

IN THE MATTER OF THE ARBITRATION BETWEEN

UNITED STEELWORKERS, LOCAL 11-418,)	FEDERAL MEDIATION AND CONCILIATION SERVICE CASE NO. 13-57907
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)	
)	
Union,)	
)	
and)	
)	
3M Company,)	DECISION AND AWARD OF
)	ARBITRATOR
Employer.)	

APPEARANCES

For the Union:

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On May 8, 2014, in Cottage Grove, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by suspending the grievant, Julie A. Diesing, for three days without pay. Post-hearing written argument was received by the arbitrator on July 2, 2014.

FACTS

The Employer manufactures a variety of products at many plants throughout the world, including one at Cottage Grove, Minnesota, a suburb of St. Paul (the "Cottage Grove Plant"), where it employs about 740 employees. The Union,¹ which is a local affiliate of the United Steelworkers, is the collective bargaining representative of about 350 employees who work at the Cottage Grove Plant -- 300 of them in production classifications and 50 of them in maintenance classifications.

The grievant was employed in production classifications at the Cottage Grove Plant for about thirty years before she retired on April 1, 2014. On May 29, 2013, the Employer suspended her for three days without pay as corrective discipline for violation of the Employer's Attendance Control Program at the Cottage Grove Plant. The Attendance Control Program, which I describe more fully below, is what is often referred to as a "no-fault" attendance program. It tallies each employee's absences from work and late arrivals as "Occurrences" and specifies that warnings be given and, eventually, that discipline be imposed for the accumulation of Occurrences. The grievant served the three-day suspension on June 18, 19 and 20,

1. I note that the Union is referred to as "Local 11-418" in its most recent labor agreement with the Employer, the effective date of which is March 6, 2013, but that in the previous agreement, the effective date of which is October 30, 2006, the Union is referred to as "Local 1-00418." The evidence shows that both numbers designate the same local affiliate of the United Steelworkers, which I refer to simply as the "Union."

2013, and on June 24, 2013, the Union initiated the present grievance in her behalf, alleging that the Employer violated the parties' labor agreement by charging the grievant with Occurrences for days when she was absent on sick leave. A primary argument of the Union is that, because the use of sick leave is a negotiated benefit established by the labor agreement, an absence while on sick leave should not be considered an Occurrence leading eventually to discipline.

The Union makes another primary argument, the description of which requires the following additional statements of fact. The Employer also operates a plant in another suburb of St. Paul (referred to by the parties as the "St. Paul Plant"). The St. Paul Plant is larger than the Cottage Grove Plant. It employs a larger number of production employees than does the Cottage Grove Plant. The local union that represents the production employees at the St. Paul Plant is not an affiliate of the United Steelworkers. The St. Paul Plant also employs a larger number of maintenance employees than does the Cottage Grove Plant -- about 190 at the St. Paul Plant and, as noted above, about 50 at the Cottage Grove Plant. The collective bargaining representative of the 190 maintenance employees at the St. Paul Plant is a local affiliate of the United Steelworkers -- a local affiliate different from the Union. The bargaining unit of maintenance employees at the St. Paul Plant includes no production workers, and the terms and conditions of employment of those maintenance employees are established by a labor agreement different from the labor agreement between the Union and the Employer.

The International Union of Operating Engineers, Local 70, (hereafter, "Local 70") is the collective bargaining representative of a single bargaining unit comprised of two groups of employees -- thirty employees who work in the Incinerator, in Waste Water Treatment facilities and in Fire Prevention at the Cottage Grove Plant and twenty-six employees who work in the Steam Generation facility at the St. Paul Plant. Though these Local 70 employees work at two separate plants of the Employer, the terms and conditions of their employment are established in a single labor agreement between Local 70 and the Employer.

The evidence shows that the Employer has had an Attendance Control Program in place at the Cottage Grove Plant for at least twenty-nine years. The parties presented in evidence as a joint exhibit a document entitled, "Cottage Grove Attendance Control Program for Production/Maintenance Employees USW Local 1-000418 [sic] and Operating Engineers Local 70." It bears the caption, "Effective February 1, 2005 Updated October 30, 2009" (see footnote 3, below). The following provisions from that statement of the Attendance Control Program describe when "Occurrences" are charged and how they lead to discipline:

Corrective Action "Occurrence" System
for Chargeable Absences

Employees who fail to report when scheduled to work have a chargeable absence subject to these guidelines. Chargeable absences will be assigned occurrences as set forth below:

One day absent = 1 occurrence
Two or more consecutive days absent = 2.0 occurrences
maximum)
Interrupted absence = 2.0 occurrences (maximum)
Overuse of vacation, partial day = .5 occurrence

Overuse of vacation, full day = 1 occurrence
Tardy < 60 minutes = .5 occurrence
Tardy > 60 minutes = 1 occurrence
AWOL = 1 occurrence

The performance correction process begins whenever an employee exceeds the plant objective for absence occurrences. The Cottage Grove site has adopted the objective of no more than five occurrences in a rolling 12-month period.

Phase I of Performance Correction. When an employee exceeds five occurrences in a rolling 12-month period, the employee will be placed in Phase I of performance correction. During this phase the employee must have no more than two absence occurrences in the next six months. If the employee has more than two absence occurrences during this period, the employee will advance to Phase II of performance correction.

Phase I Monitoring Period. If the employee does not have more than two absence occurrences during Phase I, the employee will then be placed in an attendance monitoring period for six months. During this monitoring period, the employee must not accumulate more than three absence occurrences, otherwise he or she will be placed immediately into Phase II of performance correction. If the employee does not exceed three absence occurrences in the monitoring phase, the employee will then be taken off performance correction and will be required to meet the location objective of no more than five occurrences in a rolling 12-month period. The employee's occurrences will also be set to zero upon completion of Phase I Monitoring. If the employee fails to maintain acceptable attendance by meeting the location objective for a period of twelve months following the monitoring phase, he or she will advance directly into Phase II.

Phase II of Performance Correction. In Phase II of performance correction, the employee receives a three-day suspension and must have no more than two absence occurrences in the next six months. If the employee has more than two occurrences during this period, the employee will advance to Phase III of performance correction.

Because the discipline at issue in the present case is a three-day suspension, as specified in Phase II of Performance Correction, I omit the text that describes "Phase III of Performance Correction" (a five-day suspension), the "Phase III Monitoring Period," and "Phase IV of Performance Correction" (discipline up to termination of employment).

Section 14.04 of the labor agreement that became effective on October 30, 2006,² between the Union and the Employer is set out below:

Sick Leave. See details in your Benefit Program Booklet.

Similarly, the next six sections of that labor agreement refer the reader to "your Benefit Program Booklet" for "details" relating to Long Term Disability (Section 14.05), Post Retirement Hospitalization (Section 14.06), Survivors Benefit Plan, (Section 14.07), Group Life Benefits (Section 14.08), Post Retirement

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2. At the hearing, the parties presented in evidence as joint exhibits copies of two labor agreements -- one that, by its terms is effective from October 30, 2006, through August 19, 2013 ("Joint Exhibit 1") and the other that, by its terms, is effective from March 6, 2013, through August 19, 2016 ("Joint Exhibit 2"). The copy of Joint Exhibit 2 that was presented has anomalies caused by page numbering that is different from the original document. In addition, Joint Exhibit 2 has provisions that are different, in text and numbering, from the provisions of Joint Exhibit 1. A relevant example of that difference is that Joint Exhibit 2 does not have a provision that corresponds in subject matter to Section 14.04 of Joint Exhibit 1, which, as I note above just after this footnote, adopts the provisions of "your Benefit Program Booklet" as the parties' agreement about sick leave. The Union has argued that because the present grievance was initiated on June 24, 2013, during the effective term of Joint Exhibit 1, the provisions of Joint Exhibit 1 apply in determining this grievance. I note that June 24, 2013, the date of the grievance, also falls within the stated effective term of Joint Exhibit 2. Because the record includes no evidence that the parties intended, during the term of Joint Exhibit 2, to abandon the use of the Benefit Program Booklet (presented as Joint Exhibit 4) as their agreement about benefits, including sick leave, I use the reference to the Benefit Program Booklet in Section 14.04 of Joint Exhibit 1, as still stating their agreement about sick leave, and I consider Joint Exhibit 1 as the labor agreement that applies in this case.

Group Life Benefits (Section 14.09) and a Retirement Income Plan (Section 14.10). As the parties agree, these references to the Benefit Program Booklet incorporate the benefits there described into the labor agreement.

The version of the Benefit Program Booklet that the parties presented in evidence as Joint Exhibit 4 is dated on its face "October 2006 - August 2013 -- dates commensurate with the parties' labor agreement that was presented as Joint Exhibit 1. Their presentation of that version of the Benefit Program Booklet as a joint exhibit relevant to the present grievance indicates that there has been no amendment to the Benefit Program Booklet that affects this grievance.

DECISION

It is undisputed that the grievant was on paid sick leave on some of the days she was absent from work and charged with Occurrences. The Union argues that the Employer violated the labor agreement by charging her with Occurrences when she was using sick leave. If the Union prevails in this proceeding and obtains an award removing those sick leave Occurrences from the grievant's record, that removal would eliminate the basis for her three-day suspension under the Attendance Control Program.

The Union's First Primary Argument. Thus, as I have noted above, the Union makes a primary argument that the Employer violated the labor agreement by charging the grievant with Occurrences for absences when she was using sick leave, a negotiated benefit. The Union notes that Section 8.13 of the labor agreement requires that discharge be for "proper cause,"

and it argues that the suspension of the grievant, as discipline that could be a step in the progression toward discharge, impliedly comes within that "proper cause" requirement. The Union urges that, because paid sick leave is a negotiated benefit, the Employer did not have proper cause to treat her sick leave absences as Occurrences that led eventually to her suspension.

The Employer argues that for many years the Union has recognized that absence while on sick leave will be counted as an Occurrence under what it considers to be a liberal discipline protocol established by the Attendance Control Program. The Employer presented the testimony of David L. Wakefield, who has worked at the Cottage Grove Plant for more than twenty-nine years -- four years as a production worker and a member of the Union's predecessor and then as a production supervisor. Wakefield testified that, for the past twenty-nine years, days of sick leave absence have counted as Occurrences that eventually may lead to discipline under the Attendance Control Program.

The Employer argues that the Attendance Control Program, even with inclusion of sick leave absences as Occurrences, is a reasonable program that allows many absences before discipline is imposed. Patrick J. Somers, the Human Resources Manager at the Cottage Grove Plant, testified that only a few employees are disciplined for poor attendance. In 2012, five were suspended, and in 2013, ten were suspended and one was discharged.

The Employer also argues as follows. As Wakefield testified, for many years the Union and its predecessors have

recognized that days of absence while on sick leave are counted as Occurrences under the Attendance Control Program, thus accepting that requirement as a term of successive labor agreements with the Employer.

The Employer notes that the sick leave benefit described in the Benefit Program Booklet provides hours of paid sick leave that increase with years of service to the Employer -- 32 hours of sick leave in each sick leave year during the employee's first five years of employment and increasing amounts of sick leave with additional years of employment (subject to conditions not germane to this case). In the several pages of text the Benefit Program Booklet uses to describe sick leave benefits, no direct reference is made to the Attendance Control Program, but the word, "occurrence," appears once in that text, thus:

Time Off for Second Opinion:

If scheduled during regular working hours, up to two hours of paid time will be granted for absence from work in order to obtain a second opinion as requested by the disability management team.

Paid absence for this purpose will not be counted as an occurrence.

The Employer argues 1) that this appearance of the word "occurrence," reasonably interpreted, can only be a reference to an Occurrence under the Attendance Control Program, and 2) that the statement that a paid absence to obtain a second medical opinion is not to count as an Occurrence implies a recognition that other absences while on sick leave will count as Occurrences under the Attendance Control Program.

In response, the Union makes the following argument. Under the provisions of the Benefit Program Booklet, eligibility for sick leave requires being "away from work because of injury or illness" or during "unavoidable absences caused by emergencies in your immediate family." The Union argues that being away from work at the Employer's request for a second medical opinion does not clearly come within these eligible reasons for the use of sick leave and that the cited "second opinion text" is a needed express statement that this reason for absence should not be counted as an Occurrence, thus implying nothing about counting eligible sick leave absences as Occurrences.

I consider either interpretation of the second opinion text as possible. The Union's interpretation, as summarized just above, is possible, as is the Employer's interpretation -- that the second-opinion text by excluding absence for a second opinion as an Occurrence, implies that sick leave absences are to be counted as Occurrences.

I make the following ruling. it is unnecessary to resolve the ambiguity about interpretation of the second opinion text. The record as a whole shows clearly that for many years and through many labor agreements the Union and its predecessors have agreed that sick leave absences would be counted as Occurrences under the Attendance Control Program. Wakefield testified that sick leave absences have been counted as Occurrences for more than twenty-nine years. That testimony was not contradicted by the Union, and the record shows no grievances by the Union and its predecessors that have challenged the counting of sick leave absences as Occurrences.

Indeed, The grievant, another long-term employee, testified that she knew she would be charged with Occurrences for her sick leave absences. Further, the evidence relating to the Union's second primary argument, which I discuss just below, confirms acceptance by both parties as a term of their agreement that sick leave absences will be counted as Occurrences. I conclude that the negotiated sick leave benefit, as defined by the longstanding acceptance of both parties, includes their recognition that sick leave absences will count as Occurrences under the Attendance Control Program.

The Union's Second Primary Argument. On November 5, 2010, Local 70 initiated a grievance in behalf of Todd F. Shaw, one of its members who was employed at the Cottage Grove Plant (hereafter, the "Shaw grievance"). The Shaw grievance alleges that the Employer violated its labor agreement with Local 70 by suspending Shaw for three days for Occurrences under the Attendance Control Program.³ The Shaw grievance raised an issue similar to the issue raised in the present case -- whether Shaw's three-day suspension, which was partly based on Occurrences

3. Until April 15, 2010, the Employer applied the same Attendance Control Program to employees at the Cottage Grove Plant who were members of Local 70 and who were members of the Union. On April 15, 2010, the Employer adopted a separate Attendance Control Program that applies only to Local 70 employees. Its provisions are substantially the same as those of the Attendance Control Program that applies to Union members and that had previously applied to Local 70 members at the Cottage Grove Plant. It appears that, by longstanding practice, Local 70 had also accepted the counting of sick leave absences as Occurrences under the Attendance Control Program, both before and after April 15, 2010, when the separate Local 70 Attendance Control Program was adopted.

charged for sick leave absences, violated the Local 70 labor agreement.

The then-current labor agreement between the Employer and Local 70 had a duration from September 3, 2008, till September 4, 2013. Article VII of that agreement, entitled, "Sick Pay," was written in one sentence: "Refer to Benefit Booklet." The evidence includes a copy of that Benefit Booklet, which on its face is titled:

3M Benefit Plans
Collective Bargaining Agreement
Operating Engineers - St. Paul/Cottage Grove
September 1, 2008 - September 2, 2013

The Local 70 Benefit Booklet is similar to the Benefit Program Booklet that applies to production and maintenance employees at the Cottage Grove Plant. In the several pages of text that the Local 70 Benefit Booklet uses to describe sick leave benefits, no direct reference is made to the Attendance Control Program, but the word, "occurrence," appears once in all of that text, thus:

Time Off for Second Opinion:

If scheduled during regular working hours, up to two hours of paid time will be granted for absence from work in order to obtain a second opinion.

Paid absence for this purpose will not be counted as an occurrence.

On January 5, 2012, the Employer and Local 70 settled the Shaw grievance. The settlement rescinded the suspension of Shaw, and it provided that, after a transition period, no Occurrences under the Attendance Control Program would be charged for sick leave absences. On January 16, 2014, by

grievance settlement of a later grievance, the agreement settling the Shaw grievance was amended to clarify it.

The Union argues that it is unfair and discriminatory not to give the grievant and the Union the same relief that Shaw and Local 70 received through settlement of the Shaw grievance. The Union argues that the relevant circumstances in Shaw's case are identical to the circumstances in the grievant's case:

- That both were long-term employees.
- That the grievant and other members of the Union work in the same areas of the Cottage Grove Plant and in similar working circumstances as do Shaw and members of Local 70.
- That the labor agreements with the Union and with Local 70 both require "proper cause" for discharge (and, by extension, for discipline).
- That the sick leave benefit described in the Benefit Books for members of both unions are the same.
- That the Attendance Control Programs that apply to both have the same language.

In response to the Union's second primary argument, the Employer argues as follows. The evidence shows that, in the present case, the Employer administered the Attendance Control Program in accord with its terms and with the longstanding understanding between the Union and the Employer that sick leave absences are to be counted as Occurrences.

When the Union and the Employer bargained for their new labor agreement (Joint Exhibit 2), the Union was aware of the terms of settlement of the Shaw grievance. The Union, nevertheless decided not to bargain during those negotiations for a change in the treatment of sick leave absences as Occurrences,

but, instead, seeks now to change its agreement by a favorable award in this grievance arbitration. Contract amendment is not within the authority of a grievance arbitrator; it should occur only in the give and take of bargaining.

The Employer also argues that the terms and conditions of employment established by the Local 70 labor agreement and the Shaw grievance settlement, which amended it, are justifiably different from the terms and conditions of employment established by the labor agreement between the Union and the Employer, including the employment condition relevant here -- the longstanding acceptance that sick leave absences count as Occurrences under the Attendance Control Program. The Employer presented the testimony of Vickie J. Batroot, who has held management positions at several of the Employer's plants, including that of Site Director of the Cottage Grove Plant from 2006 until her retirement in April of 2014.

Batroot testified as follows. Members of the Union work in production and maintenance classifications. The Cottage Grove Plant is in continuous production of manufactured goods, operating twenty-four hours per day and seven day per week. To be competitive, the Plant must manufacture products of high quality at a competitive cost. To do so, it is necessary to have in regular attendance the production employees who have experience and skills in the operations they are assigned to and the maintenance employees who are experienced and skilled in maintaining production equipment. Absences cause gaps in production assignments, require the finding of replacement

workers, cause a loss in production and are a burden on other employees. The Plant strives for flexibility in available personnel and can tolerate some absences, but the goal is to maintain attendance at least at the 95% level.

Batroot also testified that, because Local 70 represents employees who are not engaged in production and maintenance, the Plant can tolerate a lower rate of attendance for those employees, thus justifying the change in the treatment of sick leave absences as Occurrences that resulted from settlement of the Shaw grievance.

The Union presented evidence showing that the 190 maintenance employees at the St. Paul Plant do not have their sick leave absences counted as Occurrences -- as the result of a change in previous practice negotiated in 1997 by the Employer and the local affiliate of the United Steelworkers that represents only those maintenance employees.

The Union also presented evidence that, when it was bargaining for its new labor agreement, Joint Exhibit 2, it had been advised that it should try to achieve the change it seeks in treatment of a sick leave absence as an Occurrence through this arbitration proceeding before attempting to do so in bargaining.

I make the following ruling. If the Union is to obtain a change in the existing contract condition that treats sick leave absences as Occurrences, it should do so in bargaining and not by arbitration award. Batroot's testimony shows that the Employer has plausible concerns that distinguish the need for attendance by production and maintenance employees at the

Cottage Grove Plant from its need for attendance by Local 70 employees. That difference in the need for attendance is at least sufficient to show that the issue should not be resolved by an arbitrator's determination that relevant circumstances affecting both employee groups are identical.

Rather, the interests of the parties should be resolved in bargaining. The bargaining process is better suited than arbitration to resolution of this kind of issue -- 1) because arguments of the Union in favor of uniform treatment of both employee groups may be able to lessen the Employer's concerns about maintaining production efficiency, 2) because arguments of the Employer may persuade the Union that good attendance will enhance production sufficiently to allow economic benefits, or 3) because the parties will find some other resolution in the give and take of bargaining.

AWARD

The grievance is denied.

September 15, 2014



Thomas P. Gallagher, Arbitrator