

IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

And

Award No. 1019

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the Company's decision to discharge Grievant Glen Arwood for failure to report off, which the parties refer to as FRO. Grievant had less than four years of service at the time of his discharge. The case was tried on April 12, 2005. Pat Parker represented the Company and Dennis Shattuck presented the case for Grievant and the Union. Grievant was present throughout the hearing and testified in his own behalf. Neither party raised procedural or other arbitrability issues. The parties submitted the case on final argument.

Appearances

For the Company:

P. Parker.....Section Manager, Arbitration and Advocacy
R. Hughes.....Contract Admin. Resource, Union Relations
J. Gordon.....Manager, Flat Rolling Operations
J. Bean.....EAP Coordinator, Medical Department
J. Clayson.....Union Relations Intern
B. Kroegel.....Union Relations Intern

For the Union:

D. Shattuck.....Chairman of Grievance Committee
L. Aguilar.....Vice Chairman of Grievance Committee
G. Arwood.....Grievant

Background

At the time of his discharge on September 18, 2003, Grievant worked in No. 3 Cold Strip East. He was in the labor sequence, but was working as craneman applicant in an overhead crane. The Company introduced an exhibit summarizing Grievant's disciplinary history from May 2002 through the date of discharge in September 2003. The record is as follows:

FRO, May 28, 2002 – 1st offense, 1 day discipline*

FRO, June 4, 2002 – 2nd offense, 2 day discipline*

* These two disciplines were administered on the same day

Attendance Policy violation, July 7, 2002 – reprimand letter
(absenteeism rate of 12.31% – 10 incidents in one month)

FRO, July 25, 2002 – 3rd infraction, 3 day discipline

Attendance Policy violation, December 5, 2002 – 1 day discipline
(Absenteeism rate of 6.17% – 8 incidents in about 2 months)

FRO, Nov. 10, 2002 – 4th infraction in one year, 3 day discipline

Record Review, March 17, 2003

Attendance Policy violation, August 14, 2003 – 2 day discipline
(Absenteeism rate of 7.24% – 5 absences from May 23 to August 8)

FRO, August 5, 2003 – Suspension preliminary to discharge

FRO, August 10, 2003 – Suspension preliminary to discharge

John Gordon, Manager of Flat Rolling Operations, conducted the record review. He said he reviewed Grievant's absenteeism history, including his FROs. Gordon said he spoke to Grievant about causes for the problems, including the need for help with drug or alcohol problems.

Gordon also stressed the importance of reporting to work on time, and told Grievant that the next step in the progressive discipline schedule for an FRO was suspension preliminary to discharge.

Gordon also explained the effect of an FRO on operations. The department does not schedule excess employees and the absence of a craneman means that operations may have to be suspended while a replacement is sought or, worse, curtailed if no one can be found. Gordon also said an FRO makes it more difficult to find a replacement. The Company does not realize the employee will be absent until the previous shift employees – the most likely pool of replacements – have left for the day. And even if a replacement is found, the Company has to pay overtime to cover the shift.

Grievant testified that he had experienced problems with bipolar disorder and depression and that he was seeing a psychiatrist during the period of his FROs on May 28, July 4, and July 24, 2002. The doctor initially prescribed Wellbutrin, but Grievant said he remained depressed, that he could not sleep and, if he did get to sleep, he didn't wake up in time to go to work. The Union notes that sedation is a side-effect of this drug. On June 25, 2002, the doctor took Grievant off Wellbutrin and put him on Prozac and Trazodone, the former for depression and the latter to help him sleep. Grievant said Prozac caused him to be "highly aggravated" and that Trazodone would put him in a deep sleep, making it difficult for him to wake up. He also had trouble staying awake at work. On July 23, 2002, Grievant said he told his doctor the new medicines were making matters worse. The doctor told him to stay on the medication. Grievant

did not wake up the next day, July 24, and thus had another FRO. Grievant said he stopped taking the medicine, which caused his depression to worsen, and sought a doctor who would be more responsive to his condition and one who could see him more often.

The second physician diagnosed Grievant as type II bipolar and prescribed Depacote. Grievant said this drug caused erratic mood changes. He became more depressed and could not sleep. Grievant said his attention and alertness at work waned and that he was sometimes late because of the drug's effect. Grievant said he discussed the problem with his doctor and she not only told him to stay on the drug, but also increased the dosage. Grievant eventually went to a third doctor at Southlake Centers for Mental Health, although this was after his discharge. This physician prescribed Seraquil for Grievant's sleeping problems. Grievant said he filled that prescription on April 27, 2004, and had an FRO on April 28th. He also said he missed a day because he was in the intake process at the hospital. As of the date of the hearing, Grievant had shifted to another doctor, who questions whether he is bipolar.

Grievant also explained the FROs in August 2003. He said his birthday was on August 2, and that he switched days with another employee, as the department permits for birthdays. Grievant came back on August 5th, believing he was to work third turn when he was actually assigned to second turn. On August 10th, Grievant said he had an ear infection that he contracted at a swimming pool. His ear closed up and he did not hear the alarm.

The Company's cross examination of Grievant focused principally on his use of alcohol. Grievant admitted having three DUIs, including one in 2003. The Company pointed out that each of the information sheets the Union submitted concerning Grievant's prescriptions cautioned against the use of alcohol. Grievant denied drinking while taking Prozac, Wellbutrin, or

Trazodone. However, his testimony was confusing and contradictory concerning his use of alcohol. Grievant also acknowledged that he had taken Ambien, his girlfriend's sleeping medicine, although this was apparently after his discharge and while he was on Justice and Dignity.

John Bean, the Company's EAP coordinator, testified about Grievant's experiences under the program. Grievant was in the Alcohol and Drug program from May to July, 2001, apparently having been ordered to attend as part of his DUI conviction. Bean said Grievant "struggled" and had no-shows and was sometimes late for appointments. He was under the care of a psychiatrist and sometimes an in-patient for psychiatric treatment from July 2001 until August 2002. Grievant resumed the Alcohol and Drug program in August 2002 and completed it in September. He was eligible to return for more treatment before his discharge, but did not. Bean said he offered Grievant after-care, but Grievant declined.

The Company argues that Grievant is a short service employee with a terrible attendance record. The Attendance Improvement Program had been explained to him on a number of occasions, and Grievant had progressive discipline. Nevertheless, he continued to miss work and, of greatest importance, he still had FROs. Grievant was warned in his record review that he was close to discharge, but even that did not reform his conduct. The Company questions whether Grievant actually restricted his drinking as he claimed, and it points out that there is no evidence of attendance at AA meetings. The Company says it did not offer Grievant a last chance agreement because he is a short service employee who does not deserve that consideration.

The Union argues that Grievant was discharged for FROs and that the circumstances speaks strongly for mitigation. Grievant testified that while he is not yet stabilized, he is doing

better under the care of his current doctor. Grievant did work on Justice and Dignity following his discharge, but his record was not impressive. The Union says that four of Grievant's FROs were a direct result of his medication and that in each case he went back to his physician to try to address the issue of side effects. This is important, the Union says, because it shows he wanted to deal with the issue and its effect on his work.

Findings and Discussion

The issue in this case is not solely whether the Company correctly followed the progressive discipline schedule. It obviously did and Grievant obviously did not respond to the increasing level of discipline by correcting his behavior. But whether he was able to do so is an additional issue that must be addressed. If Grievant's FROs were caused by his use of prescribed medicine in an attempt to control a serious mental disorder, and if that medicine affected his ability to function normally, then the Company's use of progressive discipline would not be determinative; it does little good to warn an employee who cannot control his behavior.

Here, Grievant contends that he was unable to report for work regularly – and to call in on some of those occasions – because of the effect of his medication. The record confirms that Grievant was taking drugs commonly used to treat depression and other mental disorders, and that drowsiness or sedation is a side effect for each of those drugs. The Company points out that alcohol can exacerbate the effects of the drug, and it says that Grievant's alcohol use can account for his inability to tolerate the medicine. I have already noted that Grievant's testimony about his use of alcohol was not particularly impressive. But there is no evidence of any significant alcohol use in the period principally at issue here. Grievant had DUIs in both 2001 and in 2003,

occurrences which often reflect a regular use of alcohol. But there are no FROs at issue from 2001, and the 2003 DUI was after Grievant had already been suspended preliminary to discharge. Grievant testified that he did not use alcohol during the periods in which he was taking psychiatric drugs.

The record raises an issue about whether Grievant actually suffers from bipolar disorder. Grievant says his current physician doubts the previous diagnosis. Nevertheless, three psychiatrists or psychologists thought Grievant was bipolar or depressed, and they prescribed drugs commonly used to treat depression. Even if Grievant is not bipolar, the record supports a conclusion that he suffered from depression and that he took antidepressants that can affect alertness and cause sleepiness. Moreover, even though I thought Grievant's credibility was suspect about some matters, it was enhanced somewhat by his acknowledgment that the last two FROs were caused by matters unrelated to his disorder or his medication. If Grievant had lied about the effect of the medication, then there would have been no reason to change his story for these incidents.

Of course, many arbitrators have recognized that an employer need not tolerate excessive absenteeism, even if an employee suffers from medical problems. At some point, the record becomes so bad that the relationship can be severed because the employee simply cannot work a regular schedule. Grievant is close to that point here, given his many absences in a relatively brief period of employment. But unlike many (maybe most) cases involving alcohol and drug use, Grievant did not ignore his problem. He repeatedly sought medical treatment and he asked to have medication changed when it affected his ability to work. There is also evidence that he shared with the Company his problems with bipolar disorder during the record review. I am

troubled by Gordon's testimony about that conversation. When asked on cross examination whether the matter was pursued, Gordon said, "We didn't go any further into what bipolar was or what the circumstances were."

This is not a criticism of Gordon. Most people know little about bipolar disorder and Gordon's principal responsibility is to insure that his department runs efficiently. He cannot be expected to counsel employees with mental and emotional problems. Nevertheless, the issue here is whether the Company had just cause to discharge Grievant and Company's consideration of Grievant's mental disorder is part of that equation. Grievant could have asked for assistance, but people with depression or bipolar disorder sometimes fail to act in their own best interest.

I realize that Grievant had refused additional drug and alcohol counseling with Bean. But, as already noted, there is no real evidence that Grievant misused alcohol in the period principally at issue in this case. Instead, Grievant says he was adversely affected by the effects of the drugs used to treat his mental condition, which he said caused many of his attendance-related problems. Yet the Company apparently did not pursue that problem in the record review and it did not try to verify the veracity of Grievant's claim. This is an important consideration in whether it was reasonable to expect that Grievant would be able to respond to progressive discipline. Gordon said he referred Grievant to the drug and alcohol program but, as noted, that apparently was not the problem. In these circumstances, I find that Grievant's mental condition and his reaction to prescription drugs is a mitigating factor that the Company should have taken into account.

This decision should not suggest that employees can avoid severe discipline simply because of the claimed effects of prescription medication. In Inland Award 1018, heard in the same session as the instant case, I rejected an employee's claim that his use of prescription

medication was a defense to his discharge. I would probably do the same thing here if I were convinced that the Company had considered whether Grievant was amenable to progressive discipline and, if not, what the proper course of action should be. The same result would follow if Grievant's condition could not be controlled by medication, or if there were evidence that serious side-effects of the medication were permanent, leaving no real hope that he could work as scheduled. But I am unable to make those findings. Grievant testified that he is now getting better and that his new physician is optimistic, partly because of a previous misdiagnosis. I understand the limitations of post-discharge evidence, but this testimony helps support a belief that Grievant's discharge was caused, in part, because of matters over which he had no control. The Company also offered post-discharge evidence, namely that Grievant continued to work and that he continued to experience problems after he received notice of discharge. These incidents, some of which involved sleeping or similar offenses, are clearly relevant to the remedy available to Grievant. But I also note that these incidents seem to be a continuation of exactly the problems Grievant experienced prior to discharge.

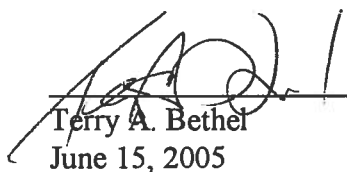
Although this is a close case, I find that the Company did not have just cause to discharge Grievant. But that does not mean that normal discharge remedies apply. During the hearing, Grievant testified that he is not yet stabilized, although he is getting better. This testimony and the post-discharge record indicate that Grievant is not able to return to work at this time and would not have been able to work at any time since his release from Justice and Dignity in 2004. He cannot be reinstated at this time and he is not eligible for back pay or other benefits.

I find that Grievant should be given a chance to correct his mental problems and establish that he can work as scheduled, but I also find that there must be some limit to the length of a

reinstatement order. Thus, I will order the Company to reinstate Grievant if, within six months of this Award, he can furnish credible medical evidence that his condition has stabilized, that he can cope with the side effects of his medication, and that his mental condition will not disable him from working a regular schedule. Grievant is to be eligible for any help available for mental disorders under the EAP. The Company has the right to have Grievant examined by its own physicians to help determine his fitness to return to work, in addition to any physicians Grievant might use. Moreover, because there was evidence of alcohol use during the period of time on Justice and Dignity, the Company will have the right to test Grievant prior to his return and to impose random drug and alcohol testing if Grievant qualifies for reinstatement. Grievant is to remain at the 5% level in the AIP program. I will not impose an LCA or order the parties to fashion one, although they are obviously free to do so if they choose.

AWARD

The grievance is sustained, in part, as explained in the Award.


Terry A. Bethel
June 15, 2005

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JUN 20 2005
GRIEVANCE COMM. OFFICE