IN THE MATTER OF THE ARBITRATION BETWEEN

MITTAL STEEL COMPANY

And Award No. 1023

UNITED STEELWORKERS, USW
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case concerns the discharge of Grievant Albirdia Lynn for excessive absenteeism and violation of her last chance agreement. The case was tried on October 24, 2005 in the Company's offices in East Chicago, Indiana. Patrick Parker represented the Company and Darryl Reed presented the case for Grievant and the Union. Grievant was present throughout the hearing and testified in her own behalf. Grievant had 28-and-a-half years of service at the time of her discharge. There were no procedural arbitrability issues. The parties submitted the case on final argument.

Appearances:

For the Company

P. Parker.....Section Manager, Arbitration and Advocacy
G. DeArmond.....Contract Administration Resource
M. Gronewald.....Section Manager, MM & Logistics
D. DeMichael.....Medical Director

For the Union:

D. Reed.....Secretary, Grievance Committee
A. Lynn.....Grievant
G. Strauch.....Griever

Background

The Company's attendance guidelines track employees over a rolling 90 day period. By October 2000, Grievant was at the three-day discipline level, which is level 3 of the disciplinary progression and the step prior to suspension preliminary to discharge. The allowable rate of absenteeism was 4.99% and Grievant's rate was 10.44%. Grievant received a record review on October 5, 2003, which is standard practice when there is a three-day discipline. The letter issued to Grievant summarizing the review said Grievant had been informed that her employment was at risk. Grievant's absenteeism rate was again above the allowable percentage on May 3, 2001, which led the Company to suspend her for 5 days preliminary to discharge. Grievant was discharged on May 11, 2001.

The Union grieved the discharge. Subsequently, the parties settled the case, which included an agreement that Grievant would be reinstated pursuant to a last chance agreement, (LCA), which she signed on November 14, 2001. Paragraph 3 of the LCA provided that there would be cause for immediate suspension preliminary to discharge should Grievant's absenteeism be 5% or higher for the next 24 months. There is no contention in this case that Grievant violated this provision. The three paragraphs involved here read as follows:

> 5. Ms. Lynn will waive any right to the special Justice and Dignity Procedure ... in the event of any subsequent suspension-discharge action taken against her within five (5) years from the date of the signing of this last chance agreement.

> 6 Ms. Lynn fully acknowledged an understanding of her 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 cause.
>
> 7. This arrangement represents a **final chance at employment** for Ms. Lynn. Failure to meet any of the conditions set forth above, any future incidents similar to that which resulted in the discharge of Ms. Lynn in this case, or any violation of any Company rule or regulation may be cause for immediate suspension of Ms. Lynn preliminary to discharge. (emphasis in original)

There were no problems with Grievant's attendance for the first two years after her reinstatement. But after that, she again experienced problems reporting to work, coming on time, and leaving early.

Grievant was absent because of a lack of transportation on November 17 and 18, 2003, which was less than a week after the initial 24 month period expired. She was tardy on February 5 and again on March 6, 2004. These incidents led to another three day discipline letter, which issued on March 31, 2004. Grievant had another record review on April 23, 2004, where she was warned that her offense was serious and that excessive absenteeism "would" result in suspension preliminary to discharge. The parties also reviewed Grievant's last chance agreement in the record review.

On February 24, 2005, Grievant had an absentee percentage of 7.69%. The incidents included a tardy on February 15, an absence due to transportation on February 16, a failure to report off (FRO) on February 17 -- which Grievant says was also related to transportation -- and a tardy on February 18. In the same 90-day period, Grievant had been tardy twice, had one early quit, and had been absent a full day for illness. The Company suspended her preliminary to discharge on March 1, 2005, and converted the suspension to discharge on March 15, 2005. That action resulted in this arbitration.

Grievant's Section Manager, Mark Gronewald, said Grievant's tardies and early quits disrupted the work of the crew, especially because someone had to pick her up from the locker room after the crew had left, or take her back early. Tardies also make it difficult to line up work in the morning.

The Union introduced evidence questioning whether Grievant's 2000 absenteeism rate improperly counted an extended absence, an allegation the Company denied. There was also evidence that Grievant had been in the plant for 16 hours on one of the days she had an early quit, although the Company said she punched out early and that the remaining time was time spent getting to the gate. There were also days when Grievant arrived late but worked past her normal quitting time, a practice permitted only with permission from the Company.

Grievant introduced a doctor's slip from March 15, 2005, indicating that she has anemia and that the doctor had advised her to take an iron supplement. She said she had previously been told to take iron, but that she did not always do so. Grievant said the anemia made her tired and that she had difficulty getting up in the morning, which accounted for many of her tardies. She also introduced evidence from a doctor in Michigan that said she has anxiety and panic attacks and that he had prescribed 2 drugs for her. The letter is dated August 8, 2005, about 5 months following the discharge. Grievant said it took three months to get the doctor to write the letter.

Grievant testified that she had suffered from anxiety for a long time, but that it was undiagnosed until she saw the Michigan doctor after her discharge. The Michigan doctor had treated her before and treats other members of her family, she said. The anxiety disorder was manifested at work, Grievant said, because there were times when

she had to get away or she thought she would "blow up." This was the reason for her early quits. She agreed that she did not tell the Company about these feelings prior to her discharge. Grievant submitted an affidavit from her sister indicating that several members of Grievant's family suffer from mental illness, including the sister.

Grievant also testified concerning transportation problems that caused her to miss work on February 16 and 17. She said her car locks were iced up both mornings and that she could not free them no matter what she tried. She said she did not report off on the 17th because she spent her time trying to open the car door. The Union introduced evidence concerning low wind chills on the days in question. Grievant also testified that she understood the LCA to be in effect for only two years.

The Company argues that the instant case is similar to Inland Award 1018, in which I upheld the discharge of an employee with more than 29 years of service. Both cases include progressive discipline resulting in discharge, a last chance agreement reinstating the employee, a record review warning of adverse consequences, and continued failure to work as scheduled. The Company says the LCA in the instant case warned Grievant that she was required to maintain acceptable attendance even after the initial 24 months had expired, and it specifically warned that repeated absenteeism in excess of the guidelines would result in discharge. The Company argues that my jurisdiction is limited to determining whether Grievant violated the LCA.

However, in the event I conclude that I have the discretion to consider mitigation, the Company says doing so would not warrant a different result in this case. It questions why Grievant did not seek medical advice sooner and questions the reliability of the Michigan doctor's diagnosis. It also says that neither he nor the local doctor said

Grievant was unable to work as scheduled. The Company points out that the temperatures were not below freezing on the days Grievant claimed her car door was frozen and it says even if they were, it was Grievant's responsibility to insure she got to work. There was also no excuse for failing to report off on November 17.

The Union argues that the last chance agreement was improper because the absenteeism record that led to Grievant's initial discharge was flawed by improperly counting extended absences. The Union also points to Grievant's anemia, which it said made it difficult for her to get to work on time. In addition, Grievant had recurrent panic attacks that caused her to miss work and leave early. Finally, the Union says Grievant could not get to work on occasion because of bad weather. The Union argues that Grievant is not a malingerer and that she did not miss work on purpose. It distinguishes Inland Award 1018 because there had been two last chance agreements in that case. The Union says Grievant has a good work record and should be returned to work and made whole.

Findings and Discussion

I cannot consider the Union's claim that the Company improperly counted an extended absence in Grievant's 2000 attendance record. Even if it did, the discipline resulting from those absences was settled by Grievant's reinstatement and LCA in November of 2001. The error – if there was one – was pertinent to that discipline and it would have been appropriate to raise the issue then. But I have no authority to review the settlement now.

As these parties know, I have sometimes been sympathetic to evidence that mental illness substantially interfered with an employee's ability to work, see Inland 1019. But in that case there was convincing evidence from psychiatrists and psychologists about the employee's illness and treatment. Also important was evidence that the employee had been taking sedating drugs at the time of the incidents that led to his discharge. In contrast, in the instant case Grievant did not seek medical attention for her alleged disability until after her discharge. Moreover, she traveled 75 miles to Reed, Michigan to obtain a diagnosis of panic attacks and anxiety from a physician listed on his web page as a pediatrician. This is not intended to impugn the physician's ability in any way. But there is no evidence that he has experience in diagnosing and treating psychiatric conditions.

This case is similar to Inland 1018, where the employee also claimed to suffer from the effects of sedating drugs, although he was taking them while he continued to work. As is true here, that employee had long service and was on a LCA, which he violated within a few months. Nothing in the case suggests that a previous LCA had any relevance to my decision. I simply found that the employee was not credible and that the employee's FRO violated the terms of his LCA.

In the instant case, Grievant completed the initial 24 month period of her LCA without incident, unlike the employee in Inland 1018. That does not mean, however, that the LCA had no continuing effect on Grievant. The LCA says that after the first 24 months the Company "may" discharge Grievant for any rule violation, including a recurrence of the kind of incidents that led to her initial discharge. That condition was met in this case. Grievant was fired initially for excessive absenteeism and she began the

same pattern almost immediately after the stricter provisions of the initial 24 month period expired in November 2003. By March of the next year, Grievant's absenteeism rate exceeded the standard, resulting in a three day discipline. At that point, Grievant was warned that another absenteeism rate above 4.99% would result in her discharge. By late February of 2005, Grievant had an absenteeism rate of 7.69%, as well as a failure to report off. Given her previous discipline and her LCA, Grievant could avoid discharge only if there were compelling reasons to justify her absences. But that is not true in this case.

Grievant was not a credible witness. It is not believable that an employee on a last chance agreement would not seek medical advice if she was unable to get up in the morning or if she had so much anxiety that she had to leave work early. Moreover, her testimony about frozen door locks was simply not true. The temperature in Hammond on those days was above freezing. A wind chill factor simply indicates how cold it feels in the wind; it does not change the ambient temperature. In addition, Grievant testified that she thought she was bound to the LCA for only 2 years. When that period expired she reverted to the same pattern of poor attendance. The timing suggests that she was willing to work as scheduled only when she believed the consequences of not doing so were dire.

The Union argues that there are sufficient mitigating factors to warrant reinstating Grievant. But even if I were to consider mitigation, the evidence would not justify preventing the Company from invoking the LCA. I recognize that Grievant is a long service employee. But I have said in other cases that long service by itself cannot save employees from the consequences of their action. Here, Grievant incurred a high rate of absenteeism despite repeated warnings. Her attempt to justify those absences was not

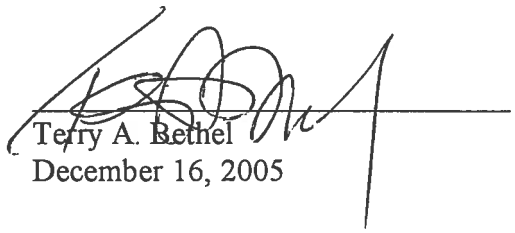
credible. It is also noteworthy that the Company did not fire Grievant in March of 2004, when her absenteeism rate was over 4.99%. Rather, it imposed another suspension and another record review. But Grievant continued to miss work without a truthful explanation for her absences.

There is no merit to the Union's claim that Grievant was subject to disparate treatment because other employees were sometimes given a pass. Nothing in the record shows that Grievant's conduct and her previous record warranted such consideration. Nor is there evidence that other employees with records like Grievant's were given passes. There is, then, no proof of disparate treatment.

The Company had just cause to discharge Grievant for violation of her last chance agreement. The grievance will be denied.[1]

AWARD

The grievance is denied.



Terry A. Bethel
December 16, 2005

[1] This case is not similar to Inland 666 on which the Union relies. In that case, the Company did not question that the employee's physical condition caused her to miss work. Rather, it argued that her absences were so numerous they should disqualify her from continued employment. In contrast, in the instant case the Company contends there was no justification for Grievant's absences, a conclusion supported by the record.