INLAND STEEL COMPANY)
)
and) Grievance No. 17-F-26
) Docket No. 310-302-4/28/58
) Arbitration No. 300
UNITED STEELWORKERS OF AMERICA)
Local Union No. 1010) Opinion and Award

Appearances:

For the Company:

W. A. Dillon, Assistant Superintendent, Labor Relations
R, J. Stanton, Assistant Superintendent, Labor Relations
J. L. Federoff, Divisional Supervisor, Labor Relations

For the Union:

Cecil Clifton, International Representative
F. Gardner, Chairman, Grievance Committee
Joseph Wolanin, Secretary, Grievance Committee

This case raises the question whether Mrs. Juanita York, the grievant, despite the medical restrictions issued with respect to her discontinued employment by the Medical Department, should have been restored to her job as Tool Keeper when she presented herself for work on December 2, 1958. Mrs. York also asks for back pay for the turns she would have worked had she not been denied work.

On August 6, 1953 the grievant became established in the Tool Keeper's occupation in the Mechanical Unit of the Tin Mill. This is the only occupation in a single-job sequence. She discontinued working on July 24, 1957 due to a back ailment which was diagnosed to be a herniated lumbar disk. A laminectomy was performed. Following convalescence from surgery the grievant applied to be restored to work on December 2, 1957. After physical examination, in advance of formal notification, and in accordance with customary procedures, the appropriate officials in the Tin Mill were informed by the Medical Department that the grievant's employment was subject to the medical restrictions of no bending and no lifting of weights in excess of 25 pounds. The grievant was denied the opportunity to work at the job she had previously occupied on the ground that she could not perform its duties within the terms of the medical restrictions. On January 14, 1958 Leon J. Armalavage, M.D., certified to the Company as follows:

> "Mrs. Juanita York has completely recuperated from a laminectomy performed for a herniated lumbar disk and is now able to resume her regular job including any lifting or bending required of her in performing her regular duties. * * *"

Notwithstanding this certification, on January 21, 1958 the Company's Medical Director, H. Glenn Gardiner, M.D., issued a formal document entitled "Medical Recommendation" reading in part as follows:

> "The above named was examined for physical evaluation on 12-2-57. The results of the examination indicate that she ? [sic] physically capable of performing the full duties of regular job. * * *
>
> "Recomendation:
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> "We recommend that this woman be restricted to work not requiring lifting of consequence (over 25 lbs.) or bending. * * *"

During this period, according to the record, it appears an investigation was in progress with the objective of finding another job for the grievant which she might perform within the bounds of the medical restriction. No such job was identified. Mrs. York filed her grievance on February 12, 1958. Finally, on March 4, 1958, Mrs. York was informed that she was in lay-off status and had been placed on the Labor Reserve List.

The Company rests its case, in part, on Marginal Paragraph 133 which provides that "Management shall be the judge" as to physical fitness. When read together with Paragraph 129 to which it relates, it becomes clear that Management is the judge of "physical fitness", under Paragraph 133 as one of the ingredients of "Seniority", as defined, which governs "promotional opportunity", "job security upon a decrease of forces" and "preference upon reinstatement after layoff". The grievant does not seek to exercise her seniority rights in any of these three situations in which the question of her physical fitness would be a factor in the determination of her rights. On the other hand it is equally apparent that the Company has the right to and the responsibility of passing on the grievant's physical fitness to perform the job. This conclusion flows from Article IV (Plant Management) and Article XI (Safety and Health), Section 1. Its determination of the physical fitness of an employee seeking restoration to her job after surgery, however, made under the authority of these provisions is subject to question in the grievance procedure and to adjudication in arbitration (Arbitration No. 166).

Dr. Armalavage, the Union's principal witness at the hearing, is conceded by the Company to be a highly qualified specialist in bone and orthopedic surgery. The grievant is his patient; he performed the operation and has been in charge throughout. His testimony strongly disputed that presented by Dr. Gardiner, the Company's Medical Director. Dr. Armalavage testified that the operation was completely successful; that the grievant is in better condition now than she was for about a year before surgery; that it would not be harmful for her to bend; and that it would not be injurious to her future health to lift weights up to fifty pounds. He conceded, on cross-examination, that her condition might not be as good as it was prior to the injury to the disk, but, he said, "the amount of the difference is in my opinion, very slight, probably." When more completely informed of the nature of the Tool Keeper's duties and after having examined photographs of representative portions of the job and area Dr. Armalavage testified that he saw no reason why the grievant should not be able to perform her activities safely and efficiently. "I would return her to her job anyway", he declared. "I have had men who will do manual labor, digging in ditches and doing shovel work at the Steel Mill here in town /Gary, Indiana/ and other heavy manual labor who have returned to their jobs and have carried them out successfully for years. I see no contra-indication of her going back to this type of work."

Thus, Dr. Armalavage, a specialist whose decision is entitled to considerable weight, attacks both the medical restriction itself and the decision that if Mrs. York were permitted to work at her job she would be injuring herself.

Dr. Gardiner, however, pointed out that while he deferred to Dr. Armalavage, as the grievant's physician, in his superior information as to the state of the grievant's spine and disks and while he respected his standing as a surgeon, he, Dr. Gardiner, presented his judgment as an industrial medicine and health expert. He observed that it is his special duty to be informed of the medical and health consequences of individuals with particular ailments or post-operative conditions working in the industrial milieu of a steel mill. His reading and his extensive experience at Inland, he felt, invested him with qualifications superior to those possessed by an orthopedic surgeon to determine the degree of risk of injury assumed by one who returns to work after a laminectomy.

Dr. Gardiner also pointed out that the U. S. Department of Labor has recommended a standard that, in general, women employees not be permitted to lift in excess of 25 pounds. Nevertheless, when the Company set up the Tool Keeper's job and made it available for women, it provided for lifting weights up to fifty pounds; but it required that women in the job conform to prescribed standards of height and accompanying stature. Thus, he observed, any variance or departure from the present standards, going beyond those of the U.S. Department of Labor, as they do, should be viewed with grave concern.

Next, Dr. Gardiner testified that experience demonstrates that one who has had a herniated disk may well suffer from a degenerated condition of the spine, and may run the risk of herniation of another disk to a greater extent than one who has had no previous experience of this kind. The probabilities of recurrence, apparently, are not mathematically computable, and all that can be said on the subject is that the probabilities favor recurrence in some degree unknown.

Further, Dr. Gardiner, although standing by his medical restrictions on the grievant, conceded that should the grievant perform her work by squatting instead of bending "there would be no extraordinary danger of a recurrence". Thus, he seemed to accept the idea that if the grievant could be prevailed upon at all times to squat, flexing the knees and favoring her back, she would not expose herself to undue danger of injury. He emphasized the fact that the Company's approach "is hinged on the lifting". (Underscoring supplied.)

Finally, Dr. Gardiner's testimony made it clear that the medical restrictions here involved were issued as a matter of "practice" in all cases of laminectomy that come to the attention of the Medical Department. This "practice" was justified on the ground of the impossibility of evaluating the spinal condition of an individual employee and, further, because of the character of the Medical Department's experience with recurrences in herniated disk cases.

The medical restrictions issued by the Medical Department with respect to laminectomies must be regarded as presumptively reasonable, based as they are upon industrial health experience of highly competent and professional Company officials. It is necessary to observe, however, that these restrictions express a flat or general rule which does not attempt to distinguish between cases. No question is raised here as to the propriety or justification of such a flat rule as an administrative procedure in such an industrial environment as Inland Steel Company in which the Medical Department must of necessity deal with a vast variety of disabling conditions. A flat rule, however, warranted by administrative conditions, must yield to specific and persuasive evidence to the contrary where it is produced in a case.

Here a respected professional specialist who performed the surgery and is best acquainted with Mrs. York's condition, after being fully informed of the demands of the job, expressed his considered opinion that there is no reason why she should not be permitted to perform her work. Testimony of this kind is certainly entitled to weight. To the Arbitrator it does not mean that the medical restrictions, themselves, are improper, unreasonable, and lacking in merit. What is suggested is that with respect specifically to Mrs. York's case, they must give way to the details and special facts pertaining to her and that the general rule should not be permitted to override this strong special

testimony. In other words, the general rule may not, regardless of particular facts, always preclude the restoration of an employee to his job.

One additional observation seems appropriate. It is evident that the Company has a lively appreciation of its responsibilities under Article XI, Section 1. Its duty "to make all reasonable provisions for the safety and health of its employees" encompasses not only negative provisions, such as medical restrictions, but positive and affirmative action as well. This duty does not go so far as to require the Company to tailor a job to the disabilities of an employee. Under this provision, however, it seems not inappropriate for the Company to give consideration to relatively minor adjustments in the job that might enable the grievant to work within the bounds of the medical restrictions it believes should apply to her work. When the Arbitrator inquired whether such thought had been given by the Tin Mill Department to minor adjustments in the tool-room layout as to changing the position of a shear coupler weighing 48 pounds, occasionally lifted by the grievant from a bin at floor level to a bin at body level, the response of the Company representative was "To my knowledge this has not been done". From the evidence presented in the case it appears to the Arbitrator that minor changes in work procedures in the tool-room and in the positioning of the tools to be dispensed might go far toward reassuring the parties and helping to meet the medical restrictions without expense to the Company or interference with the efficiency of its operations.

In any event, in this case the credible evidence offered by the Union has successfully overcome the presumption implicit in the general medical rule of the Company pertaining to disk cases which have been treated by surgery. On the evidence the Arbitrator must find that Mrs. York is physically qualified to resume her work. In the absence of the strong professional testimony of her attending surgeon, the general rule stated by the Company's Medical Director would have prevailed.

AWARD

The grievance is sustained.

Peter Seitz,
Assistant Permanent Arbitrator

Approved:

David L. Cole,
Permanent Arbitrator

Dated: January 15, 1959

INLAND STEEL COMPANY)
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and)
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UNITED STEELWORKERS OF AMERICA)
Local Union 1010)

Supplement to
Arbitration No. 300

Grievance No. 17-F-26

The Union charges the Company with failure to comply with Award No. 300, in which it was ruled that Juanita York should have been returned to her regular job as Tool Keeper, following a period of physical disability. The request of that grievance (No. 17-F-26) was:

> "Aggrieved requests she be placed back on her job and paid for all turns deprived of due to your unfair action"

The award ordered this request granted.

In conformance therewith, as the Company viewed it, Mrs. York was paid for the period January 14, 1958 to January 27, 1959 at straight time. The period is conceded by the Union to be correct, but its objection is that the Company excluded from the back pay any allowance for shift or Sunday premiums. These premiums, as the Union sees it, should be those which were paid during this retroactivity period to her replacements.

The Union believes such premiums are due her because she was deprived of them by the action of the Company which was later overruled in arbitration, on a make-whole theory. The Company urges, however, that such premiums were designed to compensate employees for working at unusual or onerous times, and that since Mrs. York did not suffer the consequences of working at such times she is not entitled to be compensated therefor.

No one can reasonably question the original purpose of shift or Sunday premiums. As time has moved on, however, they have become elements of pay which employees insist upon as additional compensation. We have seen evidence of this in contractual provisions requiring equalization of overtime opportunities among employees and even in arbitration awards holding holiday pay to be a form of increased wages. Whether this is sound or not, however, seems to be beside the point in this case. On the conceded facts, she would have had certain assignments during the retroactivity period which would have included a certain amount of premium time. This is demonstrated by the assignments given to her replacements. The argument that she did not work at the odd or onerous times calling for premium pay and should therefore not be given the premium pay she lost would apply equally to straight time pay. Normally, employees are paid only for working, except in a few exceptional circumstances by virtue of special provisions of the Agreement. This grievant did not work during normal work hours, and yet it is not disputed that she is entitled to pay as though she had worked. The same, on the make-whole theory, must be true of premium work opportunities she lost.

I have read a large number of awards reported in Labor Arbitration Reports. There are some rulings the other way, but there are many cases in which as part of back pay overtime rates have been allowed. My ruling is

not based primarily on such other awards, but rather on the fact that an employee who is awarded back pay is entitled to the pay of which he was deprived.

For these reasons, Mrs. York should be given, in addition to straight time pay, an amount equal to the shift and Sunday premium pay which was given to her replacements during the period in question.

Dated: January 10, 1961

/s/ David L. Cole
David L. Cole
Permanent Arbitrator