IN THE MATTER OF THE ARBITRATION)
)
Between)
)
ARCELORMITTAL USA)
INDIANA HARBOR)
)
and)
)
UNITED STEELWORKERS,)
LOCAL 1010)

OPINION AND AWARD

RONALD F. TALARICO, ESQ.
ARBITRATOR

Grievance No.: 20-BB-001

Case 101

GRIEVANT

Christopher Guajardo

ISSUE

Discharge/Attendance

HEARING

January 8, 2020
East Chicago, Indiana

APPEARANCES

For the Employer
Christopher Kimbrough
Representative Labor Relations
ArcelorMittal USA

For the Union
John D. Wilkerson
United Steelworkers

ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esq., was mutually selected by the to hear and determine the issues herein. An evidentiary hearing was held on January 8, 2020 in East Chicago, Indiana at which time the parties were afforded a full and complete opportunity to introduce any evidence they deemed appropriate in support of their respective positions and in rebuttal to the position of the other, to examine and cross examine witnesses and to make such arguments that they so desired. The record was closed at the conclusion of the hearing. No jurisdictional issues were raised.

PERTINENT CONTRACT PROVISIONS

ARTICLE FIVE – WORKPLACE PROCEDURES

. . .

Section I. Adjustment of Grievances

. . .

9. Suspension and Discharge Cases

. . .

b. Justice and Dignity

. . .

4) When a discharged Employee is retained at work pursuant to this provision and is discharged again for a second dischargeable offense, the Employee will no longer be eligible to be retained at work under these provisions.

Section J. Management Rights

The management of the plants and the direction of the working forces, including the right to hire, transfer and suspend or discharge for proper cause, and the right to relieve employees from duty, is vested exclusively in the Company.

In the exercise of its prerogatives as set forth above, the Company shall not deprive an Employee of any rights under any agreement with the Union.

BACKGROUND

The Employer is ArcelorMittal USA with Plant facilities located in East Chicago, Indiana. The Union, United Steelworkers, Local 1010, is the exclusive collective bargaining representative for all production and maintenance employees at the Plant. The Employer and Union have been parties to a series of collective bargaining agreements over the years the most recent of which is effective September 1, 2015.

The Grievant, Christopher Guardo, was hired by the Company on August 20, 2012 and was most recently working as a Machinist in the Machine Shop at Plant 1. The Grievant was suspended preliminary to discharge on June 3, 2015 for failing to work as scheduled. This suspension was converted to discharge on June 10, 2015. However, the Grievant continued working pursuant to the Justice & Dignity (J&D) provisions of the collective bargaining agreement.

On November 22, 2016 while the Grievant was working on J&D, he was determined to have violated the Attendance Policy for exceeding the maximum allowable percentage orf monitored absences during the period of August 4, 2016 – November 1, 2016. The Grievant was given a final warning on February 9, 2017 regarding this Attendance Policy violation.

On November 11, 2017 while the Grievant was still working on J&D, he was determined to have violated the Attendance Policy for exceeding the maximum allowable percentage of monitored absences during the period of May 11, 2017 – August 23, 2017. The parties met, and it was determined that some of his absences were not coded as FMLA. No action was taken on the discipline at that time and after one of the days were properly coded as FMLA, the Grievant was again determined to be in violation of the Attendance Policy on December 4, 2018 for exceeding the maximum allowable percentage of monitored absences during the period of May 17, 2017 – August 23, 2017.

The parties met again, and it was determined that some of the absences were still not coded properly as FMLA. On January 8, 2019, the Grievant was given a pass for this attendance violation and the remaining absences were properly coded as FMLA days.

On February 14, 2019, while the Grievant was still working on J&D, he was determined to have violated the Attendance Policy for exceeding the maximum allowable percentage of monitored absences during the period of November 2, 2018 – February 6, 2019. This period of time does not include any approved FMLA leave time nor Sickness & Accident leave time.

Based on this information, the Grievant was suspended preliminary to discharge on February 22, 2019 for failing to work as scheduled. The Union then requested that the Company review the record because they believed the Grievant should have reverted before the latest Attendance Policy violation. After reviewing his record, it was again determined that he was in violation of the Attendance Policy, and the suspension preliminary to discharge letter was reissued on March 7, 2019.

A timely grievance was filed on March 7, 2019 protesting the Company's intent to discharge and requesting the Grievant be made whole for all job rights and benefits lost. The

Company converted the suspension to discharge on March 22, 2019, which was his last day worked.

ISSUE

Whether the Employer has just cause to terminate the Grievant? If not, what should be the appropriate remedy?

POSITION OF THE COMPANY

In relation to management's rights (Article Five, Section J) the Company developed an Attendance Policy for its Indiana Harbor East Employees. This automated system, also known as the Attendance Improvement Program (or "AIP"), alerts the Company when an employee has violated the Attendance Policy. The purpose of the "AIP" is to establish a uniform policy to stifle excessive absenteeism and to codify the existing notion of progressive discipline in relation to the Attendance Policy. The AIP monitors and tracks absences due to sickness, transportation or personal reasons, failure to report off, tardiness and early quits, as well as for unknown reasons. It excuses absences for approved reasons like military encampment, funeral leave, leave of absences, union business, jury duty and injuries inside of the plant.

Under the Corrective Action Guidelines for daily absences, if an employee misses 6% or more of their scheduled turns during this period, they can be issued a written reprimand. After committing the first infraction, if they continue to miss another 6% or more of their scheduled turns, they can be issued a one (1) day suspension for a second infraction. After committing the second infraction, if they continue to miss another 6% or more of their scheduled turns, they can be issued a two (2) day suspension for a third infraction. At this point, the Employee's

maximum allowable percentage of absences decreases. After committing a third infraction, if the Grievant continues to miss an additional 5% or more of their scheduled turns, they can be issued a three (3) day suspension for the fourth infraction. The Division Manager explained that when an employee reaches the three (3) day suspension level, the Company conducts a record review with the Employee to discuss their attendance issues and to explain what will happen if they violate the policy again or how they can revert to good standing. Finally, after committing a fourth infraction, if the Employee continues to miss another 5% or more of their scheduled turns, they can be issued a five (5) day suspension preliminary to discharge for the fifth infraction.

The Grievant was hired on August 20, 2012. Shortly after he completed his probationary period, he began having attendance issues and started violating the Attendance Policy. On April 24, 2013, the Grievant was issued a written reprimand for violating the Attendance Policy. He was then issued final warnings for his attendance issues on January 23, 2014 and February 8, 2014. The Grievant was then issued a one (1) day suspension on Novembe10, 2014 and a two (2) day suspension on April 10, 2015.

After being issued the two (2) day suspension, the Grievant was suspended preliminary to discharge on Jun 3, 2015 for violating the Company's FRO policy. This suspension was converted to discharge on June 10, 2015. Despite being discharged, the Grievant continued working under the Justice & Dignity provisions of the collective bargaining agreement.

While on J&D, the Grievant again violated the Attendance Policy and was issued a three (3) day suspension on February 9, 2016. As Division Manager Brough mentioned, a record review was held with the Grievant to discuss his attendance issues on March 9, 2016. On November 11, 2016 the Grievant was suspended preliminary to discharge for violating the Attendance Policy again. This caused the Grievant to reach the five (5) day suspension

preliminary to discharge level of discipline in November, 2016. However, on February 9, 2017 the Company gave the Grievant a final warning for this attendance violation because the Grievant claimed that he had FMLA to cover some of the time that he missed during the preceding period.

After this final warning was issued, the Grievant did not have any legitimate violations of the Attendance Policy until a report was generated on February 14, 2019. On this Attendance Policy violation, the Grievant missed 14.65% of his scheduled turns during the ninety (90) day period. This is almost three (3) times the allowable percentage of less than 5% of an Employee's scheduled turns. The Grievant did not provide any explanations during the Step 2 hearing on why he missed so much time. The arguments were limited to the Grievant having erroneous policy violations in 2017 and 2018.

Up until this point, there is no real dispute of the attendance violations. The issue is whether the Grievant was properly at a 5-day suspension level when he was discharged for his February, 2019 attendance violation or whether he has reverted to a 3-day suspension level based on the reversion guidelines under the Attendance Policy. The reversion policy requires an Employee to work for one (1) year, or 365 days, without triggering the next step action. If they accomplish this, they repeat the same level of discipline. If they work an additional six (6) months, or 182.5 days, without triggering the next action step, then they move back a step in progressive discipline.

The automated system has not changed since 1999 regarding the reversion periods of layoffs, vacation, leaves of absence and other periods of inactivity. This means that days not worked are not included in the reversion count. This is because if you look at Paragraph 11 of the "AIP" it indicates that the program monitors days that the employee is scheduled to work in

the ninety (90) day period to get an allowable percentage of absences. The employee cannot show that their attendance has improved, so that they should be entitled to revert back a previous step, on days that they are not scheduled to work.

Mr. Klinker testified that he manually calculated the number of days worked. The Company counts the days worked to determine whether the Employee is entitled to revert. That is exactly what happened in this case. As Mr. Klinker explained, based on the Grievant's Line 33 from February 9, 2017 until February 6, 2019, the Grievant worked 459 days. As Mr. Klinker also explained, based on the reversion policy, the Grievant had accumulated enough days to repeat the same level of discipline, which, in this case, was a suspension preliminary to discharge. However, he needed to work a total of 547.5 days to revert back to three (3) day suspension. The Grievant fell well short of the requisite number of days needed to meet the reversion threshold.

The Union presented its manual count in Union Exhibit 1 of the Step 3 Minutes. Because the Grievant would still be discharged because he did not meet the reversion threshold, the Union is now providing a different rationale on counting days worked from what was presented at the Step 3 meeting. Finally, the Union keeps arguing that the Grievant's reversion reset because of kick-outs in November, 2017 and December, 2018. However, since the Union proved that there were mitigating circumstances, these two kick-outs were removed from the Grievant's Line 33. Thus, when the report was run, the Code 8 and Code 9 that were issued were removed from the system and would not have reset the Grievant's reversion period.

Since the Grievant failed to meet the reversion threshold under the Attendance Policy, the Company correctly issued the Grievant a 5-day suspension preliminary to discharge on March 7, 2019. Based on the Grievant's short term service and extensive absenteeism issues that began

shortly after his probationary period ended, the Company converted the suspension to discharge on March 22, 2019. Pursuant to Article V, Section I, Paragraph 9b (4) of the collective bargaining agreement the Grievant was no longer entitled to J&D because he had committed a second dischargeable offense. His last day worked was March 22, 2019.

Finally, it is important to note the Company showed several instances of being lenient to the Grievant in connection with the administration of the Attendance Policy. The Company issued final warnings to the Grievant on January 23, 2014 and February 18, 2014 instead of issuing progressive discipline. The Grievant was also given a record review to discuss his attendance issues on March 9, 2016. He was also given a final warning on his November 11, 2016 5-day suspension preliminary to discharge because, as the Company gave him the benefit of the doubt that this FMLA would cover some of the days that he missed during this period time, even though the Grievant's FMLA did not end up covering any of the days that he missed.

Based on the foregoing, the Company respectfully requests that you deny this grievance in its entirety. Thank you.

POSITION OF THE UNION

The Attendance Improvement Plan or "AIP", really is not an appropriate name for the Attendance Policy. A better fitting name is the "WAP" or Win Arbitration Plan. This is because the Plan was designed and modified, by the Company and, if followed correctly, to prove cause for the assessed level of discipline every time.

First, let us look at how an Employee can trigger a discipline level for the daily monitoring system. First, the employee calls off over 6% of scheduled turns, clearly defining that days off are not included in the percentages. Next, if an employee attempts to "game the

system" and calls off just under the threshold for the percentages or works overtime to make up for the call offs, the system goes backwards and looks at a 365 day measured period or one year, and triggers a discipline level if the employee has 12 instances. The third way is if an employee uses too many extended absences. The Company read all the attendance arbitration awards from the entire industry and developed a plan to fall in line with the rulings. All three of these triggers follow the same progressive discipline plans.

Next we have Failure to Report Off, when an employee could be disciplined twice for every event that happens. One FRO counts towards the percentage of instances mentioned before, and then in a distinctively separate progressive discipline progression. The AIP even has example letters that are supposed to be issued in the event of an FRO. This is reasonable, failing to report off could have drastic consequences for the Company, so FRO should have a greater penalty. Which is not true under the Company theory of today. They are saying reversion to good standing is easier for FROs, which doesn't make sense.

Then we have all the technical administration points we went over today. Those are a long-winded way to describe the Company attempts to get all of the managers and Employees on the same page. The intent of all this is to prevent the Company from sitting in front of an arbitrator, or if they do have to, to make sure the ruling is favorable to the Company. If departmental management had followed the AIP as written we would not be discussing this issue today, because the Plan works. But they did not take place.

It is hard to understand how you have heard from the department manager and a Labor Relations Representative who do not know how specific part of the AIP works. The Department manager made the determination to discharge an Employee while not understanding the policy that any employee is expected to understand. Then the Labor Relations Representative, Mr.

Klinker, stated he did not know how the Plan works in relation to the 365 day measured period for kick-outs involving instances. Which is the same language used by the Company to determine reversion.

Now when you go back and review the Grievance Record you will see that the Company position has completely changed today from what is recorded in the Step 3. They totally abandoned their theory of the case.

Employees are held to the language in the AIP system when getting discipline. The Company must adhere to their policy as well. The language in the AIP is clear. But the language in the BLA is also clear that there must be a second dischargeable offense.

An Award between USW and SunCoke, Inc, described the discharge of an employee on a Last Chance Agreement and his reinstatement. The Last Chance Agreement stated that the employee could not violate any Company rule or policy including the attendance policy. The Company discharged the employee because he was late one time for a shift starter meeting. They stated he was in violation of the Last Chance Agreement because he violated the attendance policy by having an "instance," even though he did not trigger discipline. This was rejected by the Arbitrator because he could not modify the attendance policy or the Last Chance Agreement.

The same is true here today. In order to discharge an employee he must violate the policy at a discharge level. The BLA states in order to remove J&D the Grievant must commit a second dischargeable offense, not just trigger at any level of discipline. Therefore, the policy must apply in its entirety and the Grievant would not have triggered at the discharge level. He must be reinstated and made while for all job rights and benefits lost.

FINDINGS AND DISCUSSION

Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority, other contractual benefits and reputation are at stake. Because of the seriousness of this penalty, the burden is on the Employer to prove guilt of wrongdoing. Quantum of proof is essentially the quantity of proof required to convince a trier of fact to resolve or adopt a specific fact or issue in favor of one of the advocates. Arbitrators have, over the years, developed tendencies to apply varying standards of proof according to the particular issue disputed. In the words of Arbitrator Benjamin Aaron, on some occasion in the faraway past, an arbitrator referred to the discharge of an employee as "economic capital punishment". Unfortunately, that phrase stuck and is now one of the most time honored entries in the "Arbitrator's Handy Compendium of Cliches". However, the criminal law analogy is of dubious applicability, and those who are prone to indiscriminately apply it in the arbitration of discharge cases overlook the fact that the employer and employee do not stand in the relationship of prosecutor and defendant. The basic dispute is still between the two principals to the collective bargaining agreement. In general, arbitrators use the "preponderance of the evidence" rule or some similar standard in deciding fact issues before them, including issues presented by ordinary discipline and discharge cases such as within.

Article Five, Section J. of the collective bargaining agreement is a broad based Management Rights clause which specifically reserves to the Employer not only the exclusive right to direct its working forces but also the right to discharge employees for proper cause. Pursuant to that authority, the Employer promulgated an Attendance Improvement Program ("AIP"), first developed in 1983 and since amended, to address the Company's absentee-related

costs, specifically in the benefits area, which were escalating uncontrollably. The stated objective of the Program is to establish a uniform plant-wide Policy to provide a consistent, standardized and pre-agreed upon procedure for handling absentee problems. The Program defines various categories of absences which are monitored and evaluated over various periods of time. When absences exceed certain percentage parameters progressive discipline is administered ranging from reprimands through five-day suspensions preliminary to discharge.

However, it is important to note that although, at first blush, the Attendance Improvement Program appears to be similar to a "no-fault" attendance policy, it is not. A no-fault Policy usually imposes specified points for certain occurrences establishing progressive discipline based upon the number of points accumulated and generally allows no discretion to consider the reason for the absence. The AIP Program, on the hand, allows reasons for an employee's absence or mitigating circumstances to be considered. Other critical differences include periodic record reviews with employees where absence violations can be corrected, if necessary, as well as the ability to have one's record revert back to a prior disciplinary level for good attendance reasons, etc. In addition, these review meetings have also often resulted in leniency or mitigation.

However, it must be remembered that the Attendance Improvement Program is a unilaterally promulgated policy of the Employer and, therefore, any discipline administered thereunder, including discharge, must still satisfy the overriding just cause provision set forth in Article Five, Section J. of the collective bargaining agreement.

In assessing both the overall reasonableness of the Attendance Improvement Program as well as whether just cause for the Grievant's termination exists, the first factor that jumps out at me is the Grievant's abysmal attendance record. The Grievant was hired on August 20, 2012 and completed his probationary period of approximately six months later. Shortly, thereafter, on

April 24, 2013 the Grievant was issued a written reprimand for violating the attendance policy. He was then issued a final warning for his attendance issues on January 23, 2014 and February 18, 2014. The Grievant was then issued a one-day suspension on November 10, 2014 and a two-day suspension on April 10, 2015. The Grievant was then suspended preliminary to discharge on June 3, 2015 for violating the Company's FRO (Failure to Report Off) Policy. This suspension was converted to discharge on June 10, 2015 but the Grievant was permitted to continue to working under the Justice & Dignity provisions of the collective bargaining agreement, while his case was being grieved.

While on Justice & Dignity the Grievant violated the Attendance Policy again and was issued a three-day suspension on February 9, 2016. A record review was held with the Grievant to discuss his attendance issues on March 9, 2016. On November 11, 2016 the Grievant was suspended preliminary to discharge for again violating the Attendance Policy. This caused the Grievant to reach the five-day suspension preliminary to discharge level of discipline in November, 2016. However, on February 9, 2017 the Company instead gave the Grievant a final warning for this attendance violation because he claimed he had FMLA to cover some of the time he had missed during the preceding period.

More recently, an attendance report was issued for the period November 2, 2018 through February 6, 2019 which reflected that the Grievant exceeded the allowable percentage of monitored absences by almost 300%. His percentage of absences was 14.65% compared to the maximum allowed percentage of 4.99% during this 90 day period.

Up until this point in time there is no real dispute about the Grievant's attendance violations. The only issue is whether he was properly at the five-day suspension level when he was discharged for this latest attendance violation, or whether he had reverted to a three-day

suspension level based on the reversion guidelines under the Attendance Policy. The reversion policy requires an employee to work for one year or 365 days without triggering the next disciplinary step. If the employee accomplishes this, they repeat the same level of discipline. If they work an additional six months, or 182.5 days without triggering the next disciplinary step, they then move back a step in the progressive discipline scheme.

Company Labor Relations Representative John "Jack" Klinker credibly testified how he manually calculated the number of days that the Grievant had worked. Mr. Klinker testified that based on the Grievant's Line 33 from February 9, 2017 until February 6, 2019 that he worked 459 days. According to Mr. Klinker, based on the reversion policy, the Grievant had accumulated enough days (365) to repeat the same level of discipline, which in this case was a suspension preliminary to discharge. However, the Grievant needed to work a total of 547.5 days to revert back to a three-day suspension level. The Grievant fell well short of the requisite number of days needed to meet the reversion threshold.

The Union argues that the Company's count is incorrect because it failed to take into consideration kick-outs in November, 2017 and December, 2018. However, according to the credible testimony of Company witnesses, these two kick-outs were, in fact, removed from the Grievant's Line 33. Thus when the report was run, the Code 8 and Code 9 that were issued had been removed from the system and would not have reset the Grievant's reversion period.

Based upon the above I conclude that the Company correctly issued the Grievant a five-day suspension preliminary to discharge on March 7, 2019 because he failed to meet the reversion threshold under the Attendance Policy. The Company then converted the Grievant's suspension to discharge on March 22, 2019. Moreover, he was no longer entitled to Justice & Dignity because this constituted a second dischargeable offense.

The Union next argues that the title "Attendance Improvement Plan" is not an appropriate name for the Attendance Policy. It asserts that a better and more fitting name would be the "WAP" or "Win at Arbitration Plan" because the "AIP" was designed and modified by the Company that if correctly followed would prove just cause for the assessed level of discipline every time. However, I would state to the Union that there is one full proof and absolute way to defeat this purported Company attempt at morphing its reasonable attendance policy into a "Win at Arbitration" policy, i.e. **SHOW UP FOR WORK!!**

Finally, as a general rule, arbitrators should not interfere with the penalty imposed by an Employer if the collective bargaining agreement permits management to exercise discretion and the reasonableness of the penalty is not seriously called into question. However, even when their power to mitigate a penalty is unencumbered arbitrators should be loathe to substitute their judgment for that of management unless the degree of mitigation is a major and consequential change.

There is no contractual prohibition against an Arbitrator reviewing the penalty imposed by the Employer within. However, after careful consideration of all of the evidence presented I am unable to find the existence of any factors that cast doubt upon the appropriateness of the imposition of the penalty of discharge for the within attendance offenses. As indicated above, the Grievant is a relatively short-term employee who began a pattern of attendance violations almost immediately after clearing probationary status. It is also important to note that the Company during these years showed several instances of being lenient in the administration of its attendance policy such as issuing final warnings on January 23, 2014 and February 18, 2014 instead of issuing progressive discipline; conducting a record review where it modified certain violations, etc. The Company also gave the Grievant the benefit of the doubt when he merely

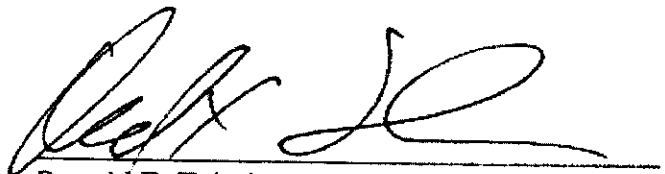
claimed that he had FMLA to cover some of the attendance violations he had incurred.

Based upon all of the above, the grievance must be denied.

AWARD

The grievance is denied.

Date: Jan. 30, 2020
Pittsburgh, PA



Ronald F Talarico, Esq.
Arbitrator