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In the Matter of Arbitration Between:)
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ISPAT INLAND)
) **Grievance No. 5 -W - 60**
) **Appeal No. 1618**
and) **Award No. 1007**
)
)
UNITED STEELWORKERS OF)
AMERICA, Local 1010.)
)

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INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on January 23, 2003 at the Company's offices in East Chicago, Indiana.

APPEARANCES

UNION

Advocate for the Union:
B. Carey, Staff Rep

Witnesses:

D. Reed, Secretary Grievance Committee
C. Geyer, Grievant

COMPANY

Advocate for the Company:

P. Parker, Section Manager of Arbitration & Advocacy

Witnesses:

C. Lamm, Senior Representative - Union Relations
D. Staugher, Section Manager - Steelmaking

Background:

The Grievant had been employed by the Company for 28 years at the time of the incident giving rise to his termination. The evidence shows that the Grievant had been discharged in September 2000. The Company and Union agreed that there was cause to discharge him, but he was reinstated under the terms of a Last Chance Agreement dated April 17, 2001. In the Last Chance Agreement the Grievant agreed to complete "a period of demonstrated ability" in the Inland Alcohol and Drug Program, since, as he testified, his attendance problems had been caused by drug and alcohol abuse. The Last Chance Agreement also contains two paragraphs of particular relevance in this dispute,

J. Should Mr. Geyer, within a period of twenty-four months, (layoffs, leaves of absence, and any extended absence of greater than twenty-nine (29) consecutive calendar days being carved out of the evaluation period), fail to report off or accrue an absenteeism rate of 5% or greater during any rolling ninety (90) day evaluation period subsequent to his return to work or violate any other provision of the Company's Attendance Improvement Program or any other Company rules or regulations with respect to absenteeism, cause will exist for his immediate suspension preliminary to discharge.

L. Mr. Geyer fully acknowledges an understanding of his basic employment responsibility to report on time for scheduled work and to give appropriate and timely notice to his department when he is unable to do so. Mr. Geyer must provide notification and documentation verifying his absences. Notwithstanding documentation provided, absences, tardiness or failure to work a complete turn is unacceptable and will be counted in Mr. Geyer's attendance record as indicated in the Attendance Program Guidelines.

N. This arrangement represents a final chance at employment for Mr. Geyer and is being made in full and final settlement of grievance number 5-W-020. Terms of this agreement will be expressly adhered to. Failure to meet any of the conditions set forth above or any repetition of the conduct which led to this suspension/discharge action or violation of any other Company rules or regulations will be cause for Mr. Geyer's immediate suspension preliminary to discharge.

Via a letter dated October 8, 2002, the Company suspended the Grievant, preliminary to discharge, for failing to comply with the terms of his Last Chance Agreement. Two weeks later the suspension was transformed into a discharge.

After the Grievant signed his Last Chance Agreement, the record shows, he had the following absences:

Early quit	August 16, 2001
Personal	September 28, 2001
Transportation	April 9, 2002
Sick	September 29, 2002
Failure to Report Off	September 30, 2002
One day extension of FMLA leave	April 1, 2002[1]
Extended Absence	April 10 - 15, 2002
Extended Absence	June 3 - Sept. 12, 2002
Extended Absence	Beginning October 1, 2002

With regard to the FRO violation, the Grievant testified that he came back to work in September after taking time off after falling down the steps at home and twisting his knee. He said that he had suffered damage to this knee previously at work. When he returned to work, he had problems with his knee swelling.

The Grievant said that he was assigned to work afternoons during the week he was charged with the FRO. He explained that he called in sick on Sunday, September 29 in the morning, so that Management would have ample time to find a replacement. He said that he did not know whether he would be in on Monday afternoon, because he was going to see the Company medical personnel on Monday morning, to determine whether he could work, given the situation with his knee. The Company nurse directed him on Monday to go see his regular doctor, which he did, and

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[1] The Grievant's FMLA leave time was not considered in the termination decision.

then returned to the Company clinic, where clinic personnel took him off duty for that day. He testified that he assumed that the clinic had informed his department that he would not be able to work that day. They did not do so. His supervisor called him, he testified, on Monday afternoon to determine if he were coming to work, and he said no.

The Grievant testified that he brought in documentation for his April absence, and a Management official told him that the documentation would cover his absence. The Grievant also testified about his extended absences. He said that the April absences were caused by getting his finger smashed while lifting weights. The June through September leave of absence was caused when he injured himself falling at home. The extended absence which was beginning on October 1, 2002 also was for his knee. The third step minutes show that the Grievant missed 71 days of work in 2002, up until September 27th.

Mr. C. Lamm, Staff Representative, Union Relations, testified about the Grievant's attendance record. He said that initially, after the Last Chance Agreement, the Grievant's attendance improved. Then, particularly in 2002, his attendance record became far worse. The Staff Representative stated that when an employee goes to the clinic to determine whether he is fit for work, the employee retains the responsibility to notify his Department if he is found to be not fit to work. On cross-examination, the Union probed whether the attendance program is a no-fault plan or not. The Staff Representative testified that generally it is not a no-fault plan, but that when an employee works under a Last Chance Agreement, it becomes more like a no-fault plan.

Mr. D. Staugher, Section Manager, Steelmaking, testified that the Grievant was part of a crew in which every position must be filled. He said that he no longer has a crew of employees from which to draw to cover long leaves. In addition, the Grievant occupied a fairly high job

classification, which took 4-6 months to learn. He said that FRO's make it particularly difficult to fill the position. In addition, he said that he does not expect the clinic to call if an employee is off work.

The Section Manager said that because the Grievant violated both the Attendance Improvement Program and the prohibition against FRO's, he was terminated. He violated the Attendance Improvement Program by having two or more extended absences within a 182-day evaluation period. He said that when he talked to the Grievant about his April absence, he told him that the absences were not excused. He also testified that he last spoke to the Grievant about his Last Chance Agreement only a few days before his FRO.

The Company's Position:

The Company argues that with regard to the violation of the LCA, the fact that the Grievant may have been really sick on the days he missed is not relevant. According to the Company, Management assumes that any days missed are because the Grievant is really sick or injured. An employee working under a Last Chance Agreement already has run the gauntlet of being excused because he is sick or injured. The Last Chance Agreement under which the Grievant was working requires that he not only provide documentation for any absence, but also that he must remain in compliance with the Attendance Improvement Program.

The Company argues that the Grievant violated the Attendance Improvement Program by exceeding the number of permitted extended absences within a six-month period. The Company notes that the extended absence part of the Attendance Improvement Program is the part of the program which the Grievant violated originally, resulting in the Last Chance Agreement. In

addition, the Company argues that the evidence shows that the Grievant committed an FRO. According to the Company, the Arbitrator's sole role is to determine whether there was a violation of the terms of the Last Chance Agreement. If the Arbitrator finds such a violation, then the discharge must be upheld. While acknowledging that there may be some compelling reasons why the Company would excuse an employee's breach of the Last Chance Agreement, the reasons here are not compelling, according to the Company.

The Union's Position:

The Union contends that the Grievant should not have been charged with an FRO for his conduct with regard to the September 30th absence. The Grievant had called the Department the day before and said that he planned to go to the clinic the following day. The Grievant did go to the clinic twice the following day, and simply incorrectly assumed that the clinic would call him off. The Union notes that the clinic does call employees off when there is an in-plant injury, and it was reasonable for the Grievant to assume that the same procedure applied to him. If he had simply called off sick for Sunday and Monday, the Union argues, he would not have been charged with an FRO. But because he was attempting to be more conscientious, he wound up with an FRO, the Union argues. However, this is not the usual FRO, where the employee simply fails completely to call in, according to the Union.

The Union also argues that the reasons for the Grievant's absences prior to the Last Chance Agreement were different, involving his drug and alcohol problems. Here the Grievant was simply the victim of bad luck, and his absences should be viewed differently, the Union contends. According to the Union, the Company acted too much like the Attendance

Improvement Program is a no-fault system, failing to consider that the Grievant's extended absences were all due to substantiated medical reasons. The Union argues that the reasons for the Grievant's absences were compelling, and he should be reinstated.

Findings and Decision:

In the instant case a long-term employee has been discharged for violating the terms of a Last Chance Agreement. The Union argues first that the Grievant should not have been charged with an FRO, i.e., a failure to report off before his shift began on September 30th. There are some aspects of this situation that are different from a typical FRO. The Grievant had reported off the day before and told the department that he intended to go to the clinic the following morning to determine whether he could work on that day. He followed the clinic's directions, and, after seeing his doctor, expected to be off for an extended period beginning that day. The Company argues that the responsibility to inform his department that he would be absent that day remained with the Grievant, not the clinic. However, this is not the typical FRO, where an employee has absolutely no contact with the Company prior to his shift, the employee does not see the Company doctor about his fitness to work, and the employee is not embarking on an extended absence. Here the Grievant had several contacts, informing the Company of his status, in the period preceding the shift.

There are sufficient mitigating circumstances surrounding the September 30th incident that the FRO, standing alone, might not provide adequate grounds for the discharge. However, the Company also bases the discharge on the fact that the Grievant had two extended absences in six

months, which violates the Company's Attendance Improvement Program. In addition, the Grievant began another extended absence at the same time he was suspended pending discharge.[2]

According to the Company, the Grievant's original discharge was for trouble with extended absences. The Union argues that the Attendance Improvement Program is not a no-fault attendance program, and therefore the Company should have considered the reasons for the Grievant's extended absences here. The Grievant testified that his extended absences before the Last Chance Agreement were related to his alcoholism and drug abuse, whereas the most recent absences were related to unfortunate accidents or injuries. The Union also notes that the Grievant provided medical documentation to back up all of his injuries.

Under Paragraph J of the Last Chance Agreement the Grievant agreed not to violate any provision of the Company's Attendance Improvement Program. The Parties dispute whether the Grievant's extended absences should be counted under the Attendance Improvement Program. However, even if the program provides the Employer with some discretion in counting extended absences as violations of the policy, the evidence does not establish that the Company abused that discretion in this case. The Union did not present evidence that other employees with similar records have been treated more leniently than the Grievant, with regard to the extended absence provisions of the Attendance Improvement Program. Therefore, the Arbitrator cannot conclude that Management erred in deciding that the Grievant had violated the Attendance Improvement Program.

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[2] This case therefore differs from Inland Award No. 948, in which a discharge for a single FRO violation of a Last Chance Agreement was overturned.

Furthermore, even though the Grievant provided documentation regarding his absences, Paragraph L of the Last Chance Agreement states that, "[n]otwithstanding documentation provided, absences, tardiness or failure to work a complete turn is unacceptable and will be counted in Mr. Geyer's attendance record as indicated in the Attendance Program Guidelines." In a similar dispute which arose under Inland Award No. 964, I held,

> Thus, I conclude that the Parties agreed, through Paragraphs 8 and 10, that any absence must at least be for a good reason, and that even ones for which a reason has been offered will be counted under Paragraph 8, except in very unusual circumstances, not present here.

Here, the language of the Last Chance Agreement itself, even more clearly than the Last Chance Agreement referenced in Inland Award No. 964, obligates the Grievant to provide documentation for absences, but makes clear that providing such documentation does not excuse the absences.

The Last Chance Agreement states that any violation of the Attendance Improvement Program establishes cause for suspension preliminary to discharge. While there may have been good medical reasons for the Grievant's extended absences, there is not sufficient evidence that the Grievant was treated differently than other similarly-situated employees under the Attendance Improvement Program. Therefore, there is sufficient evidence in the record to establish that the Grievant did violate the Attendance Improvement Program by virtue of his "two, going on three" extended absences within six months. It is unfortunate that an employee with so many years of seniority is in this situation. However, under these circumstances, the Arbitrator is obligated to uphold the terms of the Last Chance Agreement to which the Grievant and the Union agreed. Therefore, the grievance must be denied.

AWARD

The grievance is denied.

Jeanne M. Vonhof
Labor Arbitrator

Decided this 7th day of March, 2003.