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

OPINION AND AWARD

RONALD F. TALARICO, ESQ.
ARBITRATOR

Grievance Nos.: 32A-17-24; and
32A-BB-001

Case 110

GRIEVANT

Larry Young

ISSUE

Discharge/Attendance

VIDEO HEARING

July 10, 2020

POST HEARING BRIEFS

Received by July 20, 2020

HEARING TRANSCRIPT

Received by August 4, 2020

APPEARANCES

For the Employer
Christopher M. Melnyczenko, Esq.
Christopher Kimbrough
ArcelorMittal USA LLC

For the Union
John D. Wilkerson
United Steelworkers

ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esq., was mutually selected by the parties to hear and determine the issues herein. A video evidentiary hearing was held on July 10, 2020 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 pending receipt of post hearing briefs and the hearing transcript. No jurisdictional issues were raised.

PERTINENT CONTRACT PROVISIONS

ARTICLE FIVE – WORKPLACE PROCEDURES

. . .

Section C. Hours of Work

. . .

2. Absenteeism

a. It is expected that Employees shall adhere to their prescribed schedule. When an Employee must be absent from work, s/he shall, as promptly as possible, contact the designated person and provides the pertinent facts and when the Employee expects to return to work.

b. Reasonable rules for the implementation of these principles shall be developed by the Company and made known to Employees. Such rules will not deprive any Employee of any rights otherwise provided by this Agreement and shall be reasonably applied.

Section I. Adjustment of Grievances

. . .

9. Suspension and Discharge Cases

. . .

b. Justice and Dignity

1) In the event the Company imposes a suspension or discharge, and the Union files a grievance within five (5) days after notice of the discharge or suspension, the affected Employee shall remain on the job to which his/her seniority entitles him/her until there is a final determination on the merits of the case.

. . .

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, Larry Young, was hired on November 8, 2004 and last worked as a Maintenance Technician-Mechanical ("MTM") in Field Forces. On September 13, 2017 the Grievant was determined to have violated the Company's Attendance Policy for exceeding the maximum allowable percentage of monitored absences during the period of March 13, 2017 to August 30, 2017. On December 7, 2017 Grievant was suspended preliminary to discharge for violation of the Company's Attendance Policy. His suspension was converted to discharge on December 14, 2017. However, pursuant to Article Five, Section I, 9.b. of the 2015 BLA, the Grievant was permitted to continue working under the Justice & Dignity ("J&D") provisions until a final determination could be made on the merits of his case.

Grievant was on approved Sickness & Accident ("S&A") leave from the Company from January to March, 2018. Additionally, during the time between his 2017 and 2019 discharges, Grievant utilized approved Family and Medical Leave Act ("FMLA") time.

On December 4, 2019 the Grievant was suspended preliminary to discharge for again violating the Company's Attendance Policy. Grievance No. 32A-BB-001 alleges that the Company violated the Basic Labor Agreement, specifically Article 5, Section J, when it discharged the Grievant for violation of the Attendance Policy and overall work record. Grievance No. 32A-BB-001 was heard at Step 2 on December 10, 2019. The Company converted the suspension to discharge on December 16, 2019. However, since this was the Grievant's second discharge, he was no longer entitled to Justice & Dignity, and he has not returned to work since this date. The Union advanced this grievance to arbitration so that a final resolution on the merits of the case could be determined.

ISSUE

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

POSITION OF THE EMPLOYER

The case before you today is about a discharge – a discharge of an Employee who, among other things, failed at one of the most basic requirements of the job – showing up for work. In fact, the Grievant , in this case today, did not miss work just once or twice. He missed work repeatedly. He had enough occurrences in the absentee monitoring system to reach the discharge level – twice! We are here today for a case, not where the Company acted unfairly or against the basic principles of just cause. Instead, we are here today because enough was enough. The issue in this arbitration is whether the Grievant was discharged for just cause by the Company in either of his discharges.

Division Manager Mike Traczyk explained how the Grievant was given information and made aware of what was expected in terms of his attendance and work performance. The Grievant was fully aware that the AIP does not count disability or FMLA absences against him. On top of these excused absences, the AIP system allows for a percentage of unexcused absences as well. Even with these built in allowances, the Grievant still managed to violate the Attendance Policy routinely. Division Manager Traczyk explained how after each violation, he had countless conversations with the Grievant about what was expected of him and what would happen if he continued down that path.

When analyzing this case, it is important to understand that the Grievant had attendance issues shortly after he began working at Indiana Harbor on November 8, 2004. The Union does not dispute that the Grievant was aware of the Company's policies. Even with this knowledge, he received a Written Reprimand on June 29, 2006. He then received a one (1) day suspension on October 6, 2006. From this point on, the Grievant did not show up for work enough to take advantage of reversion under the Attendance Policy. So, on December 18, 2015, the Grievant was issued a two (2) day suspension for violation of the Company's Attendance Policy. The Grievant was then issued a three (3) day suspension for violating the Company's Attendance Policy on January 24, 2017. The Company held a record review over the Grievant's attendance on February 20, 2017. At hearing, Division Manager Traczyk read from his notes of that meeting, "although [Grievant] was [off] on extended absence for a long time . . . He picked right back up. Need to come to work! Next is 5 days [suspension] prelim. [to discharge]. He understood.

On September 13, 2017, the Grievant was determined to have violated the Company's Attendance Policy for exceeding the maximum allowable percentage of monitored absences during the period of March 13, 2017 to August 13, 2017. He was issued a suspension preliminary to discharge for failure to work as scheduled on December 7, 2017. A Step 2 meeting was held on December 14, 2017, and the suspension was converted to discharge on December 14, 2017. The Grievant did not provide any reasons for his absences at the time, and the Union agreed with the Company that there was just cause for this discharge.

For the three (3) years prior to that discharge, the Grievant missed greater than twelve percent (12%) of his scheduled turns. The Union and the Grievant do not dispute the validity of the Failure to Report Off's ("FROs") or him violating the Attendance Policy that led to his first

discharge. In fact, the Grievant took ownership of missing the scheduled turns that led to his first discharge, and the Grievant shook Division Manager Traczyk's hand and told him that his attendance would improve if he was allowed to return to work. The Grievant returned to work on J&D on December 27, 2017.

After the Grievant returned to work, the Company was unable to conduct a Step 3 on this matter before the second dischargeable offense occurred. Simply put, the Union did not request that this matter be heard until the Grievant was discharged a second time on December 16, 2019.

It is obvious why the Union did not want to take this case to arbitration. They believed the Company had just cause to discharge the Grievant. So, it was better to allow him to work on J&D and hope that he did not commit a second dischargeable offense. However, now that this case is in front of the Arbitrator, there is just cause to discharge the Grievant under the first grievance, and there is no need to reach the merits of the second discharge, and it should be dismissed.

On November 14, 2019, while the Grievant was working under J&D, he was issued a three (3) day suspension for failing to verify that equipment was properly locked out on November 14, 2019. Since the Grievant received a three (3) day suspension, he was given a record review to go over his record, which provides notice that his next offense could lead to discharge. When the Grievant's attendance was ran, he was determined to have violated the Company's Attendance Policy for exceeding the maximum allowable percentage of monitored absences during the period of July 27, 2019 – November 1, 2019. On December 4, 2019, the Grievant was suspended preliminary to discharge for violation of the Company's Attendance Policy and for his overall work record. This suspension was then converted to discharge on December 16, 2019.

During the Step 2 hearing, the Union argued that the October 10, 2019 early quit should be excused because the Grievant had a doctor's note for this date. As Division Manager Pappas explained, the Company does not have a no fault Attendance Policy. Conversely, doctor's notes are not always accepted to automatically excuse an absence. It is reviewed on a case-by-case basis. The Company will consider reasons for unexcused absences, and management grants passes at their discretion. The Company looks at an Employee's past record, abuse of the system, and the validity of the note, among other things, in making a determination .

Furthermore, the Attendance Policy excludes short-term disability leave (i.e. S&A), FMLA leave, and other excused absences from the days that an employee can miss work. On top of this, an employee can have unexcused absences up to a certain percentage of their scheduled turns within a ninety (90) day period. For the Grievant, this would have been 4.99%. The Grievant had been warned repeatedly about missing work, and yet, he still chose to accumulate five (5) unexcused occurrences in addition to his ability to use approved leave. When the Grievant works a day schedule, his shift is from 6:30 a.m. until 2:30 p.m. When he works the afternoon schedule, he works from 2:30 p.m. until 10:30 p.m. This leaves ample opportunity to schedule personal appointments, as other employees routinely do. Quite simply, Grievant's attendance record reflects that his employment was never his priority. Division Manager Traczyk's testified that, following his review of the Employee's work schedule, he noticed five (5) instances within the last four (4) months of Grievant's schedule where unexcused absences aligned with Grievant's scheduled time off (i.e., weekends, vacations).

This is the exact situation with the Grievant. He had worked his way of progressive discipline to being discharged on December 14, 2017. At this point, the Grievant should have taken extra care with his attendance to prevent going over the allowable unexcused absences.

The Grievant had S&A (short-term disability), FMLA, three (3) weeks of vacation and ten (10) paid holidays during the course of the year before even accumulating unexcused absences. In addition, he also works from 6:30 a.m. to 2:30 p.m. or 2:30 p.m. until 10:30 p.m. This allows him to schedule appointments before or after work as well as one of his off days. Instead, like the employee in Morgan, the Grievant did not request permission in advance to excuse his absence but chose to gamble with his chronic poor attendance record. Id. at 836. As a result, because the Grievant created a dilemma of his own doing and he expired his leeway with all of his prior unexcused absences. Id. 1t 835.

During the Step 3 hearing, the Union shifted focus. For the first time since the Grievant began working for the Company, the Union argued that he had a drug and alcohol problem. It is important to note that on each attendance record interview done with the Grievant, he was asked whether he had a drug and alcohol problem, and on each occasion, he said no. More importantly, the Union did not raise this mitigating factor until after the Grievant had been discharged a second time for the same offense.

The Company also questions the sincerity of the Grievant seeking drug and alcohol treatment. At the Step 3 hearing, in the Union's Step 3 written response to the Step 3 Minutes, and during the arbitration, the Grievant adamantly asserted that his seeking treatment was voluntary, and that he realized that he had a problem and needed to work on it for himself. However, his alcohol treatment was not on his own volition. Instead, it was court mandated treatment based on a plea argument.

The Union also argues that the Grievant's attendance improved during the period of his first discharge and his second discharge. However, this is a mischaracterization of the purpose of the J&D language in the BLA. The purpose of J&D is not to be a tool or a mechanism to

show that an Employee's performance has improved over a period of time. The language is there to allow the Grievant to continue working, when applicable, while the grievance is going through the grievance procedure, and until a final determination can be made on the merits of the case. For Grievance No. 32A-17-24, the Union failed to advance the grievance until the Grievant was discharged a second time and was no longer entitled to continue working on the job until a final determination could be made on the merits of his case. Essentially, the Union was forced to arbitrate the 2017 discharge, as a result of the Grievant finally being put out of work.

In addition to the two (2) discharges for failing to work as scheduled, the Grievant's 2019 Record Review shows his extensive disciplinary history, and the leniency shown to the Grievant, over the past five (5) years. However, Division Manager Traczyk explained that the superseding issue was that the Grievant failed to come to work in the grievances that led to his first and second discharge. The Company's purpose is to run a business, and irregular attendance obviously disrupts management's ability to schedule work assignments. Moreover, the Grievant was unable to correct his behavior regardless of the opportunities the Company gave him to improve his record.

The Company respectfully requests that Grievance Nos. 32A-17-24 and 32A-BB-001 be denied in their entirety.

POSITION OF THE UNION

The Company's petition for an immediate ruling was not granted but it is still important to discuss because of several factors:

1. The Company did not notify the Union that they intended to take this position. This type of surprise tactic is not accepted under the BLA. The parties agreed to disclose every

position they intend to take during the grievance process prior to arbitration, with the spirit of partnership in mind, to avoid either party being at an unfair disadvantage.

2. Entering in Stale Evidence (expired Last Chance Agreement):

   a. This is perhaps one of the most underhanded action the Company has taken in an arbitration hearing. The parties agreed in the writing of that document that it would not be cited unless it was for failure to comply, by either parity, with the document.

   b. This type of action severely undermines the integrity of settlement agreements when the Company violates the terms and conditions of the document.

   c. The BLA only affords a five year look back with regards to discipline history.

   d. This was a blatant attempt to influence the Arbitrator with an action that is in violation of the BLA.

   e. This evidence was rightfully not accepted by the Arbitrator, but the intent of the Company still must be noted.

3. The Record Review presented by the Company:

   a. Most glaring issue was the cited, but then not cited "verbal" Last Chance Agreement. This was another action that was attempting to influence the Arbitrator in a misleading way.

   b. Then the Company witness, Mike Traczyk Division Manager, could not identify which discipline had been rescinded, even pertaining to, suspension(s) preliminary to discharge. Adding discipline on a record review, and presenting it in arbitration, that was removed in a lower step of the grievance process is another example of attempting to influence the arbitrator in a negative manner; making the appearance these discipline statement are "passes or breaks" given by the Company. When in fact they are more examples of discipline removed to rescinded because they were without cause.

   c. Based on all the information surrounding this document the entire document should be viewed as non-credible. Also, the misleading nature of the Company actions must be noted.

4. Past Arrest Record

   a. First the document was never presented to the Union. If it had the Union could have obtained documents proving that the alcohol rehabilitation was additional to the Grievant's rehabilitation that was presented in arbitration.

   b. The arrest that took place was in 2014 and is consistent with the Grievant's testimony that he had an alcohol problem.

   c. This evidence should not be admitted because it is not relevant and outside the scope of the arbitration hearing. I would also argue that the use of this document does not call the Grievant's credibility into question, but shows a new level of willingness to violate procedural norms by Company.

5. "Tallest of the Midgets"

   a. The Union expressed a lack of understanding in what Company witness, Mike Traczyk was trying to express. Was he saying that the Grievant was one of the best people in his department but his department was the "midgets?" Was comparing the Grievant to others in recovery from substance abuse? Was he saying the Grievant's own record used to be bad but not it is better? What we do know is this statement was wildly inappropriate and offensive. It also shows a real lack of empathy and understanding in the fact that substance abuse is a disease. A fact that is memorialized in the BLA.

   b. This statement and Mike Traczyk's testimony in general was abrasive and condescending. He seemed agitated even when being questioned by the Company advocate.

   c. Mike Traczyk's attitude would be consistent with the actions that have been taken by the Company in this case. It would also explain why the Company has chosen to forgo all integrity in this case and defy all procedural norms. Reasons being Mike Trayzck has a personal issue with the Grievant, and no matter what actions the Grievant did or didn't take Mike would have created any reason to discipline the Grievant.

6. The Union did not enter evidence in to the record prior to the Hearing:

   a. This is an absolute fabrication of the truth. The arguments that were presented in arbitration are noted in both Union Written Responses Step 2 and 3.

   b. Chris Kimbrough, LR Representative, testified that he received the Step 2 and Step 3 Union Written Response with adequate time to respond to

each. He also stated the only Doctor's Note the Union made arguments about were over the appointment dates.

c. Step 2 minutes Union Written Record state, in part:

   i. "The Grievant provided a note from his doctor excusing one of the days . . ."

   ii. "The Grievant testified he could not safely perform his job, on that date."

   iii. "Then, the Company, although they are not medical professionals, admitted the issue appeared completely debilitating."

   iv. At no time did the Company object to any of the information presented by the Union in the Written Response.

d. Step 3 minutes state, in part:

   i. "Once he was notified he presented the Company with a note from a doctor stating he was unable to work."

   ii. "It would render him unable to work or even drive to work."

   iii. Mike Traczyk, when asked, said he was well aware of the Grievant's "eye thing"

   iv. The Company's minutes also state, under Statement of the Union Position, "provided a doctor's note for one (1) of the days that he missed." It does not say Doctor's Appointment or half day missed.

e. What is not in the minutes is the Union argument of the having doctor's appointment for one of the days. This argument was made however, it was secondary.

f. The fact that the argument are in both the Company's minutes and the Union's response either shows incompetence or dishonesty by this Company position. Also, the Company after several long breaks, made the choice not to call Mike Traczyk to refute the Union Written Response after Chris Kimbrough's testimony.

Once the smoke and mirrors are removed we can discuss what the real Company position that is being relied upon to prove cause for this discharge. First, that alcohol addiction cannot be

treated as mitigation for the Grievant's attendance record in the past. Second, that the Company assess discipline for attendance even if the Grievant was incapacitated. Third, even if the Company third party agency, Reed Group, approves Family Medical Leave after the fact, it does not apply.

To start the discussion regarding alcoholism as a treatable medical condition, the Union will discuss Award 904 by Arbitrator, Jeanne Vonhof. Although the grievance in this case was denied there are some important insights into applying mitigation with post-discharge rehabilitation:

> "For some time now, arbitrators have been routinely considering post-discharge rehabilitation in alcohol and drug abuse cases, both in this bargaining relationship and in labor arbitration as whole. There are different situations in which an arbitrator might consider post-discharge rehabilitation in a discharge case. The issue may be raised in a case where the discharge in flawed in some other respect not related to the alcoholism question. It also may arise in cases where there would otherwise be justification for termination at the point of discharge for an offense like absenteeism. If the absenteeism relates to alcohol or drug abuse, the arbitrator may take that factor into account, just as we would consider whether another employee's absenteeism were due to some other disease."

> "Under either case described above, it may be reasonable to consider post-discharge rehabilitation in determining whether an employee is healthy and reliable enough to be offered reinstatement. In some cases it also may be reasonable to consider such rehabilitation as a factor in mitigating the penalty, depending upon the circumstances of the discharge and the nature of the employee's rehabilitation."

In Award 827 Arbitrator Terry Bethel provides a good look at the history between the parties in regard to attendance and improvement based on a treatable medical condition and concludes that:

> "Other arbitrators have also recognized that the potential for rehabilitation is an appropriate factor to consider in excessive absence cases."

The record of the Grievant's improvement, in Award 827, pales in comparison to the improvement the Grievant has in this case.

Award 934 given by Terry Bethel, again stating discharge was not appropriate based on improvement in attendance while on Justice and Dignity. The Grievant also did not receive any discipline for a long period of time while on Justice and Dignity. What is different, between the current case and Award 934, is the mitigation for his second dischargeable offense was car trouble. His mitigation for the first discharge was working two jobs and drinking problem, which the Grievant admitted to still drinking on the date of the hearing. Which is why the Arbitrator fairly reinstated the Employee without back pay, and mandated a Last Chance Agreement for attendance with alcohol provisions. The difference in this case are drastically in favor of the Grievant.

1. For about two years the Grievant committed to a sober life. For those two years there has not been any nexus between his out of work conduct negatively impacting his employment.

2. The mitigation that was presented for the events that led to the removal of Justice and Dignity, in Award 934, was car trouble. That is not the same as an Employee being unable to safely travel to work or perform work if transportation was provided.

3. After the current Grievant began having issues he then applied and was approved, by the Company, for FMLA covering the time of the Doctor's note and scheduled appointments.

Based on these differences, the same remedy cannot be applied. There was no cause for Justice and Dignity to be removed so the Grievant in this case must be made whole. Forcing a Last Chance Agreement is not appropriate because the Grievant had such a long duration of time

with no infractions, demonstrating after his rehabilitation, he changed his life; just as the progressive discipline has changed the Grievant's behavior at work.

The Union is asking that you reasonably look at the facts. In Award 101, you stated that Jack Klinker was credible in his testimony on how the reversion in the AIP works. The Union disagrees with the statement, however, that facts were still reasonably assessed when consideration was given to modify the discipline. This made the Award reasonable and fair given the facts. The Grievant in this case followed the only proof and absolute way not to get discharged for attendance, he showed up for work. It was only when he was physically unable to show up for work he was over the allowable percentage.

Based on the facts the Union would ask you grant the grievance and make the Grievant whole 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 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 a "no-fault" attendance policy, it is not. A "no-fault" Policy usually imposes specified points for certain occurrences and establishes 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 other 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.

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 their first infraction, if they continue to miss another 6% or more of 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 6% or more of 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 they continue to miss an additional 5% or more of scheduled turns, they can be issued a three (3) day suspension for the fourth infraction. When the employee reaches the three (3) day suspension level, the Company conducts a record review with them to discuss 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 scheduled turns, they can be issued a five (5) day suspension preliminary to discharge for the fifth infraction – which is what occurred within.

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.

All reasonable management readily excuses occasional absences due to illness or other compelling circumstances. However, at some point, an employer must be able to terminate the

services of an employee who is unable to work more than part-time for whatever reason. Efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity. If an employee has demonstrated over an extended period of time an inability to maintain an acceptable attendance record, an employer is justified in terminating the relationship particularly where it has sought through counseling and warnings to obtain an improvement in attendance – which clearly was done within.

Even the most cursory examination of the Grievant's attendance record up through September 13, 2017 shows it to be, without question, abysmal. The 10,000 foot view of the Grievant's attendance record during the three years prior to his December, 2017 discharge, is that he missed greater than 12% of his scheduled turns. In fact, the Grievant even had attendance issues shortly after being hired in November, 2004. For example, he received a written reprimand on June 29, 2006 and then a one-day suspension on October 6, 2006.

On December 18, 2015 the Grievant was issued a two-day suspension for violating the Company's Attendance Policy, and then a three-day suspension on January 24, 2017. He participated in a record review on February 20, 2017 which seemed to have little effect on his attendance patterns. The Grievant continued not coming to work and on December 7, 2017 he was issued a suspension preliminary to discharge for failure to work as scheduled during the period March 13, 2017 to August 13, 2017. At the Step II meeting his suspension was converted to discharge. Significantly, the Grievant did not provide any reasons or explanations for his absences at that time, nor did he offer any potential mitigating circumstances. In essence, it can be said the Grievant "agreed" that just cause existed for his termination but expressed optimism that he would be able to do better in the future.

The concept of "Justice & Dignity", which appears in Article Five of the Basic Labor Agreement, is fairly unique to just the steel industry. It recognizes the economic harm that can befall an employee who has been discharged and is waiting for their "day in court". Justice & Dignity allows the discharged employee to remain on the job (with certain exceptions pertaining to drugs, safety violations, etc.) pending a final determination on the merits of their termination, which in many instances can take months if not years. Justice & Dignity also recognizes the inherent weaknesses of an Arbitrator's "make whole" remedy if awarded long after the employee has been out of work.

Subsequent to his return to work on Justice & Dignity, the Grievant was issued a three day suspension for allegedly failing to verify that certain equipment was properly locked out. However, that infraction triggered a record review which discovered that the Grievant again violated the Company's Attendance Policy during the period July 27, 2019 through November 1, 2019. Grievant was then discharged a second time on December 16, 2019 but was no longer eligible to continue working under Justice & Dignity. The grievances for his December, 2017 and December, 2019 terminations were promptly moved to arbitration and are presently before this Arbitrator for determination.

In the within situation Justice & Dignity kept the Grievant on the job from December 14, 2017 to December 16, 2019 -- almost three years to the day – after his initial termination. It is important to recognize, however, that Justice & Dignity should not routinely be interpreted as some form of a "Last Chance Agreement". Unfortunately, when the final determination for the discharge has been delayed for too long I find the arbitral issue often morphs into whether the employee has, in essence, "mended their errant ways regarding attendance" during the interim

work period afforded by Justice & Dignity -- as opposed to simply whether just cause existed as of the date of discharge. I am not saying that that type of review is totally inappropriate in all cases. Only that it should not be routinely applied.

Moreover, it appears in many instances the Union uses Justice & Dignity as a strategy, which it certainly is entitled to do, to not quickly move the discharge to arbitration hoping that the employee does not subsequently commit a second dischargeable offense, rather than risking going to arbitration in a timely fashion just on the facts that caused the discharge.

The record evidence within is compelling that the Grievant was treated with complete fairness and given every opportunity whatsoever to save his employment prior to his December, 2017 discharge. However, as indicated above, his attendance record as of December, 2017 was abysmal. More importantly is the fact that the Grievant offered no mitigating circumstances whatsoever upon which this Arbitrator could perhaps conclude that the December, 2017 discharge was not for just cause and that some lesser penalty should instead have been imposed. Although the Union did argue that the Grievant was dealing with alcohol issues, unfortunately that circumstance was not raised until the Step 3 hearing held on March 12, 2019.

I cite with approval the 1993 Das Award in Bethlehem Steel Corporation and the 1998 Bethel Arbitration Award in US Steel Gary Works where these two highly experienced and well regarded steel industry arbitrators determined that if a grievant's discharge for the first offense was for just cause it was, therefore, unnecessary to determine whether the subsequent discharge was also for just cause. That is exactly the principle that I am applying within which, parenthetically, is generally applicable to all employment situations and not just the steel industry.

Accordingly, there is no need to make a full blown just cause analysis with respect to the second grievance -- the December, 2019 discharge. However, if pressed to explain I readily conclude that just cause did in fact exist for the second discharge. I would note the Union's arguments regarding whether Grievant's October 10, 2019 doctor's excuse should have been accepted are not persuasive. The Company has wide latitude and discretion in determining whether to accept such excuses. Under all of the attendant circumstances surrounding that issue I find the Company acted appropriately in denying the same.

For all of the above reasons, Grievance No. 32A-17-24 must therefore be denied.

AWARD

Grievance Nos. 32A-17-24 is DENIED.

Date: Aug. 27, 2020
Pittsburgh, PA

Ronald F. Talarico, Esq.
Arbitrator