IN THE MATTER OF THE ARBITRATION	)	OPINION AND AWARD
	)	
Between	)	**RONALD F. TALARICO, ESQ.**
	)	**ARBITRATOR**
ArcelorMittal Cleveland, LLC	)	
	)	Grievance No.: 0798
and	)	
	)	
UNITED STEELWORKERS	)	Case 111
LOCAL 979	)	

GRIEVANT

Ian Rich

ISSUE

Discharge

HEARING

July 21, 2020
Cleveland, OH

APPEARANCES

For the Employer
Janet E. Jordan
Manager, Labor Relations

For the Union
Tony Panza
Chief Griever

ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esq., was mutually selected by the parties to hear and determine the issues herein. An evidentiary hearing was held on July 21, 2020 in Cleveland, Ohio 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 THREE – HEALTH, SAFETY AND THE ENVIRONMENT

Section A. Employee and Union Rights

1. **Employees have the right to a safe and healthful workplace, to refuse dangerous work, to adequate personal protective equipment, to safety and health training, to a proper medical program for workplace injuries and illnesses, and to a reasonable alcoholism and drug abuse policy.**

2. **The Union has the right to participate in active and informed Joint Safety and Health and Environmental Committees to appoint Union health and safety representatives, to join in regular safety audits and accident investigations, to receive full and continuing access to all information (including all OSHA reports), and to participate in programs which address certain special hazards. The Company will provide the Union Safety Department with prompt telephonic notification of all basic facts concerning any fatality at the worksite, followed by a written communication. The Company will also provide the Union Safety Department with a copy of any fatal accident report.**

3. **The Company will develop and implement, with the involvement of the Union, policies and programs for ensuring these rights.**
4. **The Company, with the involvement of the Employees performing the work, will develop and require the use of safe job procedures for the performance of all work. In the absence of a formal safe job procedure, a personal hazard assessment and control checklist will be used until a formal safe job procedure is developed.**

Section B. The Right to a Safe and Healthful Workplace

1. **The Company will provide safe and healthful conditions of work for its Employees and will, at a minimum, comply with all applicable laws and regulations concerning the health and safety of Employees at work and the protection of the environment. The Company will install and maintain any equipment reasonably necessary to protect Employees from hazards.**

. . .

ARTICLE FIVE – WORKPLACE PROCEDURES

. . .

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 Cleveland, Ohio. The Union, United Steelworkers, Local 979, 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, 2018.

On June 18, 2019, while in the process of tapping a heat of steel in the No.2 Vessel, a process engineer noticed flames around the kaowool at the break-joint area which is located between the flux floor and service level. Two MTMs were sent to investigate and gained access to a platform in this area. One MTM was tasked with packing the No. 2 Vessel break-joint and attempted to access the northwest corner of the platform by leaving the platform and crossing around the lance entry hole to access the opposite platform.

During this process, the MTM fell or stepped off of the northeast side of the platform near where the lance goes into the vessel and near the thermocouple dropper and slid into the lance hole opening and landed on the vessel approximately twenty to thirty feet below. Fortunately, he was able to make contact via radio with his crew to alert them of the situation. The crew was able to locate him and he was able to crawl to the side of the vessel to be removed. The injured employee was transferred via ambulance to Metro Hospital and suffered very serious injuries including have a foot amputated.

An investigation was conducted into this incident and eventually the following corrective actions were taken in response thereto: repair a missing railing at the end of the No. 2 Vessel northeast break-joint platform; fabricate a cover for the lance hole opening; and develop an SOP for packing/repacking the break-joint with kaowool on No. 1 and No. 2 Vessels. The recommended SOP was issued on September 12, 2019 and provided, in pertinent part, as follows:

> **"If, for any reason, an ArcelorMittal employee or contractor must access the break-joint platform on either vessel to**

perform maintenance on the break-joint itself or the corresponding expansion joint, the following must be done:

Safety Note:

Fall protection must be worn if stepping off the break-joint platform at any time. . . ."

Because of the serious injuries suffered by the MTM, the U.S. Department of Labor, Occupational Safety & Health Administration ("OSHA"), conducted an investigation. OSHA determined that this was a repeat violation of failing to ensure that each employee on a walking-working surface with an unprotected side or edge that is four feet or more above a lower level is protected from falling. As a result OSHA proposed the Employer pay a penalty of $225,000.00 which is currently being appealed.

The Grievant, Ian Rich, worked as part of a Company Internship during the period June 30, 2014 to August 19, 2016. On May 30, 2017 he was hired as a regular employee and at all times pertinent to the within matter held the position of Maintenance Technician Mechanical (MTM) (Labor Grade 4) in #1 Steel Producing. On March 10, 2020, Grievant began work at 2:00 a.m. and he and another MTM were assigned by shift manager Mike Troyan to get Vessel No. 2 ready for operation. The vessel had been down due to hood leaks. The two MTMs began re-packing the cable in the break-joint which needed to be done because, although it had been re-packed once, debris had fallen into the joint.

Grievant packed the front of the joint. When the re-packing was done, the other MTM began blowing out the break-joint which caused a significant amount of dust and lime, which can be very harmful to the skin, to be blown near where Grievant was working. The Grievant stated that he was working with a new crew who probably didn't realize his location and it was too loud to call them on the radio to stop blowing the dust. In order to get away from the dust he

decided to climb over the recently installed permanent handrail on the west platform and stepped down onto the lance hole entry cover plate. He then walked across the cover plate and climbed up onto the east platform away from the blowing dust.

The following morning, the Company received a complaint regarding the above incident. This complaint led management to review/audit video from the platform area of No. 2 Vessel. On March 11, 2020 during the audit, Grievant was observed climbing over the permanent handrails on the west platform and down onto the lance hole entry cover plate and continued to walk across the cover and climb up onto the east platform. This is a violation of both the Fall Protection Golden Rule and the Cleveland Plant Rules.

A meeting was held with Grievant and his Union representatives on March 12, 2020. On March 16, 2020, as a result of these violations, Grievant was suspended with intent to discharge. By letter dated April 20, 2020 he was informed that he was terminated for violating the following Cleveland Plant Rules and Golden Rules:

> **Cleveland Rules:**
>
> **April 16, 2018**
>
> **Dear Fellow Employee:**
>
> **In the interest of protecting our business and our Employees, this communication is designed to alert all Employees to the specific rules and regulations that are to be adhered to at ArcelorMittal Cleveland LLC listed below. These rules are designed to create a safe and positive environment for our Employees and to provide security for our business assets. It is important that you are aware of and comply with the content of these rules. If you do not understand one or more of the rules, please contact your Supervisor for clarification.**

NOTICE:

- **The safe performance of work, in all work-related activities in the plant, is a condition of employment for all Employees. Any Employee found to be in violation of following proper safe work procedures and/or failing to utilize required Personal Protective Equipment (PPE) shall be subject to discipline.**

- **In addition to the above rules, Employees engaging in conduct such as Failure to Report to Work, Reporting Late for Work, Insubordination, Carelessness, Poor Workmanship, Negligence, Excessive Absenteeism, Horseplay, Work Stoppages in Violation of the Labor Agreement, will be subject to discipline, including suspension and discharge.**

Golden Rules:

Health and Safety Golden Rules

The overwhelming majority of our hourly and salaried employees work in a safety-conscious manner. They work diligently every day to make a difference, to improve conditions and to eliminate hazards.

Unfortunately, a few employees choose not to follow key life-saving safety rules. In many of these situations the outcome has been catastrophic.

. . .

Within the U.S., these rules must be followed in all situations. An employee – salaried or hourly – who violates a Golden Rule may be disciplined up to, and including, suspension and dismissal. We will ensure that all employees understand the rules and the consequences for failure to follow them.

- **I will use fall protection or prevention whenever and wherever required according to our standards.**

- **I will respect all the Health & Safety basic rules, standards, and signals and I will wear the required PPE.**

ISSUE

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

POSITION OF THE EMPLOYER

The facts in this case are not in dispute. The Grievant did, in fact, climb over a barrier specifically erected to keep people out from an extremely dangerous area without fall protection which would have been required if he had any business in that area – which he did not.

So, both parties to this case would agree, I think, that the Grievant committed an offense. The difference is that the Company believes that this is such a serious offense as to merit discharge. From the Union's perspective this is a much less serious offense, like absenteeism, which merits a milder penalty aimed at correction.

The paradigm is that if the Grievant had put someone else in a position where they could have been maimed or killed, and where he would have known that he was putting them in a position where they could be maimed or killed, we probably wouldn't be here. The Union surely would not tolerate one employee putting another employee into such a predicament, but it seems that because the Grievant was risking his own neck, the Union would have us look at it differently. Well, Mr. Arbitrator, we don't look at it differently, we look at it simply as an employee needlessly jeopardizing his life, with a clear knowledge of the hazards present in the space he climbed into after receiving extensive training to not go into that space without good reason and without fall protection.

And whether it's an employee playing Russian Roulette with his own life or pointing the gun at one of us when he pulls the trigger it is behavior that can absolutely not be tolerated in the

workplace. The fact is that the Grievant understood the risks. He saw his colleague suffer horribly when he fell in that same spot.

The fact is that he had received extensive training to stay out of that area except when the job required it and except when he was wearing that proper fall protection and tied off. The fact is that he knew that climbing over that barrier could result in his discharge. Not that discharge is not the far lesser penalty for what he did as he could have easily been badly hurt or killed.

That he wasn't hurt or killed this time is not a reason to return him to work and so we ask that you deny this grievance and the relief asked for.

POSITION OF THE UNION

The Union alleged that the Grievant has a good safety record and there is no just cause for termination. During the grievance meeting, The Grievant acknowledged that he was able to pack the front side of the break-joint without crossing over the railing and that he had completed the task before the other MTM began using the air lance to blow out the break-joint. However, he alleged that, once the blowing began, the dust was very thick and he could not handle it. He believed the safest option to get away from the dust was to go across the cover plate.

The Grievant admitted that the Company recently installed a permanent handrail to keep employees from going onto the cover plate. He acknowledged that, while no PPE is needed while on the platform of Vessel 2, it is required if you go over the railing onto the cover plate. However, he also acknowledged that he did not have a harness with him. He has done this job before and believes that was the first time he went over the railing.

The Grievant had entered the northwest corner of the platform of Vessel 2 by coming up the steps on the west side of the vessel. He acknowledged that there is more room on the stairs and platform on the east side of the vessel. The Union alleges that an employee cannot wear full

protection gear if entering the platform on the west side of Vessel 2 because there is not enough room to get through.

The Union also explained that when lime hits exposed skin it is "bad news". It can cause skin irritation and can actually indent into the skin. The Union also alleges that this particular job is the nastiest one in the mill and this area is "a pigsty". The Union alleges that once blowing begins, workers cannot communicate with other employees because it is too loud. The Grievant acknowledged that he had a working radio on the night of the incident, however, radios cannot be used because they quickly fill with dust and get ruined. Hence, according to the Grievant, he had no way to let the other MTM know to stop blowing so he could get some relief from the dust.

The Grievant acknowledged that he made a bad choice, it was totally wrong, and he should not have done it. He now realizes the severity of the penalty but, more importantly, the fact that this decision could have resulted in serious injury or death.

The Union also posited that it was unaware that video from cameras around the plant is being audited and demanded to know the placement of every camera in the plant because the Union does not have the same option to watch video of management.

The Union also argued that the Grievant is a good employee and deserves a second chance to contribute to the Company. He can return to work and become an advocate for how things should be done the safe way. And, more importantly, he can try to make sure that he and his fellow employees go home after each of their shifts the way they came to work.

The Union believes that it is written somewhere that a violation of the Golden Rules results is a 10-day suspension and requests the Grievant be reinstated.

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.

It follows from management's right to establish safety rules that it may therefore discipline workers for failure to observe them. Arbitrators have consistently recognized an employer's right and obligation to promulgate and enforce reasonable workplace safety and health rules, and the necessity for employees to abide by these rules. With respect to the within matter both parties agree that there is no dispute as to the essential underlying facts pertaining to Grievant's safety violations. In fact, there is video evidence clearly depicting that misconduct.

As a result, the narrow issue presented is whether the punishment of termination meets the just cause standard set forth in Article Five J. of the collective bargaining agreement?

A steel mill is inherently an extremely hazardous work environment. The purpose of the within safety rules is to minimize and even eliminate the **risk** of personal injury and property damage in the work place. The fact that Grievant was not injured when he walked across the lance hole cover plate without wearing fall protection equipment is irrelevant. The record reflects that Grievant received adequate training on the safety procedures applicable to this incident. Although it should be noted that he received the Golden Rule training in 2016 and had not had any update on those Rules since that time. However, Grievant still admits that he "made a bad choice to climb over the handrail without fall protection equipment to get away from the heavy lime dust being blown in his direction. In fact, he candidly stated that he expected that he would be punished to some degree -- but not terminated.

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 loath 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 this Arbitrator reviewing the penalty imposed by the Employer within. Furthermore, the safety Rules violated do not involve a "zero tolerance" situation because both sets of Rules provide for disciplinary and corrective action "up to and including termination". After careful consideration of all of the evidence presented I find the existence of several factors that do cast doubt upon the appropriateness of the penalty of discharge for the within offenses.

The Grievant is only 25 years old and had only worked in No. 1 steel producing for less than three years at the time this incident occurred. In my mind his youthful age and relative lack of on-the-job experience significantly contributed to his bad decision. In addition, the Company was just hit with a large financial penalty from OSHA for safety violations that led to very serious bodily injury suffered by another MTM in the not too distant past. The Grievant's actions were likely viewed as a poke in the eye to the corrective actions the Company took in response to that prior incident. Furthermore, there is no question that the Company has been trying very hard to develop a culture of safety for its workforce. However, developing such a culture does not happen immediately and will only take place over time.

I am in no way minimizing the seriousness of Grievant's actions. However, as contemplated by both sets of Rules, corrective action should always be considered unless circumstances unquestionably lead to the conclusion that Grievant is beyond redemption. To that end I found the testimony of James Cottrall, the Division Manager for No. 1 and 2 steel producing to be significant when he testified that the Grievant not only had a good safety record but, more importantly, he was a good worker. In fact, the Grievant had no prior safety violations, whatsoever, in his record.

Finally, Grievant did not intentionally expose himself to risk of harm. He was attempting to avoid being sprayed with dust and lime and being injured in the process, rather than intentionally violating known safety rules. He was simply exhibiting careless behavior.

On the basis of all of the above, I find just cause for termination did not exist. A long-term suspension without pay should impress upon the Grievant the errors of his way and the need to make safety his No. 1 priority over and above any shortcuts he may think appropriate in

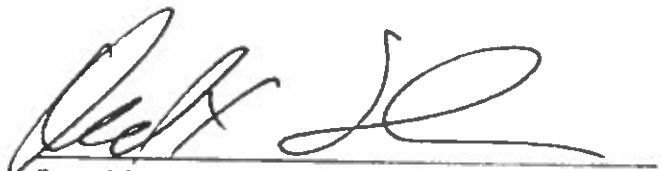
performing his job duties going forward. The Grievant is salvageable and deserving of a second chance.

AWARD

The grievance is hereby sustained in part and denied in part. The Grievant shall immediately be returned to his former position but without the payment of any lost wages or benefits.

Jurisdiction shall be retained in order to ensure compliance with this Award.

Date Sept. 2, 2020
Pittsburgh, PA



Ronald F Talarico, Esq.
Arbitrator