Company is entitled to evaluate whether there is work available for her. The question at issue in this case, then, is whether the Union has established that there was work available grievant could have performed on a continuing basis.

I am satisfied that grievant could not have worked in the ladle reline area. Union witness Harvey's testimony was very careful, but even he seemed reluctant to claim that she could do such work. There is too much heavy lifting involved, plus the need to get into and out of the ladles. The only work grievant could really perform, then, was clean up work. I have no doubt there are tasks in the BOF that grievant can perform. She can sweep floors, clean sinks, empty light trash cans, and perform related tasks. I am not

persuaded that there is any regular assignment composed entirely of duties that fall within grievant's medical restrictions. <FN 1> Grievant's restriction prevent her from climbing more than a flight or two of stairs, and restrict the amount she can stand or squat or lift or walk. It is not easy to envision any cleaning job that would be wholly consistent with these restrictions.

The question the Union raises, however, is whether the Company has an obligation to construct a job for grievant from tasks that she is capable of performing. Even if it were possible to do so, the Union has not cited any contract provision or any practice that requires such action. The only evidence is that employees with temporary restrictions are sometimes accommodated for periods of time in order to allow them time to improve. There was no testimony that the

<FN 1> There was a good deal of disagreement about the requirements of some of the janitorial assignments. Grievant herself acknowledged that she could not do some of the jobs. There Union says that there are others which are less demanding. All of the jobs, however, involve emptying trash, or mopping or using floor cleaners or buffers. It is not clear to me that grievant can do all of that work. And, even if she could, there was some mention of the fact that some of the people currently assigned to the janitor jobs have medical restrictions. There was no mention of whether these restrictions were permanent or temporary and of what would happen to these employees if grievant displaced them.