Award No. 868

In the Matter of Arbitration Between:
Inland Steel Company
and
United Steelworkers of America,
Local No. 1010.
Grievance No. 5-T-88
Appeal No. 1479
Arbitrator: Jeanne M. Vonhof
February 15, 1993
REGULAR ARBITRATION
INTRODUCTION
The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Friday, January 8, 1993 at the Company's offices in East Chicago, Indiana. The Company and the Union filed pre-hearing briefs in the case.
APPEARANCES
UNION
Advocate for the Union:
J. Robinson, Chairman, Grievance Committee
Witness:
S. Dotson, Grievant
Also Present:
L. Aguilar, Second Vice Chairman, Grievance Committee
M. Bochenek, Griever
COMPANY
Advocate for the Company:
P. Parker, Project Representative, Union Relations
Witness:
B. Sammon, Section Manager, No. 2 BOF/CC
Also present:
B. Smith, Senior Representative, Union Relations
R. Allen, Human Resources Generalist, No. 2 BOF/CC
RELEVANT CONTRACT PROVISIONS
Article 3, Section 1
Article 8, Section 1
BACKGROUND:
This is a case involving the discharge of an employee for failure to comply with the requirement of regular attendance. The Grievant, S. Dotson, has thirteen years' tenure with the Company, and worked as a Caster Operator at the No. 2 BOF/CC at the time of his discharge.
The record indicates that the Grievant has had a history of attendance problems, related to a number of personal and health problems. Between 1988 and 1990 he was suspended a number of times for excessive absenteeism. In April, 1990 he was discharged for his attendance problems. The Union filed a grievance over the discharge and the Parties eventually agreed to a Last Chance Agreement dated June 8, 1990. As is customary, in the Last Chance Agreement the Union agreed that the Company had cause to discharge the Grievant at that time.
Under the terms of the Last Chance Agreement the Grievant developed a Personal Action Plan to combat the problems which he identified as causing his absences. The plan addressed the following problems: transportation difficulties; alcoholism; addiction to gambling; various health problems including hypertension, diabetes and a serious knee problem caused by a non-job related injury; and home emergencies occasioned by his wife's illness.
The Grievant returned to work and since that time has been subject to the following discipline related to his absenteeism:

DATE	INFRACTION	ACTION
08/23/90	Missed Counseling Sess.	Verbal Warning
11/15/90	Failure to Report Off	Verbal Warning

08/21/92	Failure to Report Off	1 Turn Discipline
08/21/92	Excessive Absenteeism	Suspension
09/02/92	Excessive Absenteeism	Discharge

The Grievant's Last Chance Agreement was set to remain in effect for two years from the date it was signed; the expiration date therefore was June 8, 1992. The strict attendance provisions of the Last Chance Agreement expired six months earlier.

The Grievant's absenteeism record since his return to work under the Last Chance Agreement is as follows:

DATE	REASON	DAYS ABSENT
08/08/90 - 08/20/90	Sick	9
10/31/90	Personal	1
11/14/90	Personal	1
03-09/91	Personal	1
03/24/91	Sick	1
04/17/91	Sick	1
04/27/91	Sick	1
05/08/91 - 05/18/92	Sick	273
06/15/92	Tardy	.5
07/08/92	Early Quit	.5
07/19/92	Sick	1
08/02/92	Failure to Report Off	1
08/03/92	Sick	1
08/17/92	Sick	1
08/18/92	Sick	1
	TOTAL	294

The Company's Attendance Improvement Program differentiates between daily absences and "extended absences," i.e. those lasting more than three days; each are tracked separately by the Company through a computerized attendance tracking system. Employees are evaluated for a rolling ninety-day period (or the period since the date of the last discipline letter) for daily absences and a similar rolling period of 182 days/365 days for extended absences. For daily absences the computer program is set to trigger an action when an employee is absent 6% or more of scheduled turns until the employee reaches the two-day discipline level; after that, action is triggered when an employee is absent 5% or more of scheduled turns. Discipline is not automatic once the computer "kicks out" the name of an employee, however. The employee's supervisor is to consider the circumstances surrounding the employee's absences.

At the arbitration hearing the Grievant presented the following excuses for his absences since 1990. He stated that he believed, but was not certain, that the three-week absence in 1990 was due to his knee, since he has had surgery on it twice. He also was not certain about the causes of the three personal days off in 1990, but thought that they might be related to his teenage daughter running away.

The Grievant testified further that the absences in March and April of 1991 were due to his knee injury, as was his lengthy absence of one year from May, 1991, to May, 1992. The Grievant testified that he had surgery on his knee around August, 1991, after it was postponed because of other health problems. The Grievant returned to work on May 18, 1992.

On June 15, 1992 the Grievant was late for a pre-turn meeting. On July 8, 1992 he left work early because of a problem of his wife's. He testified that normally he has relatives caring for her, as per his Personal Action Plan under his Last Chance Agreement, but that all the relatives had gone to a family reunion which occurs only once every four years.

On August 2, 1992, the Grievant had a "failure to report off" before the turn because he had no phone in his house, he testified, and could not get to a telephone fast enough. On July 17, August 3, August 17 and August 18, 1992 he reported off sick because of problems with his knee, according to his testimony.

On August 21, 1992 the Grievant was suspended prior to discharge for excessive absenteeism. On the same date he was given a one-turn discipline for "failure to report off."

The Grievant's Section Manager testified that the Grievant's position is almost always filled and that if the Grievant is not available the supervisor usually must call out another employee or hold someone over from the earlier shift, and pay overtime. The Union presented evidence of the Grievant's efforts to address his health and other problems, and the improvement in his attendance since 1988.

THE COMPANY'S POSITION

The Company contends that it had just cause to discharge the Grievant. According to the Company the Grievant had been provided with ample opportunities to prove that he could correct his attendance problems and he gave no indication that he was willing or able to do so. The Company argues that further disciplinary measures would have proved futile.

The Company contends that it is not required to retain an employee who is unable to meet his or her responsibility to provide regular attendance. According to the Company, the Grievant failed to work as scheduled a total of four hundred fifty (450) turns over the past five years. The Grievant was counseled and made aware of his situation in regards to the absenteeism disciplinary procedure. Progressive discipline eventually led to his discharge. The fact that the Grievant continued in his same pattern of absenteeism following his last chance reinstatement clearly demonstrates that the Company's use of progressive discipline failed to change the Grievant's behavior, the Company asserts.

The Employer contests the Union's argument that the grievance should be granted because part of the Grievant's most recent attendance problems were brought on by temporary personal problems and a legitimate illness. According to the Company, if these absences were the Grievant's only absences, the discharge might not have been warranted. However, the Company argues, these absences are not isolated instances, but rather continue a long-standing habit of failing to work as scheduled. According to the Company the Grievant has offered assurances in the past that he would correct the problems causing his absences, and, having failed to do so after so many instances, his current assurances are not credible.

The Company contends further that the discharge was not based upon legitimate illnesses alone, or any other single type of failure to work as scheduled. According to the Company, it is the Grievant's total record which caused the discharge. In addition, the Company argues that it is not prohibited from relying upon extended illnesses in evaluating an employee's attendance record. The Company argues further that an employee may be disciplined for absences for which he or she receives S & A benefits.

The Company also contests the Union's assurance that the Grievant has been rehabilitated since his discharge. According to the Company, rehabilitation which occurs only after discharge is usually suspect, and there is no other indication that the Grievant's knee is rehabilitated, when it was not cured during the year he was off work.

For all of the above reasons the Company urges that the grievance be denied and the discharge upheld.

THE UNION'S POSITION

The Union contends that the grievance should be sustained. In support of this position the Union contends first that it is important to note that the Grievant's absences were predominantly related to extended absences for which he received Sickness and Accident benefits, rather than sporadic one-day absences which typically trigger disciplinary measures. According to the Union, the majority of the days of work missed by the Grievant throughout the five-year period from 1988 to 1992 involve extended absences; individual days missed involve a very small amount of the total.

The Union relied upon several charts and graphs it prepared, in which it separated out the Grievant's extended absences from his daily absences. According to the Union the instances of individual absences since 1989 show a level below the 5% trigger for the Company's computer tracking system. In response to the Company's argument that extended absences are tracked separately, the Union argues that the Attendance Improvement Program is only the Company's attendance tracking system, and does not serve as a substitute for the contractual standard of "cause." In further support of this argument the Union points to arbitration awards stating that each attendance case must turn upon its own facts.

The Union argues further that the Company must establish first that there was excessive absenteeism, and then establish cause for the action taken, taking into account the Grievant's attitude and possibilities for rehabilitation. The Union notes that rehabilitation is at issue here because the Grievant presented uncontested testimony that he has his medical problems, notably hypertension and his knee problems, under control.

The Union contends that the reasons for the Grievant's extended absences were not under his control. According to the Union the Grievant has done everything he said he would under his Last Chance Agreement to control the attendance problems he could control. Over the course of a long period of time, any employee might suffer some ailment or injury which would necessitate a long extended absence, the Union suggests.

The Union further contends that the Company did not permit sufficient time for the process begun with the LCA to work. For this and all the other reasons stated above the Union requests that the grievance be sustained and the discharge overturned.

OPINION

The instant case involves the discharge of an employee with thirteen years' tenure, for attendance problems. The Grievant had been discharged in April, 1990 for excessive absenteeism arising from a host of personal and medical problems. He was returned to work on a Last Chance Agreement in the summer of 1990, which expired about two years later. He was discharged again in August, 1992 for failure to report for work as scheduled. It is this second discharge which is under dispute in the instant case. At the outset the Arbitrator wishes to make clear what this case is not about. The instant case does not involve a challenge to the Company's overall Attendance Improvement Program. The Union is not challenging the program, at least as a means of initially tracking absences.

In evaluating the evidence in this case, the Arbitrator has relied upon the principles established over the years between the Parties, and to a lesser extent, in the steel industry. One basic principle arising from these cases is that each case of discipline for attendance problems must turn on the facts and circumstances of that individual case. (Inland Award No. 252, Seitz, Arb., 1958; Inland Award 666, Luskin, Arb. 1979) Another primary tenet is that regular attendance is the obligation of every employee. Both Parties have cited Arbitrator Peter Seitz in Inland Award No. 252, where he stated,

Correlative to the responsibilities of Management are its right to be assured a responsible work force. The regular and responsible attendance of employees is essential to the fulfillment of the managerial functions. The duty of the Company to furnish work when employees are scheduled therefore is paralleled by the employee's attendance in accordance with such schedule.

Arbitrator Seitz went on to note that excessive non-attendance, for whatever reason, hinders management in achieving the productive goals of the business. However, as the Union notes, Arbitrator Seitz stated further that the conclusion that the absenteeism is excessive is not sufficient, standing alone, to determine whether proper cause exists:

"Excessive frequency," (of absences) of course, is a question to be determined by the facts presented in each case; but the inquiry does not end there. After "excessive frequency" of absenteeism is found it is still required to determine whether "proper cause," the standard for disciplinary action placed in the Agreement by the parties has been met. This standard makes it appropriate to inquire into the circumstances that occasioned the absences, the mental attitude of the grievant, and the possibilities of rehabilitation. (Emphasis added).

The Union argues in the instant case that the three factors cited above, i.e. the circumstances surrounding the absences, the mental attitude of the Grievant, and the possibilities of rehabilitation, all argue in favor of overturning the discharge in this case.

The Undersigned Arbitrator stated in an earlier case between these Parties that the Employer may discharge an employee for excessive absenteeism, even when the reasons for the Employee's absenteeism involve illness or some other factors beyond the Employee's control. However, the Arbitrator does not view discipline as necessarily meeting the "for cause" requirement of the labor agreement simply because there has been "excessive absenteeism," as established by the Company's Attendance Improvement Program. The evidence does not demonstrate that the Parties have agreed that the attendance program overrides or substitutes for the contractual requirement of "cause" which applies to all discipline and discharge cases. Nor did the Arbitrator mean to suggest that the reasons for the employees' absences are irrelevant. The Employer's program in itself is not a no-fault policy, i.e. there is some latitude for supervisors to determine whether the reasons for an employee's absences indicate that the next disciplinary step should or should not be imposed. Furthermore, as Arbitrator Seitz' opinion makes clear, the circumstances surrounding an employee's absence are one factor to be considered in determining whether proper cause existed under the labor agreement.

In examining a record of absenteeism, arbitrators do consider extended absences somewhat differently than sporadic daily absences. The Union has cited a paper presented by Arbitrators Richard Mittenthal and Howard Block at the 37th Annual Meeting of the National Academy of Arbitrators in which they explained the rationale underlying this difference,

Extended absenteeism is viewed somewhat differently. Although it may produce higher absenteeism rates than casual absenteeism, it is far less disruptive. Because it is known in advance, it can be factored into the scheduling of the work force. It does not cause unexpected vacancies or last minute force adjustments.

In addition, Arbitrators also view absences which are under the employee's control somewhat differently than those which are not under his or her control. The employee who is unable to control his or her absences is generally accorded more leniency -- both by employers and arbitrators -- than the employee who is able but unwilling to do so.

However, there comes a point when even extended absences or absences for causes outside the employee's control may substantiate a termination. Extended absences are not inconsequential. At some point the Employer has a right to have an employee on the job, even if the Employee's absences are long-term absences occasioned by genuine illness. As the Union notes in its brief, Arbitrators Mittenthal and Block stated in their paper, "Extended absences are ordinarily exempt from discipline until they become chronic or
excessive."

With these principles in mind, the Arbitrator turns to the facts in this case. The Union notes that the vast majority of the Grievant's absences since 1988 were extended absences, rather than daily absences. The Union contends that these absences were occasioned by illnesses which were out of the Grievant's control and suggests that because the Grievant received Sickness and Accident benefits for the absences, they cannot constitute proper cause for discipline or at least discharge.

However, the Union has implicitly recognized that extended absences can legitimately be considered as one factor in determining proper cause for discharge. In 1990 when the Grievant's Last Chance Agreement was negotiated, the vast majority of the Grievant's days absent in the prior two years were attributed to extended rather than daily absences. However, the Union agreed when the Last Chance Agreement was signed that there was cause for the Grievant's discharge at that time.

Having entered into that Last Chance Agreement (LCA), the evidence indicates that the Grievant complied with it well enough to see it through to its completion. The record indicates that the Grievant was given a verbal warning shortly after the LCA went into effect for missing a counseling session with an Employee Assistance Plan (EAP) counselor. And the Grievant had another verbal warning several months later for a Failure to Report Off, according to the Company's evidence. However, the Arbitrator concludes that the Company did not regard these instances as sufficiently serious violations of the Last Chance Agreement to trigger its suspension/discharge provisions, since they were not in fact triggered.

According to the terms of the LCA, it was to be in effect for two years from June 8, 1990. The strict attendance provisions were in effect for eighteen months from June 8, 1990. The Company did not discharge the Grievant within the time period covered by the Last Chance Agreement.

Since the Agreement expired, the Grievant never received any warning or other discipline on his record until the day he was suspended prior to discharge, August 21, 1992. On that date he was given a one turn discipline for failure to report off; on the same date he was given his ultimate suspension prior to discharge. The Company has argued that it would be futile to give the Grievant any further warnings or discipline because he has demonstrated clearly that he is unable or unwilling to maintain regular attendance. The Grievant's record indicates, however, that he has made substantial progress in assuming control over the situations which are under his control, and which formerly caused his absences. The very substantial reduction in his daily absences from 41% in 1988 to around four or five percent for the following years demonstrates a great improvement in his record.

The Arbitrator does not mean to overstate the Grievant's improvement. The Arbitrator recognizes that the figures for the Grievant's absenteeism record for 1991 and 1992 might be somewhat different if he had not had such a long extended absence during that time period. And the Grievant's inability to remember some of the reasons for his absences added to the fact that he has had any instances of failure to report off, tardiness, leaving early, etc. is a serious problem, given his past record, as discussed in more detail below. The Grievant's extended absences remain a problem as well. However, the Company did not discharge the Grievant during or immediately after his extended one-year absence for the knee surgery. This fact, and the Company's argument in this case, leads the Arbitrator to conclude that the Company did not discharge the Grievant on the basis of this extended absence alone. Rather, the Company discharged the Grievant three months after he returned from this extended leave and had four other instances of individual sick days, one tardy, one early quit and one failure to report off.

As discussed in more detail below, this is not an enviable record. However, the Arbitrator concludes that the record is not so serious that the Grievant should have been discharged without any progressive discipline after the termination of the Last Chance Agreement. The only discipline the Grievant received after the institution of the Last Chance Agreement were two verbal warnings in August and November, 1990. The Last Chance Agreement expired almost two years later, and the Grievant never had any further word from the Company concerning his attendance record until the day he was ultimately suspended prior to discharge.

The Last Chance Agreement provides for immediate suspension preliminary to discharge for any violation of the Agreement. However, the Agreement also contains a set expiration date; there is no evidence that the Agreement was extended because of the Grievant's lengthy extended absence during the period of the LCA. Because the Grievant has been discharged previously for the same offense, it may well be that he is not due the full panoply of progressive discipline due another employee with the same current record and no past record of excessive absenteeism. However, once the Grievant has fulfilled the terms of his Last Chance Agreement, and its time limits have expired, the Arbitrator concludes that its provision permitting immediate discharge without further warning or progressive discipline does not extend forever in time.

The Grievant testified that he has had no problems with his knee since his discharge. However, on the record before her, the Arbitrator cannot conclude that his knee problems (or some other problems) will not reappear when he returns to work. It may be that the Grievant's recurrent problems will prevent him from assuming his responsibility to maintain regular attendance. However, an employee with thirteen years' tenure is due some warning that his employment will be terminated, even if he is ultimately unable to control the reasons for his absences.

Therefore the Grievant will be reinstated to his former position. However, there will be no backpay award, for the following reasons. First, the lack of sound medical documentation and the Grievant's inability to remember the reasons for some of his absences since the institution of the Last Chance Agreement is a problem. Second, the Arbitrator concludes that the Grievant could have exerted more control over the absences which were not related to illness. Although his testimony concerning his early quit to care for his wife in 1992 may be reasonable, his excuses for his recent failure to report off and tardiness are not, and the information regarding his earlier personal days off is much too vague to be credible.

The Grievant must realize that his attendance must improve, or the Company at some point will have proper cause to discharge him. Given his past record of extended absences, it is especially important that he exert the utmost control over those situations which are under his control which might cause his absences. His failure to do so in 1992 and his overall past record lead the Arbitrator to conclude that backpay is not appropriate in this case.

AWARD

The grievance is sustained in part. The Grievant will be reinstated, without back pay.

/s/ Jeanne M. Vonhof
Jeanne M. Vonhof
Labor Arbitrator
Acting Under Umpire Terry Bethel
February 15th 1993.
Chicago, Illinois.