****

In the Matter of Arbitration Between:)
)
ISPAT INLAND)
)
) **Award No. 1011**
and) **Grievance No. 26-W-54**
)
UNITED STEELWORKERS OF)
AMERICA, Local 1010.)

****

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on December 18, 2003 at the Company's offices in East Chicago, Indiana.

APPEARANCES

UNION
Advocate for the Union:

D. Reed	Secretary, Grievance Committee

Witnesses:

D. Shattuck	Chairman, Grievance Committee
G. Young	Grievant

COMPANY
Advocate for the Company:

P. Parker	Section Manager of Arbitration & Advocacy

Witnesses:

Dr. DeMichael	Plant Medical Director
R. Vela	Area HR Manager
T. Kinach	Section Manager

Background

This is a case involving the discharge of the Grievant for his failure to work as directed and his overall unsatisfactory attendance record. The Grievant was hired by the Company on September 23, 1974. The records show that the Grievant received leave under the Family and Medical Leave Act in 2001 and 2002. In 2002 he began taking FMLA leave in July, 2002, used up all his FMLA leave, and then failed to attend work, except for about 2 ½ or 3 days in March, 2003. On April 29, 2003 the Company wrote the Grievant stating,

> You have been on extended absence since April 7, 2003 and we are advised by the Inland Medical Department that they do not have any data that justifies your continued absence. Work is available and you are directed to report for work on Monday, May 5, 2003, the 3-11 shift. You are to report to Supervisor, Carolyn Smith, in the Yard Department where you will be assigned to work as a laborer. This laborer assignment is consistent with medical restrictions placed upon you by the Inland Medical Department.
>
> Failure to report to work as directed may result in your suspension preliminary to discharge for absenting yourself from work without cause.

The Grievant did not return to work and was notified on May 12, 2003 that he was suspended for five (5) days and at the end of that period he would be subject to discharge. A suspension hearing was held and the Grievant was discharged.

The Company's Medical Director Dr. DeMichael presented evidence regarding the Grievant's medical condition. He presented a report from an Independent Medical Examiner, Dr. Suresh Mahawar, dated October 26, 2001, stating that at that time the Grievant complained of having foot pain in both feet for the past five (5) years. The report noted that he had been diagnosed with planter fasciitis, which Dr. DeMichael described as a condition causing pain and inflammation in the arch of the foot. He was also diagnosed with heel spurs. He reported being in severe pain most of the time. The Independent Medical Examiner stated that his examination

of the Grievant "did not reveal significant objective clinical findings and therefore there is no one to one correlation of objective clinical findings with his subjective symptoms." The doctor said that the Grievant should be able to work with certain restrictions, including,

1. No excessive walking over 2 hours at a time.
2. Sitting down for 15-30 minutes after 2 hours of walking.
3. No ladder climbing.
4. No lifting over 40 lbs without assistance.

A second independent medical examination was performed by the same doctor dated February 18, 2003. In this report the Independent Medical Examiner indicated that he had reviewed many medical reports from the Fall of 2002 regarding the Grievant's health, including x-rays and biopsies associated with diverticulitis and a sigmoid colon resection surgery that the Grievant had in August, 2002. He noted that all of these tests were essentially normal. He also noted that the Grievant was taking medication for asthma and depression. In this letter the doctor stated that the Grievant was suffering from "mild degree of plantar fasciitis and flat foot deformity" and recommended the same restrictions as in his 2001 letter. Dr. DeMichael testified that plantar fasciitis is almost always a temporary partial disability. He stated that many people function normally on jobs with plantar fasciitis.

The Company also presented medical information from the Grievant's own doctors. The Grievant's gastroenterologist, Dr. Benjamin Schmid, wrote a note dated February 4, 2003, stating, "[Grievant] has been ill with diverticulitis, abdominal pain, rash, depression. He may return to work with light duty, no lifting more than 30 pounds and with 5 minute breaks every hour – limit work to 8 hours per day, 40 hours per week."

In addition there is a medical form from the Occupational Medicine Department of the

Hammond Clinic stating that the Grievant could return to work on April 7, 2003, with the following restrictions,

1. No lifting or carrying more than 25 lbs.
2. Sitting job/minimum walking
3. Ground level work only, no climbing other than stairs or ramps.
4. Minimum bending, stooping or twisting
5. Limited use of left leg.

The Company also presented a form from its own Medical Department, listing the restrictions of no ladder climbing, no lifting more than 40 pounds without assistance, being permitted to sit for 15 minutes after 2 hours of walking, and no working more than 8 hour shifts. The Company sent this to the Grievant's own orthopedist, Dr. Coleman, who returned it on May 19, 2003, with the following note,

> "I agree with the above restrictions as applicable to this patient. I do not feel he needs any additional restrictions at this time. The above are not exactly the same as I previously delineated in my office visit, April 21, 2003, but they are close enough to accept as reasonable at this time."

The Union presented evidence that Dr. Coleman had previously recommended no lifting more than 25 pounds, a 15 minute rest break after 90 minutes, and no climbing stairs for more than 30 minutes cumulative in 8 hours. Dr. DeMichael testified that the job the Grievant was working at the time he was terminated, the Janitor position, could be performed within any of these restrictions.

Human Resources Area Manager R. Vela testified that in July, 2002, the Grievant was promoted to a job as a Feeder on the coiler line at the 80 Inch Hot Strip Mill. The Feeder makes sure that coils are ready for the line by cutting off the lead or tail end of coils. According to the

Area Manager, the Grievant could have performed the work of this job within his medical restrictions. He could sit down in between coils, as only about 10-20 coils are wound each day. There is no climbing of ladders. Although the cut ends of the coils may be heavy, and the Feeder must remove them, the Grievant could have cut them into smaller pieces or asked for assistance, in order to meet his weight lifting restrictions, according to the Area Manager. He also testified that the Grievant had performed work in the Feeder job in the past under these restrictions.

The evidence shows that, due to retirements, the Grievant could have promoted to the Coiler position in his sequence in about January of 2003. According to the Area Manager, there is far less physical activity in this job than in the Feeder position. The Coiler basically sits in a pulpit 98% of the time performing his work via control panels.

The record shows that the Grievant demoted himself from the Feeder position to a General Labor position in February, 2003. A medical placement meeting was held to determine whether there was work meeting the Grievant's medical restrictions within his new classification within his Department. There was no such work in his Department, but work meeting his restrictions was found in the Janitor position, according to the Area Manager.

According to the Grievant he promoted into the Coiler job but did not feel that he could perform the job. He stated that he had trained on the Coiler job and although it is physically easier than the Feeder job, it is a high-stress, fast-paced position. The Grievant testified that his doctor had told him that stress can make his diverticulitis worse. The Grievant testified that he has had diverticulitis for 15 years. In August of 2002, he had surgery to have his sigmoid colon removed.

The Grievant stated that he told his Supervisor that he would demote to the lowest job in

the sequence but was told that he had to be promotable or remove himself from that line of jobs. The Grievant said that he pointed out to his Supervisor that other employees were in that sequence who had been permanently or temporarily denied promotion. He said that he would not have taken a demotion to a Labor position, losing about $25,000 in wages per year, if he could have stayed in his sequence. On cross-examination he said that he did not file a grievance over this problem because he did not know that he had any recourse.

The Grievant also disputed some of the attendance records. He testified that although the records showing him having an FRO (Failure to Report Off) in the middle of a group of absences, this must be must be an error. He said that he never reported back on for duty, so he could not have had a failure to report off duty. He also testified that he never reported off "personal," although the Company's attendance records show him doing so at the start of several long absences.

The Grievant went to work for a period of 3 days in mid March, 2003. He said that because of his plantar fasciitis he was no longer able to walk after several days at work. He reported to the Company's medical clinic, which sent him home. The Grievant applied for a Permanent Incapacity Pension, but only after he was discharged, because he said that he did not know about it before his discharge.

The Greivant testified that he tried but could not perform the Janitor job because he was on his feet all the time, and had to lift items weighing more than 40 pounds. He said that he reported this to his Supervisor, who told him just to do the best that he could. The Grievant testified that he heard that the Company had cut down on the number of Janitors, and he could not always find someone to help with lifting. Under questioning from the Company the Grievant

acknowledged that at the suspension hearing and grievance procedure he said that he was not returning to work. He said that his doctors would not allow him to return under the Company's restrictions. He stated that he does not believe that he can return to work now, that it is not in his best interests, and that he is totally and permanently disabled, but that if he had to do so, he would go back to work, under the restrictions laid down by his doctors.

The Grievant also said that he believed that he had applied for Sickness and Accident benefits in 1999, 2000 and 2001, although he had no documents to prove it. An employee is eligible for such benefits after seven days of absence. Mr. T. Kinach, Section Manager, Union Relations, testified on rebuttal that the Company's payment records of Sickness and Accident benefits back to 1998 demonstrate that the Grievant did not collect the benefits before May-June, 2001.

The Grievant also testified that he signed up for FMLA leave about three or four years before his termination. He stated that he obtained the forms from Human Resources and gave them to his doctor. The Grievant testified that he believed that he did not need to refile these reports later.

The Human Resources Area Manager also presented documents showing the Grievant's attendance record from 1998 through 2002. The records show that he received leave under the Family and Medical Leave Act for extended periods in 2001 and 2002. The Grievant's past disciplinary record shows that he received the following discipline for absenteeism: a one-day discipline in 1999, a two-day discipline in 2000, a final warning in January, 2002, a 3-day discipline and a record review in April, 2002, and a one-day discipline for an FRO (Failure to Report Off) in the same month.

The Chairman of the Grievance Committee testified that the records do not support the Company's claim that the Grievant's past attendance record provides grounds for discharge. He testified that under the labor agreement, any absence in excess of four (4) calendar days shall be deemed to be leave taken under the FMLA, even if the employee has not requested FMLA leave.[1] According to the Chairman, a similar case about 3 years ago revealed that the Company's computerized attendance system had not been counting such absences as FMLA leave. According to the Chairman, he brought this oversight to the Company's attention, and the change was made to count absences in excess of 4 days automatically as FMLA leave.

The Chairman noted that the Grievant's own record shows that longer absences were designated as FMLA leave in the Company's computer records beginning in 2001. However, the Chairman noted that the Grievant had several periods of extended absences in 1998, 1999, and 2000 that were not designated as FMLA leave. He testified that if the Company had counted these absences as FMLA leave, then the Grievant would have received at most one letter of discipline. On cross examination he acknowledged that an employee must have a "serious health condition" in order to qualify for FMLA leave.

The Union introduced, over the Company's objection, two medical documents regarding the Grievant's medical condition after his discharge. One document, dated August 26, 2003, states that the Grievant was suffering from a fever of unknown origin, skin rash, diarrhea, neuropathy of his lower extremities and plantar fasciitis. The doctor recommended that he be maintained off work at that time. Another document, dated November 13, 2003, stated that the

---

[1] He stated that the Company may require medical documentation, but must affirmatively do so.

Grievant was ill and "has been under treatment and evaluation since approximately August, 2002. At which time he had surgery for diverticulitis. He has continued to have problems with abdominal pain, fevers and skin rash. An extensive evaluation has been done to determine the cause of this. He has been seen in the office on the following dates by myself and also has been seen by numerous other doctors: January 31, 2003, July 1, 2003, July 14, 2003, July 28, 2003, August 12, 2003 and September 30, 2003. He had a colonoscopy November 5, 2002 and a gastroscopy the same date. He has also been evaluated by Dr. M.M. Shah of Hematology, by Dr. Valdez of Neurology, Dr. Klein of Internal Medicine, Dr. Gordon of Dermatology and numerous other physicians."

The Company's Position

The Company argues that the evidence shows that the Grievant has refused to work as scheduled, and has not proven that he was or is physically unable to work. According to the Company the Grievant missed 169 days of work in 2001 and 2002, not counting his full allotment of FMLA leave. He missed all but three days in 2003, until he was discharged in May, and then continued to remain off work through the period of the grievance procedure.

The Company contends that the Grievant has not established that he has been disabled at any time, or that he was disabled even at the time of the arbitration hearing. The Grievant wishes to be reinstated, not to return to work, the Company argues, but simply to remain on the employment rolls until he reaches 30 years. The Company contends that there are no 30-year pension benefits offered at 28 or 29 years, and that the Grievant would not qualify for a Permanent Incapacity Pension either.

According to the Company two evaluations from the same Independent Medical Examiner concluded that the Grievant could return to work, with certain restrictions. The Grievant's own orthopedist agreed with the restrictions suggested by the Company's Medical Department, based upon the findings of the Independent Medical Examiner. The Grievant's other doctors also released him to return to work, the Company contends.

In addition, the Company argues that the evidence shows that there was work available within the Grievant's restrictions. According to the Company, the Coil Process line is not a high pressure line. Only 10-20 coils are rewound per turn, and the Grievant could have rested in between coils. The Company suggests that the Grievant realized that he could perform his work on the Coil line within his restrictions, and therefore demoted himself to a labor position, because the Company was less likely to find work within his restrictions in this position.

The Company further disputes the Union's argument regarding the FMLA and the Grievant's past discipline for absenteeism. The Company notes that the argument was not raised during the suspension hearing or the third step of the grievance procedure. The Company also argues that the language on p. 243 of the Agreement must be read as it relates to 29 CFR Sec. 825, which it cites, and to the rest of the language of the Section. According to the Company, its meaning can only be understood in terms of the FMLA's requirement that an employee has a serious health problem. If the Grievant had raised this argument, or said that he was seriously ill at the time of the absence disciplines rendered earlier, then the Company could have asked for certification at that time.

The Company contends that the Grievant has been missing work for a long time. According to the Company, the Grievant decided that he no longer wishes to work. Although he

has long service, all of the doctors were in agreement that he could return to work, and he refused to do so, which constitutes a "quit," according to the Company.

The Union's Position

The Union contends that the Grievant suffers from a multiplicity of chronic diseases and illnesses, including (but not limited to) plantar fasciitis, diverticulitis, numbness of legs, sleep disorder, diarrhea, severe skin rash, sleep apnea, arthritis, depression, asthma and neuropathy of his lower extremities. The Union argues that the evidence does not show that the Company had work within the Grievant's restrictions. According to the Union, the Grievant was removed from a less strenuous job as a Coil Process Operator and placed in a Janitor position, which was more strenuous and never came close to correlating with his medical restrictions. His job as a Janitor required him to be on his feet most of the day, the Union notes, even though he had plantar fasciitis. The Grievant worked alone and was ordered to lift 40 - 50 pounds of janitorial supplies, a clear violation of his medical restrictions, the Union contends.

The Union argues that the Company has violated the Grievant's rights under the collective bargaining agreement and the Family and Medical Leave Act. The Union asserts that the Company erred when it did not count the Grievant's absences in excess of four (4) calendar days as taken pursuant to the FMLA, as required by the collective bargaining agreement. These absences should not have been monitored under the Company's attendance program, because FMLA absences cannot be used against an employee in any manner, even as part of a no-fault attendance plan, according to the Union. The Union relies upon the testimony of the Chairman of the Grievance Committee to substantiate that the Company did not abide by this provision of the

labor agreement until sometime in 2001. Therefore the Grievant should not have been placed at such a high level of discipline at the time of his discharge, the Union asserts. The Company's assertion that no grievances were filed over this violation of federal law does not give the Company the right to circumvent the law or the collective bargaining agreement, according to the Union.

The Union concedes that the Grievant could not return to work at the time of the arbitration hearing. The Union argues, however, that he could only qualify for a Permanent Incapacity Pension from the Company if he is an employee. The Union requests that he be reinstated and either given one last opportunity to establish that he can work, or be allowed to retire under a Permanent Incapacity Pension.

Findings and Decision

The Grievant was discharged for failing to work as directed and for his overall attendance record. The Union contends that the Grievant had serious health problems and that the Company failed to provide him with work within his medical restrictions. The Union also argues that the Company violated the FMLA and the collective bargaining agreement's provisions covering the law.

With regard to the Grievant's health, the Independent Medical Examiner who examined the Grievant on two occasions 16 months apart, released the Grievant to work with restrictions on both occasions, the most recent being only about three months before the Grievant's discharge. The Union suggests that the Independent Medical Examiner performed only a cursory examination of the Grievant, or perhaps did not consider all of his medical problems. However,

the report of the Independent Medical Examiner demonstrates that he reviewed many reports of the Grievant's other doctors concerning the ailments the Grievant had been treated for in the past several years.

However, none of the Grievant's doctors stated that he was unable to work because of his medical problems. The Grievant's own orthopedist agreed that the Grievant could return to work under restrictions developed by the Company's Medical Department, even though the doctor noted that they were somewhat different from the restrictions he originally recommended. The Grievant's gastroenterologist also released him to return to work, with similar restrictions, in Spring, 2003. The restrictions recommended by the doctors were similar, even when they were treating him for different conditions. After carefully considering the medical evidence in this case the Arbitrator concludes that there is not sufficient evidence on this record to establish that the Grievant was unable to work at the time of his discharge. Every one of the doctors who examined him said that he could return to work, under certain restrictions.

The Union argues, however, that the Company did not provide work within the Grievant's restrictions. The Grievant did not testify, however, that he believed that the work of the Feeder failed to meet his medical restrictions. Instead the Union argued that the Grievant was placed in the more physically demanding Janitor position instead of being allowed to remain in the Feeder position. However, the evidence shows that the Grievant voluntarily demoted himself to the general labor pool. He testified at arbitration that when he refused the Coiler position he was told that he could not remain in the sequence unless he was promotable. However, the record shows that other employees who were not promotable remained in that sequence and that the Grievant knew that this was the case. If he believed that he was being treated differently than other

employees, and forced to go to a more physically demanding job when he believed that he had serious medical problems, it is unlikely that an employee with his years of seniority would not have taken further action to protect his rights. The Grievant's testimony that after 28 years of service he was forced to demote to the general labor pool, and yet did not file a grievance, is not convincing.

With regard to the Janitor position, there was conflicting testimony regarding whether the work was within the Grievant's medical restrictions. The Company presented evidence that the Grievant could perform the janitorial work within his medical restrictions. It is not clear from the record about how much the Grievant's Supervisor knew about his restrictions, during the two or three days that he worked in this job. The Grievant testified that he discussed the problems with his Supervisor who told him to "do the best he could." There is no evidence that the Supervisor told the Grievant to ignore his medical restrictions or specifically ordered him to perform work outside these restrictions. There is simply not enough evidence in the record for the Arbitrator to conclude that the Company did not provide work within the Grievant's medical restrictions. In particular there is not enough specific evidence that the Company failed to accommodate the Grievant's weight restrictions, his need for assistance or rest periods in the Janitor position. However, even assuming, for the sake of argument, that the work was not within the Grievant's restrictions, the Grievant simply left the job after two or three days and never returned to work again. Even after being ordered to return to work, there is no evidence in the record that he raised the issue with the Company that his janitorial duties did not meet his restrictions. He simply stopped coming to work. The third step minutes do not reflect that this issue was raised during the grievance procedure either.

The Union argues that under the FMLA the Grievant was not required to accept a light duty assignment. It is true, that for the 12-week period covered by the FMLA, the Employer may not compel an employee to accept light duty over leave. However, the Grievant already had used up his FMLA leave at the time of the incidents giving rise to this dispute. The Grievant's right not to perform light duty in lieu of taking FMLA leave had expired.

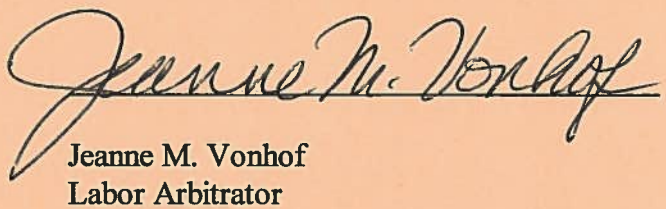
The Grievant was ordered to return to work, and has not provided a good reason, on this record, why he was unable to do so. His doctors, the Company medical clinic and the Independent Medical Examiner all had released him to return to work, under certain restrictions. Even the most recent post-discharge letter from his gastroenterologist does not state that the Grievant is unable to work, although it does say that he is ill and has been under treatment for some time. It is not clear why, after 28 years of service, the Grievant voluntarily demoted himself to the general labor pool, which often includes physically demanding jobs. However, there is not sufficient evidence on this record to conclude that the Company did not provide work within his restrictions, even within the general labor pool. It is unfortunate that an employee with the Grievant's long service did not believe that he could return to work, even though the doctors said that he could, or that he did not believe that he could work out a job within reasonable medical restrictions. On the basis of this record, however, the Arbitrator must conclude that the Grievant did fail to return to work as directed, and has not provided a good reason for that failure.

The Union argues that with regard to the second basis for the discharge, the Grievant's overall attendance record, the Company failed to count the Grievant's FMLA absences correctly prior to May, 1991, which placed him at a higher level of discipline than he would have been otherwise. This argument was not raised during the grievance procedure. In addition, even

assuming that it is correct, there is sufficient evidence on the record for the Grievant to be discharged over his failure to return to work, without consideration of his overall attendance record.

AWARD

The grievance is denied.



Jeanne M. Vonhof
Labor Arbitrator

Dated this 31st day of March, 2004.