IN THE MATTER OF THE ARBITRATION BETWEEN

ISPAT INLAND STEEL COMPANY

And Award No. 1018

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the Company's decision to discharge Grievant Halver McIntosh for a violation of his Last Chance Agreement (LCA). Grievant had almost 29 and one-half years of service at the time of his discharge. The case was tried on April 11, 2005. Pat Parker represented the Company and Darrell Reed 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
F. Linders.....Section Manager, 80" Hot Strip
D. McMichael.....Medical Director
J. Clayson.....Union Relations Intern

For the Union:

D. Reed.....Secretary of Grievance Committee
H. McIntosh.....Grievant
J. Torres.....Assistant Griever

Background

The Company introduced Grievant's disciplinary record for the five years prior to his discharge. There were numerous suspensions and other disciplines for attendance-related issues, and two record reviews, the latter of which was in late September 2003, about six weeks before the discharge at issue here. In addition, Grievant had faced discharge twice, once in June 1999 for violating rule 135r, which deals with use of abuse or threatening language, and again in July 2003, this time for leaving the workplace without swiping out and stealing time. The initial discharge was settled on March 8, 2000, with Grievant's reinstatement on a last chance agreement (LCA). That agreement acknowledged that cause existed for discharge, but that the Company had consented to return Grievant to work on a last chance basis.

Grievant was required to observe the following terms that are relevant to this case:

> 3. Should [Grievant], within a period of twenty-four (24) months from the date of his return to work ... accrue an absenteeism rate of five percent (5%) or greater during any rolling ninety (90) day period, or violate any other terms of the Company's Attendance Improvement Program or any other Company rule or regulations with respect to absenteeism, cause will exist for his immediate suspension preliminary to discharge.
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> 6.[Grievant] fully acknowledged an understanding of his basic employment responsibility to report on time for scheduled work, to give timely notice when unable to do so and that absence, tardiness, or failure to work a complete turn may be only for just cause.
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> This arrangement represents a **final chance at employment** for [Grievant]. Failure to meet any of the conditions set forth above, and future incidents similar to that which resulted in the discharge of [Grievant] in this case, or any violation of any Company rule or regulation may be cause for immediate suspension of [Grievant] preliminary to discharge. (emphasis in original)

Grievant signed the LCA on March 9. Roger Hughes, Union Relations Representative, testified that he explained the agreement to Grievant in detail, which Grievant did not rebut.

The Union points out that Grievant completed paragraph 3, meaning that he worked for a period of 24 months without violating the attendance program. However, following his second discharge in July 2003, the Company agreed to reinstate Grievant and the parties agreed to extend the original last chance agreement for an additional five years, ending in September 2008. As they had done with respect to the 2000 discharge, the parties agreed that cause had existed for the July 2003 discharge.

The incident at issue here happened on October 31, 2003. Grievant was due to report to work at 6 a.m. Records indicated that he had worked first turn (10 p.m. to 6 a.m.) the week before, including two doubles. The Company pointed out, however, that Grievant had been off on October 30. Grievant had experienced problems with attendance issues, which he said stemmed from in-plant injuries involving his back in 1993, 1994 and 1995. There is no dispute that Grievant was injured and that he was off work for an extended period in 1993 and for a shorter period in 1994. Following the injury, Grievant began taking a generic form of Vicodin for pain, and Xanax for anxiety. In addition, he took a drug for high blood pressure and another one for diabetes. He continued to take all four drugs in October 2003, the time of the incident at issue.

Grievant testified that he was in pain on October 30, 2003, and that his back hurt more than usual. He did not take either Vicodin or Xanax during the day because he was driving his personal vehicle. The Vicodin prescription says Grievant is to take one pill four times a day, as needed. However, Grievant said he often delayed taking the medicine during the day -- especially when he was working -- and took it at night. He said he took 3 Vicodin and 1 Xanax at 10:30 p.m. on October 30.

Grievant said he went to sleep after taking the medicine and that he woke up at 5:30 a.m. and tried to call the plant to report off, but no one answered the phone. Another Union witnesses testified that the answering machine in the department sometimes malfunctions, although Grievant did not say whether the machine attempted to pick up his call and malfunctioned. He simply said he could not reach anyone.

There was a working foreman on duty during the first turn of October 31. Because the working foreman is a bargaining unit employee, the Company could not subpoena him to testify at the hearing. In lieu of testimony, the Company submitted an account of the incident. That account reads as follows:

> On Friday Oct. 31, 2003 as I was working the midnight shift, at about 5:15 a.m. I was checking the pay screen to see when the day turn crew was coming in. I noticed that [Grievant] did not swipe in yet. I kept checking every few minutes and still nothing. I went up to coil handling to see if he was here. I ask the crew upstairs if they had seen [Grievant] and they said they did not. I came back to the office to check the pay screen at about 6:15 and still nothing. At that time I call his house to see if he was on his way and all I got was his answering machine which I left a message for [Grievant] to call. I waited until 6:35 and still no response. I then made a phone call to find a driver to cover his job. After I obtained a driver [Grievant] called in at about 6:45 telling me that he had just woke up and wanted to know if he could come to work. I informed him that I had already covered his job and told him that he cannot come to work. He then said to report him off.

The Union did not question the accuracy of this report at the hearing, and did not call the working foreman to cross examine him about his statement.

Grievant acknowledged that he was able to contact the department by telephone at 6:45 a.m., and said he had overslept. Someone (he couldn't remember who) told him that he had found a replacement and that Grievant could not come in. Under the provisions of mp 10.13 of the Agreement, employees can report for work as late as 6:30 and, if so, are to be assigned to work in their occupation. After 6:30, however, the supervisor on duty need not allow employees to work. In this case, Grievant did not report in at all; rather, he called at 6:45, but was not present at the mill.

On cross examination Grievant agreed that he lives 8 miles from the mill and that it would have taken him less than 20 minutes to get to work. Grievant said he was drowsy and sleepy when he woke up at 5:30. When asked how he could have overslept if he was awake at 5:30, Grievant said he hadn't heard the alarm go off. He also said he was willing to try to go to work.

The Union introduced evidence that each of Grievant's four prescriptions can cause dizziness and drowsiness. Grievant said the drugs had that effect on him, which is why he sometimes delayed taking the Vicodin and Xanax. Grievant said he was cautious about taking the drugs at work because he drove a coil carrier, a large piece of equipment that could pose hazards to the operator and other employees. Thus, he wanted to remain alert at work.

Dr. Daniel DeMichael, the Company's Medical Director, testified that the medicine Grievant took regularly could cause someone to be dizzy or sleepy. However, he said these symptoms usually lessen with time and he noted that Grievant had been taking Vicodin and Xanax for ten years. DeMichael also said that it was improper to take all or most of the medicine at one

time and that doing so could make someone somnolent and could be dangerous. Dr. DeMichael said the clinic knew about Grievant's prescription drugs and his medical condition. However, when Grievant returned to work on September 9 after an absence of two or three weeks, his personal physician did not recommend any work restrictions. Nor were any warranted by the Clinic's own examination of Grievant. Another Company witness said Grievant could have demoted from the coil carrier. In addition, he could have revealed any problems at his record reviews, one of which was only a few weeks prior to his discharge. Grievant said he did not take any such action because he didn't want to work labor.

The Company argues that my role in this case is limited to determining whether Grievant violated a provision of his last chance agreement. If he did, then the Company says the discipline attached to that action has already been determined by the parties, who agreed that any violation could lead to suspension pending discharge. Even if I were to expand my review, however, the Company says the issue is whether Grievant's reasons for failing to report off were so compelling as to justify his failure. The Company says there are no compelling reasons. In the first place, if Grievant actually took three Vicodin at 10:30 on October 30, then his inability to work was his own fault. Grievant had been taking the drug for ten years and he knew the consequences a large dose might have.

The Company also questions the credibility of Grievant's claim that he overslept. Grievant claimed to have tried calling the plant at 5:30. It makes no sense that he didn't reach anyone until 6:45. Grievant acknowledged that he knew he could report without an FRO by 6:30. He lived close enough to the plant to arrive prior to that time. Finally, the Company says that Grievant's long service is not a mitigating factor to apply in this case.

The Union disputes the Company's claim that my authority is limited to determining whether Grievant violated his LCA. Grievant's problems stem from an on-the-job injury and, the Union argues, the Company owes him more than an LCA and a reduced pension. Grievant was not able to take his pain medicine as prescribed because of safety concerns. This meant that he had to take more at night to get relief. On October 31, Grievant was nearly "comatose" and it would have been unsafe for him to work. Grievant is only 49 years old and was only a few months away from a vested pension. If the discharge is upheld Grievant will have no medical insurance, which is difficult for an employee with severe medical conditions. The Union says the mitigating circumstances to take into account here are that Grievant was hurt in the plant and that he is a very long service employee.

Findings and Discussion

Grievant's story was not credible. He said he got up at 5:30 and tried to call in. But when he spoke with the working foreman at 6:45, Grievant told the foreman he had overslept. Grievant could not explain how he could have overslept but still have been awake at 5:30. There is no rational explanation for his story except that he did not tell the truth. I think Grievant did, in fact, oversleep and that he woke up shortly before he called the foreman at 6:45. But once he realized that this would constitute an FRO and, therefore, a breach of his LCA, Grievant made up the story about trying to call in at 5:30.

As the Company points out, if Grievant had been awake at 5:30, he would have had no difficulty getting to work. When he talked to his foreman at 6:45, Grievant did not say that he was sick or that he could not work. To the contrary, he asked if he could come in. This means

that he felt well enough to work and, if he had actually been awake at 5:30, he could have gone in. At the very least, he could have gone to the plant to confront the issue of whether he should work. Grievant does not live far from the plant and he knew he was on his second last chance agreement and that he had very little margin for error. There is also no merit to the Union's claim that other employees have come in after the start of the shift -- even after a replacement has been secured -- and have been allowed to work. Not only is this discretionary with management but, more important, Grievant did not come in at all. He simply called, but 45 minutes after he was to have arrived.

I reject the Union's argument that Grievant overslept because of a medical condition caused in part by the Company, and because he was concerned about safe operation of equipment. Frankly, I did not believe Grievant's testimony that he took three Vicodin and a Xanax prior to going to bed. But even if he did, the Company cannot be held accountable for Grievant's decision to ignore his physician's advice about how to take the drug. Thus, even if it were true that the drugs prevented Grievant from working, it was due to his own inappropriate action and not to anything the Company did.

In short, I find that Grievant's story about why he did not call in properly on the morning of October 31 is not true. Grievant obviously has physical problems and his medicine can cause side effects, even though Dr. DeMichael said they would lessen over time. But his physical condition is not the reason he failed to report off properly on October 31, 2003. The Union's only real defense is that Grievant was a very long service employee who was only about seven months away from full retirement. But this does not change the fact that Grievant's FRO violated

his LCA or that the parties agreed that any violation could be grounds for discharge. The Union's plea, then, is to give Grievant back pay and reinstate him so he can retire.

I recognize the role length of service plays in assessing whether an employer has just cause for discipline. I have sometimes noted that as a factor warranting reinstatement in this bargaining relationship, usually to the dismay of the Company. This case is particularly hard because Grievant is quite close to retirement. But as Arbitrator Vonhof noted in Inland Award No. 1017, there are some obstacles long service cannot overcome.

Grievant has had two last chance agreements, and was on his second one at the time of his discharge. He had had numerous final warnings and other attendance-related disciplines in his last few years of employment. Moreover, he had previously been reinstated twice on the basis of mitigating factors, including his years of service. The same mitigating factors cannot repeatedly save Grievant from his own mistakes. Finally (and perhaps most importantly), I cannot ignore the fact that when these parties agreed that any violation of the September 10, 2003 LCA would be grounds for discharge, they did so knowing Grievant had more than 29 years of service. They understood, then, that Grievant's record was so bad that any more violations could lead to discharge, despite his long service. In these circumstances, I cannot conclude that Grievant's long service saves him from the consequences of his own agreement.[1]

[1]The Union's reliance on Inland Award 916 is misplaced. There, I allowed an employee to remain on voluntary layoff for one week so he could retire. But I also noted that even though he was often tardy, that employee made a real effort to get to work, often hitchhiking from 20 miles away. Grievant in the instant case lived much closer to the plant and had an automobile, but he still did not report to work.

AWARD

The grievance is denied.

Terry A. Bethel
May 29, 2005