ARBITRATOR'S AWARD

In the Matter of the Arbitration
Between

Case 122

ArcelorMittal Indiana Harbor,
Cleveland Cliffs, Inc., East Chicago, Indiana

and

Josef Warren, an individual Grievant represented by
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers International Union,
and it Local Union # 1010

Grievance # 3SP-2021-006

July 21, 2021

David A. Dilts
Arbitrator

APPEARANCES:

For the Company:

Richard Samson, Attorney-at-Law

For the Union:

Jacob Cole, USW Staff Representative

Hearings in the above cited matter were conducted at the Offices of ArcelorMittal Indiana Harbor, Cleveland Cliffs, Inc. at 3210 Watling Street, East Chicago, Indiana on Thursday, June 30, and July 15, 2021. There was also a motion made by the Union on June 30, 2021 by email and an interim award concerning that motion was made on July 1, 2021. The parties stipulated that the present case is properly before the Arbitrator pursuant to Article Five, Section I of their 2018 Collective Bargaining Agreement. The record in this case was closed upon the completion of the hearings on July 15, 2021.

ISSUE

Was Josef Warren, herein the Grievant, discharged for just cause pursuant to the parties' Basic Labor Agreement? Was the Grievant properly denied the benefits of the Justice and Dignity language of Article

Five, Section I. 9. b. of the BLA? If either of these matters is resolved in favor of the Union, what shall be the remedy?

BACKGROUND

The ArcelorMittal owned by Cleveland Cliffs (herein the Company or Employer) operates a Steel Mill at Indiana Harbor (herein the plant or Mill). The Company's employees are represented for purposes of collective bargaining by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Local 1011 (herein the Union). The parties' current labor agreement became effective on September 1, 2018 (herein the Basic Labor Agreement or BLA).

This case is a disciplinary matter, in which the Grievant was discharged for having allegedly harassed a janitorial employee working for a contractor (SEI Solutions) on the Employer's site. Corollary to the discharge matter is the Union's complaint that the Grievant was improperly denied the benefit of the Justice and Dignity language contained in Article Five, Section I. 9. b. of the BLA.

Although the parties stipulated that these issues are properly before the Arbitrator, there are preliminary matters concerning the postponement and continuation of the arbitration hearing. The preliminary matters will be briefly examined before proceeding to the primary issues between these parties involving the discharge of this Grievant and the denial of his Justice and Dignity benefits under Article Five, Section I. 9. of the parties' current Basic Labor Agreement.

Preliminary Matters

The hearing in this matter was originally scheduled for Friday, June 25, 2021. Upon a motion by the Company, the Arbitrator granted a postponement of the hearing until June 30, 2021 to permit the execution and service of subpoenas for two witnesses deemed necessary for their case. Management, upon presentation of three witnesses, then requested a continuance of the hearing due to one of the subpoenaed witnesses not presenting himself to testify. That witness was the employee of a contractor (SEI Solutions) and the Company was unable to convince that contractor to provide information concerning the whereabouts of that witness. Pursuant to Article Five, Section I. 8. a. §(4).: *"the arbitrator shall have the obligation of assuring that the hearing is, in all respects, fair;"* the Arbitrator granted the Company's requested continuance.

Upon reflection, the Union then after the adjournment of the hearing, objected to the granting of the continuance based on Article Five, Section I. 7. d. of the BLA which states: *"Failure to present a case when it is called shall constitute withdrawal of the grievance and failure to respond to a case when presented shall constitute granting of the grievance and agreement to the remedy sought, provided that a hearing may be postponed once if the arbitrator determines that circumstances clearly require postponement.* The Company responded to the Union's motion asserting that the continuance was not contemplated by the parties as a postponement because there was no failure to respond and it was within the Arbitrator's authority to grant the continuance so that a fair hearing (in all respects) could be had and a full record could be developed so as to enable him to issue an appropriately informed decision. The Arbitrator issued an interim

decision concerning the Union's motion objecting to the continuance of this arbitration hearing stating, in pertinent part:

> In fact, this Arbitrator is not persuaded that the prescription that only one postponement applies to these facts and circumstances. The absence of Mr. Santiago is part and parcel of the cause for the original postponements but setting this argument aside. It is not clear from the language of Article 5 (I) (7) (d) that the parties intended to bar a continuance of this nature, even after a postponement had been granted on its merits. Therefore, the Arbitrator is not persuaded that this Union motion should be granted under the specific language of BLA.

The Arbitrator is obligated to assure a fair hearing, and where tension exists between postponing or continuing a hearing and fairness, the later must prevail. In the Company's best estimate Mr. Santiago's testimony was needed for presentation, and there is no evidence before this Arbitrato to suggest otherwise. Therefore, it is this Arbitrator considered opinion that the preliminary matter concerning the Union's motion has been decided and requires no further examination.

Merits

The Company issued the Grievant a suspension, pending discharge notice (Joint exhibit 4) dated February 15, 2021 which states in pertinent part:

You are hereby notified that you are suspended for five (5) days effective the date of this letter at the end of that period, you are subject to discharge.

This action being taken as a result of your violations of the Fair and Equal Treatment Policy, as well as Personal Conduct Rules 2.J and 2.V. any one of which standing alone would be grounds for discharge. Personal Conduct Rule 2.J and 2.V state in pertinent part:

> 2. The following offenses are among those which may be cause for discipline, up to and including suspension preliminary to discharge:
> J. Conduct which violates the common decency or morality of the community . . .
> V. Engaging in sexual harassment or other forms of harassment of another employee or found displaying material of a sexual nature or a harassing and demeaning nature.

Under the provisions of Article 5, Section 1 of the current Collective Bargaining Agreement, you may request and be granted, during this five (5) day period, a hearing before the Division Manager; and, at such hearing, you are entitled to Union representation. Pursuant to Article Five, you are not entitled to Justice and Dignity for this offense.

S/ Tim Halls

Division Manager
3 Steel Producing

A step 2 hearing was conducted and the minutes of that meeting, together with the Union's exceptions were entered into the record as Joint exhibit 6. The basis of the charges brought against the Grievant are found in the "Statement of Company Position" in Joint exhibit 6, the second through fourth paragraphs:

> At the Step 2 Neb testified that Ms. Ramirez [herein the Complainant] came to clean his office and he had asked he how she was doing. The Complainant responded that there was someone who was acting inappropriate [sic] towards her. On February 9, 2021 Neb proceeded to contact Love Kaira, Senior Engineer, on what the proper next steps were. Love gave Neb, Emily Albano from Labor Relations [sic], email address and advised him to report what the Complainant told him. On February 10, 2021 Neb contacted Labor Relations.
>
> Miguel Santiago, a janitor of SEI,[1] testified that he was upstairs

---

[1] SEI is the outside contractor whose employees are not members of the Steelworkers bargaining unit and who provide

in the control room one day when the Grievant asked for the girl named "Julio," "Coolio." "Coolo." Mr. Santiago knew that the Grievant was speaking of the Complainant because she is the only female that [sic] goes up there with him. Mr. Santiago approached the Complainant and informed her that there was a guy upstairs looking for her. Mr. Santiago also testified about another incident where he was cleaning the men's locker room with the Complainant. Signs were put up with a female's picture on it to show a female was present cleaning and Mr. Santiago checked to make sure no one was in the locker room before the Complainant entered to make sure the area was clear. Mr. Santiago was mopping; he did not see the Grievant come in but did see him in there and he heard him tell the Complainant that is was okay, she could see him naked. Mr. Santiago stated that when he cleans the men's locker room with another male, he does not put-up signs.

The Complainant, a janitor with SEI, testified that in late November early December of 2020 herself and a male employee who no longer works with SEI solutions were cleaning the locker room. The male employee had checked the locker room to assure there were not any Employees in the room before the Complainant entered. The Complainant was cleaning when the Grievant made his way to her and took his towel that he had

---

janitorial services for the Mill.

on and flipped it, so the gap was in the front, so his genitals were exposed. The Complainant stated the he told her that she could stay in the room, at that time she elected to exit the room. The Complainant also testified to an incident with the Grievant that occurred on February 3. She stated that she and Mr. Santiago were to clean the locker room but before they began, he checked the locker room to assure there were no other Employees present. The Complainant saw the Grievant enter, she informed him that she was going to exit, the Grievant then replied to her "you don't want to see me naked? You can see me naked." The reason the Complainant claimed she did not report the first incident when it happened was because she was new to the job. The Complainant disclosed to Neb on February 4, 2021 what had been happening with her and the Grievant. The Complainant stated that she is the only female who cleans locker rooms in the area.

A subpoena was issued for the Complainant, and she was called to testify. The Complainant's testimony, was in the main, consistent with the scenario contained in Joint exhibit 6. There were aspects of her testimony which were inconsistent concerning specific details concerning her location in the locker room when the towel incident was alleged to have occurred. She identified the SEI employee who was in the locker room, who was not identified in Joint exhibit 6 as a person named Derrick; the name Derrick appears in the Step 3 minutes. She further indicated that Derrick no

longer works for SEI, consistent with the narrative in Joint exhibit 6. The Complainant testified that the towel incident occurred sometime toward the end of the month of November of 2020.

The Grievant explained the Union's allegation that she failed to report this incident immediately. She claimed that she *did* immediately report the alleged incident to SEI Solutions management who apparently chose to ignore her. Further, that in either January or February of 2021 Derrick's father died and he was no longer employed by SEI. The Grievant further testified that subsequent to the towel incident there her sister had contracted Covid 19 and was gravely ill. Because of the health issues in her family, she was required to be away from work for an unspecified period of time. The Step 3 minutes (Company exhibit 1) have more precise claims that her sister was ill with Covid 19 and she did not come to work on February 5, 2021 (last two lines, page 3 and first two lines page 4).

The Company's other witnesses were Holly Kocel from Human Resources who testified concerning the investigation of the complaint brought against this Grievant. Her testimony is consistent with the narrative found in Joint exhibit 6. She interviewed the Complainant and Mr. Santiago from SEI, and their information formed the basis of the facts she reported. Mr. Halls, the Division Manager also testified as to his involvement and why he issued the letter converting the aggrieved suspension to discharge (Joint exhibit 7). Neither of these later witnesses were present when any of the alleged violations occurred and testified concerning the findings of the investigation and results from the grievance procedure.

In the Step 3 minutes (Company exhibit 1) on the second page, beginning on the fifteenth line the following sentence is found: "The Complainant mentioned that a bargaining unit employee, Oliver Caston, and her immediate supervisor at SEI Solutions, Patricia Maywald, had additional information to support her claim." The Step 3 minutes show that the Company asked Mr. Caston what information he had concerning these matters, and denied witnessing anything that was inappropriate (third full paragraph, page 4). Mr. Caston testified at the arbitration hearing and gave testimony consistent with the information found in the Step 3 minutes. These matters were alleged to have been concerning comments the Grievant was accused of making concerning the Complainant's posterior (the "culo" comments). He stated he knew who Mr. Santiago was and had spoken with him in passing. Mr. Caston testified that he had not shared any of the Grievant's alleged comments concerning the Complainant's body with anyone. Mr. Caston further testified that the Grievant never made any such comments to him and that their conversations were limited to retirement related issues.

The Grievant was called to testify and denied that the towel incident occurred. He specifically claimed in direct examination "that I would never do that," when asked if he exposed himself to the Complainant. Management made an issue of the Grievant having made a comment concerning risking his job would require a much younger woman. The Grievant testified that in discussing this during the investigation that he was simply suggesting it would be stupid to risk his job over something like this. He intended his comment to mean he would not be stupid enough to this even for a younger woman.

The Grievant denied, consistent with Mr. Caston's testimony, ever

discussing the Complainant's body with him or anyone else. The Grievant described his contact with the Complainant in the locker room in early February as simply walking past her to go to his locker to change into his street clothes. He claims to never have been in any state of undress in her presence; and it was his clear recollection that was all that occurred in that locker room on that day.

The Union also presented two witnesses who were Union officials, Mr. Hemphill and Mr. Barron who offered their impressions of the conduct of the investigation and of the grievance meetings. Both Union witnesses complained that they were not given the specifics of the charges against the Grievant during the investigative phase, and that they only became aware of the particulars during the grievance procedure (Joint exhibit 5). Both of these Union officers allege that this interfered with their ability to provide the Grievant with the fair representation to which he is entitled. Mr. Barron also testified that Mr. Santiago claimed to him he never saw the Grievant in the locker room when he allegedly stated "would you like to see my dick?" According to Barron, Mr. Santiago claimed only to have heard the Grievant's words. This element of the record contains three versions of the alleged statement.

In the Step 2 minutes the Grievant is alleged to have responded to the Complainant's announcement that she was going to leave the locker room with "you [sic] don't want to see me naked? You can see me naked." [Joint exhibit 6, page 2 next to last paragraph]. Mr. Santiago reports the statement in the Step 3 minutes as "it's okay you can see me naked." [Company exhibit 1 page 3, next to last paragraph]. The third version is also reported in Company exhibit 1, page 4, third paragraph where it is memorialized that Mr. Santiago heard one of the first two versions, and not

another proposed wording of "Do you want to see my dick?" This is contrary to the testimony offered by Mr. Barron. The source of this third version is identified by Barron as being Santiago but no corroboration of this origin is to be found in the record before this Arbitrator, even though it was argued at one point to be factual. Mr. Santiago, although subpoenaed failed to appear to testify.[2]

Albeit, there are two witnesses who were present during the relevant events giving rise to this discharge they are the Complainant and the Grievant. Mr. Caston was identified by the Complainant as having relevant probative evidence, which Witness Caston denied. The remainder of the record focuses primarily on the investigation and the processing of this grievance.

Hearings in the above cited matter were conducted at the Company's Indiana Harbor, Cleveland Cliffs, Inc. offices at 3210 Watling Street, East Chicago, Indiana on Thursday, June 30, and July 15, 2021. There was also a motion made by the Union on June 30, 2021 by email and an interim award concerning that motion was made on July 1, 2021. The parties stipulated that the present case is properly before the Arbitrator pursuant to Article Five, Section I of their 2018 Collective Bargaining Agreement. The record in this case was closed upon the completion of the

---

[2] Joint exhibits 8 a through 8 c are documentary evidence showing attempts to serve the subpoena on Mr. Santiago. Albeit SEI Solution had originally denied Management's requests for contact information for Santiago, they recanted and provided an address, which was verified. The Company discovered that Mr. Santiago had been injured in an automobile accident and was suspected of impairment due to alcohol.

hearings on July 15, 2021.

COMPANY'S POSITION

It is the Company's position that it conducted a fair and thorough investigation of the three complainants brought against this Grievant and found them to be of merit. The result of the facts discovered was that the Grievant engaged in serious misconduct. The Grievant's actions violated Personal Conduct Rules 2. J and 2 V [Joint exhibit 2] as well as the Company's Fair and Equal Treatment Policy [Joint exhibit 3]. Because of the nature of the offense, the Company considered the matter of such gravity as to warrant denying the Grievant the benefits of the Justice and Dignity language [Article Five, Section 1. 9. b. of the BLA, Joint exhibit 1] in order to protect employees of the Company and its contractors.

The Company maintains that it has proven its case against this Grievant with the preponderance of the credible evidence and that the Union's contention that a higher quantum of proof is necessary is without merit. The Company points to the reasoning of Arbitrator DiFalco in *CoreCivic* (139 LA 1257; 2018) that the preponderance of the evidence standard is sufficient to prove that an employee was engaged in inappropriate conduct related to harassment.[3] That a requirement that the Company prove its case with "beyond a reasonable doubt" is misplaced

---

[3]The Company also takes the position that the prevailing arbitral thought on the matter of proof is that preponderance of the evidence is what is typically required by the majority of arbitrators in these cases.

and should not be applied here.[4]

The record shows that the Company did conduct a thorough investigation interviewing Mr. Santiago, Mr. Caston, the Complainant, and examined the scene of the towel incident. The findings of this investigation were shared with the Union during the grievance procedure and nothing was hidden, as the Union seems to suggest. The Union officials who testified have an interest in defending this Grievant and therefore it is to be expected that they would attempt to portray the Company's investigation in a light favorable to a ruling for the Union – that after all is their obligation. In this case, the Company's investigation was fair, thorough and its results were made known to the Union. Nothing in this record suggest any impropriety in the handling of this investigation and the Union assertions to the contrary should be dismissed as being without merit.

The merits of this case are rather straightforward and simple. The Grievant engaged in three distinct actions which were proven and are clearly misconduct in violation of the Personal Conduct Rules (2J and 2V of Joint exhibit 2) as well as the Company's Fair and Equal Treatment Policy (Joint exhibit 3). The three incidents are: (1) The Grievant exposed himself to the Complainant in the men's locker room; (2) The Grievant made remarks demeaning the Complainant to fellow employees (Santiago and

---

[4]Arbitrator Bethel in ArcelorMittal Case No. 70 (2015) also discusses issues concerning proof and at page 24 specifically suggests that what the courts require in Title VII cases are uncorrelated with how arbitrators view proof under Collective Bargaining Agreements. His view is that what is required is evidence sufficient to persuade him of the merits – with which this Arbitrator agrees.

Caston) using Spanish slang for a large posterior "culo;" and (3) In close contact with the Complainant, the Grievant asked her if she would like to see his dick or to see him naked, or words to that effect.

The investigation found that all three of these events occurred. Santiago, Caston and the Complainant were all in the specific areas of the Mill at the times these events occurred and all credibly relayed to Ms. Kocel and other management officials what had transpired. The results of the investigation were then given over to Mr. Halls, the Division Manager, who independently examined the evidence, policies, and circumstances and arrived at the conclusion that the Grievant was culpable and that the gravity of the misconduct warranted converting the suspension to discharge. Simple, fair and straightforward; management did what the facts required of them to protect the work environment and to enforce their properly promulgated rules and policies.

The Union also complains that the Grievant was improperly denied the benefits of the Justice and Dignity language of the BLA [Article Five, Section I. 9. b.]. It is the Company's position that the exceptions to Justice and Dignity apply in this case [Article Five, Section I. 9. b. 2.). The Union contends that since the Grievant's alleged misconduct is not specifically listed as an exception, that Justice and Dignity benefits are due. However, that is not the letter or the spirit of this exception language in the second paragraph. The examples used in that language were not meant to be an exhaustive list of the exceptions; they are merely examples of the conduct that qualifies as an exception. Furthermore, it is clear what the parties intended with the phrase "This paragraph will not apply to cases involving offenses which endanger the safety of employees. " The Grievant's misconduct is precisely the type of behavior that was intended by the

parties to be excepted from Justice and Dignity.[5]

The Union has argued that there is a paucity of proof in this case and that the Complainant's veracity is suspect. Such claims are for the Union to prove. The Complainant testified credibly and was forthright. The issue of Mr. Santiago's testimony is well documented in the investigation, and the fact that he has been injured, and not available to testify should not diminish what was discovered during the investigation. The Union had the opportunity during the grievance procedure to test his recall and did not call his veracity into question during those proceedings.

It is the Company's position that a preponderance of the credible evidence in this case supports the conclusion that the Grievant engaged in the identified misconduct with respect to the Complainant. No mitigating circumstances are present in this matter, and the penalty imposed is identified in Joint exhibit 2 should violations occur. It should also be noted that the behavior exhibited by the Grievant is such that a reasonable person would expect to lose their job for such conduct. Furthermore, the Grievant was trained concerning the Fair and Equal Treatment Policy (Joint exhibit 3).

The Union makes assertions that the Company did not provide requisite information during the time leading up to the Step 2 meeting (Joint exhibit 5). The Company rejects this Union assertion and suggests that it is for the Union to make specific claims and prove them with a preponderance of the evidence.

---

[5] Arbitrator Bethel, again, in ArcelorMittal Case No. 70 (2015) found that similar circumstances warranted an application of this exception to Justice and Dignity benefits (pp. 33-35).

For all of the foregoing reasons, the Company urges the Arbitrator to deny this grievance in its entirety and sustain the discharge of this Grievant.

UNION'S POSITION

The Union asserts that the Company wrongfully accused this Grievant of misconduct he did not commit. The record of evidence proffered by the Company has considerable short-comings, is based mainly on hearsay and a single witness's testimony. Further, the Company denied the Grievant of the benefits of Article Five, Section I. 9. b. of the Basic Labor Agreement. The clear language of the Justice and Dignity provision was violation. Therefore, the Union asks that this grievance be sustained, and that the Grievant be granted the appropriate remedies for these violations.

The record of evidence is basically one of "he said, she said." The Complainant accused the Grievant of exposing himself to her in the men's locker room, and the Grievant testified nothing of the sort happened. No corroborating witness was called by the Company, no physical proof was offered, what we have here is nothing more than a simple accusation without supporting proof.

The Grievant is accused of having told Mr. Oliver Caston that the Complainant had a big "culo."[6] He was accused of having Mr. Caston relay this to Mr. Santiago; and Caston was called to testify. Mr. Caston testified that he really didn't know Mr. Santiago that well, and that he and the Grievant never had the subject conversation. The truth of the matter is clear and obvious, Mr. Caston denies that such language was used by the Grievant in his presence contrary to the Company's assertion.

---

[6] Colloquial Spanish for Butt.

Finally, the Company asserts that the Grievant made an offensive statement to the Complainant. The various versions were "do you want to see me naked," "you can see me naked," and "do you want to see my dick?" All that is in this record is the Complainant making the claim, Human Resources investigators repeating the claim, and the Grievant's denial that anything like that was ever said by him.

The Union does not disagree that if these accusations were true that serious misconduct would have occurred. In fact, the Union concurs that these alleged actions would be in violation of the Rules of Personal Conduct and the Company's Fair and Equal Treatment Policy. However, there is no proof that any of these actions occurred. The Complainant made the claim, the Human Resources Investigators reported her claim, and the Grievant categorically denied each of those claims. However, there are two important points here. The only other person present for any of this was Mr. Caston, and his testimony clearly supports the Grievant's recollection of the events, and refutes the Company's claim. The second point, is the language of the "Its okay to see me naked" comment was in constant revision. There are differences in the connotation of each of those phrases, and the distinctions are not trivial. Yet we don't even know what it is the Grievant is alleged to have said from this record. Simply put, there is no reliable evidence upon which to find any misconduct concerning this Company charge.

The bottom line is the Company bears the burden to prove the allegations against this Grievant that resulted in his discharge. Regardless of the standard of proof required the Company did not meet their burden. There are allegations, the testimony of the person making the allegations, and not one shred of evidence to support that set of allegations.

In this case, what the Grievant has been charged with is serious moral turpitude, perhaps even criminal conduct. Because of the seriousness of the allegations and their implications for his future, the standard of proof must greater than a simple preponderance of the evidence, at a minimum it should be clear and convincing proof of the charges. This record fails to met either standard.

The Union negotiated for the Justice and Dignity language in Article Five, Section I. 9. b. of the BLA. The purpose of that language was to operationalize the presumption of innocense, but exceptions to the continuation of employment until the matter was resolved were written into the BLA. To protect employees and the mill they parties agreed to certain exceptions to Justice and Dignity. These exceptions were primarily safety matters and are outlined in the BLA language. Nothing akin to the allegations brought against this Grievant are to be found in those exceptions. It is therefore, the Union's position that the Company has violated Article Five, Section I. 9. of the BLA and the Grievant was improperly denied a continuation of his employment until this matter was properly resolved.

The Union also believes that the Civil Rights Committee should have been involved in this matter during the investigation. By failing to adhere to the provisions under which that Committee operates the Union asserts that the investigation was tainted.

The Union therefore respectfully requests that this grievance be sustained in its entirety and the aggrieved discharge be overturned. The remedy requested by the Union in this case is for the Grievant to be reinstated to his former position with the Company with full back pay and benefits from the time he was suspended pending discharge. The Union requests that the discharge and notations concerning the charges against

this Grievant be expunged from all Company records. The Union also asks that the Arbitrator to order the Company to abide by the processes and procedures for disciplinary investigations contained in the parties' Basic Labor Agreement. Further, the Union asks the Arbitrator to grant what ever additional remedy may be due for these violations.

ARBITRATOR'S OPINION

The matter before this Arbitrator involves charges of inappropriate conduct towards a female employee of an outside contractor against this Grievant. Management has charged this Grievant with three specific instances of misconduct that form the basis for his discharge. In the Company's view these charges required that the Grievant be denied the Justice and Dignity benefits. The Union, on the other hand, complains that the Grievant was entitled to the benefits of the Justice and Dignity language of Article Five, Section I. 9. of the Basic Labor Agreement which which management had no right to deny him. The Union further complains that management did not properly investigate these matters and failed to involve the Civil Right Committee properly under the BLA. The Union also complains that the Company neglected to follow the due process requirements of the BLA. Each of these issues will be examined, in turn, in the following paragraphs of this Arbitrator's opinion.

Just Cause

There is little agreement between the parties concerning the facts and circumstances of this case. In fact, there is controversy concerning the

precise nature of the charges brought against this Grievant. Joint exhibit 4 is the February 15, 2021 notice to the Grievant that he was suspended pending discharge. This notice outlines the charges:

> This action is being taken as a result of your violation of the Fair and Equal Treatment Policy, as well as Personal Conduct Tule 2.J., and 2. V., any of which standing alone would be grounds for discharge. Personal Conduct Rule 2.J., and 2.V. state in pertinent part:
>
> > 2. The following offenses are among those which may be cause for discipline, up to, and including suspension preliminary to discharge:
> > J. Conduct which violates the common decency or morality of the community . . .
> > V. Engaging in sexual harassment or other forms of harassment of another employee or found displaying material of a sexual nature or of a harassing and demeaning nature.

The Company's properly promulgated Fair and Equal Treatment Policy (Company exhibit 3) is also cited as a rule that the Grievant violated in this matter. Management did not elaborate, at Step 2 or 3, nor during the hearing what provision of the Fair and Equal Treatment Policy the Grievant is alleged to have violated. Management has, rather than use the terms "sexual harassment" in its case against this Grievant, has relied instead on the specific language found in the Personal Conduct Rules (Joint

exhibit 2). In so doing, Management focuses on the conduct alleged to have occurred rather than the motivations of the Grievant in engaging in the alleged misconduct. The avoidance of the emotionally charged and socially repugnant term "sexual harassment" is, in this Arbitrator's opinion, a distinction without a difference. The language of the Fair and Equal Treatment Policy is (as Management argues) consistent with and strongly correlated with Personal Conduct Rules 2.J., and 2.V. Therefore, this Arbitrator finds part [c] of the definition of sexual harassment (page 2) of Joint exhibit 3 to be the operable language of the Fair and Equal Treatment Policy at issue in these proceedings:

> **Sexual Harassment:** Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when: (a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (b) submission to or rejection of such conduct is used as a basis for an employment decision affecting that individual; or © the purpose or the effect of such conduct is to interfere substantially with the affected individual's work performance or to create an intimidating, hostile or offensive work environment. Some examples of unwelcome behavior that can be construed as sexual harassment include; but are not limited to: **sexual advances, propositions**, off-color jokes, touching, physical assault, sexually explicit or suggestive objects or pictures, **references to a person's body parts**, request for sexual activity, and/or **sexually explicit conversation**. . . .

What this Grievant is charged with is sexual harassment, in violation Personal Conduct Rule 2 V: *"V. Engaging in sexual harassment or other forms of harassment of another employee or found displaying material of a sexual nature or of a harassing and demeaning nature."* As the Elkouris observe:[7]

> It is now established that under certain conditions sexual harassment constitutes a type of sex discrimination . . .
> Hostile-environment sexual harassment occurs when an employee is subjected to a pattern of unwelcome sexually related conduct in the workplace that interferes with an individual's work performance or creates a hostile, intimidating, or offensive work environment [footnote not reported here].
>
> What constitutes "sexual harassment" is context dependent.

What nomenclature is applied to the alleged misconduct is of little import to this Arbitrator's decision. Exposing ones self and comments clearly proscribed by Company policy above are sound foundations for disciplinary action, and there is clear warning in the Rules and Policy that

---

[7] Frank and Edna Asper Elkouri, edited by K. May, *How Arbitrator Works, eighth edition.* Arlington, VA: Bloomberg BNA, 2016, p. 17-101-102.

serious violations may result in a penalty up to and including the loss of one's employment. What is of concern to this Arbitrator is whether the charges brought against this Grievant are adequately supported by evidence.

Proof of Misconduct

Whether labeled as sexual harassment or not, the conduct with which the Grievant stands accused is serious moral turpitude. A male exposing himself to a female co-worker is intolerable, and will have implications for other aspects of his life (marital relations, future employment, *et al*). If true, there can be no doubt that actions are of a harassing and demeaning nature eroding requisite civility in the work environment. Whether the quantum of evidence is beyond a reasonable doubt, clear and convincing or just a simple preponderance of the evidence is, in this Arbitrator's view, and interesting academic argument with likely good arguments supporting whatever position one cares to defend. In the practical world of industrial jurisprudence what quantum of proof must be the standard, alas, is what convinces this Arbitrator he is making the right decision in this particular case – that is what the contract requires and what are most likely the true representation of the facts as a reasonable and impartial trier of fact would determine.[8] Clearly, the Arbitrator's obligation is to ascertain what the

---

[8] Arbitrator Bethel opines (ArclorMittal Case No. 70, 2015, p.28) . . . /

record of evidence reflects happened and to apply that image to the rules and policies governing behavior in that Mill.

The Complainant was the single witness called by the Company to provide direct testimony who was present to observe the conduct for which the Grievant was discharged. Others were present, but their testimony was not proffered at the hearing, even though there was mention of statements made by those witnesses obtained during the investigation. The Complainant testified directly and nothing arose which persuaded the Arbitrator that she was not credible. There was some confusion about locations in the men's locker room on the day she alleged the towel incident occurred. There was also controversy concerning the placement of signs and what those signs contained. However, nothing occurred to persuade the Arbitrator she was not telling the truth as she saw it.

Culo Statement

One of the charges brought against this Grievant is that he made comments concerning the Complainant's body parts, and that this statement was made to other employees. Such conduct is demeaning, and is classically included under the broadly understood definition of sexual

---

could not say with great confidence whether a court would find Grievant's conduct sufficient to establish a hostile work environment. But I am persuaded in the instant case that his actions violated the Company's Non-Discrimination and Anti-Harassment Policy. . . The facts and circumstances in Case No. 70 were at controversy, however, much of the Company's case against that Grievant was corroborated by multiple witnesses.

harassment causing a hostile work environment.

The problem is that the Complainant stated to the investigators that Mr. Caston could corroborate her story concerning the "culo" characterization. Mr. Caston is a member of the bargaining unit and the BLA does not permit management to cause him to testify. He was, however, called as a Union witness and he did testify at the arbitration hearing. Albeit the Company does not concede that Mr. Caston denied the investigator's and Complainant's contentions, the Arbitrator is persuaded that he did. He was specifically asked on direct examination whether he heard the Grievant make the offensive comment, and his answer was that he did not. He was also asked if he relayed such offensive comments to Mr. Santiago or anyone else and he again was firm in his negative response.

On the basis of this record of the facts and circumstances this charge fails, it is not supported by a foundation of persuasive evidence.

"Would You Like to See Me Naked?"

The Grievant is charged with making a comment directly to the Complainant, which was witnessed by Mr. Santiago, which is potentially of a sexual nature and potentially offensive. Mr. Santiago is not a bargaining unit employee, but was then an employee of SEI Solutions, a contractor providing janitorial services in the Mill, therefore the Company is not barred from calling him to testify. The Company requested a postponement and then a continuance of the hearing to track down and offer this witness at hearing. Repeated efforts to locate this person and several attempts at service of the subpoena yielded nothing.[9]

The second evidentiary problem in this matter arises when considering the other allegation of an offensive comment. The worst version of the Grievant's alleged comment was "Do you want to see my dick?"[10] Two other versions of that comment are found in this record which do not include the word "dick" and therefore perhaps less sexually charged and boorish. "Do you want to see me naked?" and "You can see me naked" are versions moving away from the most offensive comments of that nature.

There are differences in these statements worthy of consideration. The most offensive of these statement uses the word "dick." The least is the comment which seems to grant permission to see the person naked. Clearly, the first statement, almost regardless of context is sexually charged and inappropriate. The last comment requires a context to determine its culpability. When there is that much variation in the alleged choice of

---

[9] The Company informed the Arbitrator and Union that they had discovered that Mr. Santiago was likely avoiding service of the subpoena due to legal problems of his own. He had been in an alcohol related automobile accident in which he was injured. The Arbitrator finds the Company's attempts proper and consistent with an honest attempt to complete this record. However, how much credit could be given the testimony of someone in Santiago's situation remains to be seen.

[10] This is one of the proven elements of misconduct in a case before this Arbitrator in 2018 (grievance ILVT-20017-004) in which that Grievant used the word "dick" to a female employee in a series of actions that were found to be boorish and created a hostile work environment worthy of discipline short of discharge.

words, then there needs to be evidence which permits the Arbitrator to determine the accurate language.

Again, there is a witness who was identified by the Complainant to have been a witness to this statement, and that witness did not testified, albeit in spite of the efforts of management to get him to the hearing. Without corroboration and without the exact words, the Arbitrator is being asked to make guesses and assumptions, rather than judge facts – this Arbitrator cannot, in good conscience do.

This charge must also fail.

Exposing Himself

The final remaining charge is the one in which the Grievant is alleged to have exposed himself to the Complainant in the men's locker room. If proven, this charge clearly violates both Personal Conduct Rules and the Company's Fair and Equal Treatment Policy. Likely, this event alone would reasonably form the basis for grounds for removal from employment; if the Arbitrator was persuaded this likely occurred.

The Complainant was explicit and unwavering in her description of the events in the men's locker room in which the Grievant allegedly exposed his genitals to her. While the Step 3 Company position identifies the time frame as late November or early December, 2020; the Complainant places the event at the end November of 2020. Albeit, there was some confusion about her location in the locker room, that is of little consequence to the scenario to which she testified.

There was a witness, according to the Complainant, to the events in the men's locker room in which the Grievant is alleged to have exposed

himself. That witness was identified as a male employee of SEI Solutions who was also a janitor, named Derrick. Derrick was not present to testify and is no longer an employee of SEI Solutions. His whereabouts is apparently unknown to the parties.

On the other hand, the Grievant denies that any of these locker room events occurred. He claims that the alleged towel incident simply did not occur.[11] Again, the Grievant can only offer his testimony that the events did not occur without corroboration.

What is before the Arbitrator is a classic "he said, she said" situation. Such matters where there are only two witnesses present for a claimed event and they tell two completely different stories of what happened are difficult challenges for impartial triers of fact.[12] While it is true that the Grievant has an interest in retaining his employment, that alone is not

---

[11] There was an assertion that the Grievant claimed he would not risk his job over this Complainant and that somehow a younger woman might be different. This statement the Grievant admits making, but stated it was in defense of his claim that he did not expose himself. This Arbitrator is not persuaded that context is also important with this statement. The claim is vague and without a context and exact wording is not probative of any of the charges before him.

[12] Arbitrator's have wrestled with these quandaries for decades. Marvin Hill and Tony Sinicropi, "Evidence in Arbitration," Washington, D.C.: Bureau of National Affairs, Inc., document much of this search for standards and have an excellent discussion of what they discovered to be how arbitrators have approached these matters over time in Chapter 9 of that disquisition.

sufficient to "tilt the scales" against him.[13]

In the analysis of the previous two charges this Arbitrator noted those factors that were persuasive enough for a finding of fact. The issue concerning the "culo" comments and involving Mr. Caston's testimony are worthy of note here.[14] In the issue of the towel incident it is alleged that a witness was present, as was the case with the "culo" comments. In the "culo" matter the Complainant's testimony was not corroborated by Mr. Caston's testimony, in fact, this Arbitrator found his testimony to favor the Grievant's version of the allegation. Albeit, it is not certain what Derrick's testimony would have been here, the claim of a corroborating witness in the towel matter is now something this Arbitrator cannot ignore in determining which story to believe.

Further complicating matters is the fact that the incident in the men's locker room was alleged to have occurred in late November.[15] However, this incident was not reported to the Company's management until February of 2021. Again, the Complainant testified, credibly that she reported the incident to the management of her Company, no management person from SEI Solutions was called to corroborate this story.

More than two months passed from when the alleged incident occurred

---

[13] R. Fleming, "The Labor Arbitration Process" Campaign, Ill.: University of Illinois Press, 1967, p. 182 quoting Arbitrator Richard Mittenthal. See also *John Deere Waterloo Tractor Works* 20 LA 583, 585 (Davey, 1953) for the seminal discussions of these issues.

[14] The "see me naked" issue is of no guidance in this credibility contest.

[15] By the Complainant's testimony.

to when this matter was brought to the Company's attention.[16] The Complainant claims that the delay was due to the fact that her sister had Covid 19 and she was unable to report the matter. Perhaps this is what happened, but again, all that this Arbitrator has in the record before him is the Complainant's claim of a seriously ill sister. Corroborating witnesses, FMLA paperwork, or some other documentation would permit this Arbitrator to credit this delay in reporting the locker room incident to something beyond the Complainant's control.

Further, it is the Company that must prove the Grievant's misconduct. The Grievant is under no obligation to prove himself innocent of these charges. Albeit, interest is sometimes sufficient to offset this burden of proof assessment. This alone is not sufficient for the Arbitrator to find in favor of the Grievant's version of events.

What is before this Arbitrator is a witness not present to testify when one who was gave testimony contrary to the Complainant's version of events when he was identified, initially, as a corroborating witness. Further, there is delay between the alleged locker room incident and the Company acting, which is explained by the failure of SEI Solutions to act, and a seriously ill sister. Yet, there is no evidence that the towel incident was reported to SEI and no corroboration of the seriousness of the sister's illness. When combined with the fact that the Company bears the burden to prove the allegations concerning this matter, the Arbitrator is left with little reasonable recourse save to find that this charge is unsupported by

---

[16] There is no doubt that once in the hands of Labor Relations at Cleveland Cliffs they moved when haste and prudence to investigate the matter.

even credible preponderance of the evidence.

The Arbitrator is persuaded by the record before him, that the aggrieved discipline is not supported by a persuasive factual record. The Arbitrator has no alternative save to find that the grievance must be sustained and the discipline was issued without just cause.

Justice and Dignity

Article Five, Section I. 9. (1) provides for: *In the event the Company imposes a suspension or discharge, and the Union files a grievance within (5) five working days after notice of the discharge or suspension, the affected Employee shall remain in the job to which his/her seniority entitles him/her until there is a final resolution of the merits of the case.* This is the Justice and Dignity benefit contained in the BLA.

The benefit of this language of the BLA was denied the Grievant by the Company because they argued that the allegations against the Grievant fit the exception contained in Article Five, Section I. 9. b (2) which states in pertinent part: *This Paragraph will not apply to cases involving offenses which endanger the safety of employees of the plant . . .* The paragraph goes on to include the safety of the plant and equipment and offers specific examples of the types of conduct excepted.

The Union argued that the exception applies only to the bargaining unit employees and this case involves other individuals as the alleged victims therefore is inapplicable under these facts and circumstances. The Arbitrator take notice that the language says "employees of the plant" and does not differentiate between Cleveland Cliffs bargaining unit employees and employees of other organizations whose work place may be in the

Cleveland Cliff's owned plant. The parties were free to include an indication of such an intent, by limiting the word employee to mean only the bargaining unit, excluding contract employees, non-bargaining employees, or others. This Arbitrator is not persuaded that was the authors' intent. To rule that this language applies only to bargaining unit employees would be to give a harsh and unintended meaning to this paragraph; which the Arbitrator has no authority to do.

Article Five, Section I. 9. c. (1) gives guidance as to what occurs in the case an employee is found to been discharged for just cause. This instruction presumes that the exception in paragraph (2) does not apply, nor the scenario in paragraph (4) is not the case. In that matter the employee would continue in his employment without change.

In this case, without a showing of just cause for the aggrieved discipline the Grievant should not have been removed from his job. Further, no basis for an exception to the Justice and Dignity language exists without prevailing on the issue of just cause under these specific facts and circumstances. Therefore, the Union's grievance concerning the wrongful denial of justice and dignity benefits is of merit and is sustained.

Other Issues

The Union raises several other issues corollary to just cause in this case. The Union claims that the Civil Rights Committee should have been involved in this case but was not. The Arbitrator, upon reflection finds that issue to be moot with a finding on the merits to sustain the grievance.

The Union complains, in its appeal to Step 2, that information concerning the issues resulting in the disciplinary action were not timely

shared with the Union, thereby, interfering with the ability to fairly represent this Grievant. The Union also complained of this in the grievance procedure (Joint exhibit 5). Perhaps there is merit to this claim, but upon reflection, the Union prevailed on the merits of this grievance and this complaint is also moot. Further, there is nothing in this record which persuades the Arbitrator that the Union suffered any disadvantage resulting from any lack of due process.

The most serious of these Union corollary complaints is that the Company did not properly investigate this case. The Union was upset with the investigators not sharing what charges were being investigated and what facts were in hand. The grievance process is the discovery process for these issues. Without clear evidence showing willful suppression of evidence or relevant information there is not a real basis for finding merit to this Union complaint in this case. It must be remembered that the issues involved in this matter were sensitive issues and that a thorough and fair investigation is to occur. This Arbitrator is persuaded that management was operating under difficult circumstances, with unusually sensitive issues, and with the work force of an outside contractor who appears to have been less than cooperative. Under these circumstances the Arbitrator finds no merit to the Union complaint in this specific case.

CONCLUSION

The record of evidence in this matter fails to persuade the Arbitrator that the Grievant engaged in the charged misconduct. Therefore, the Arbitrator finds that there is no just cause for the discharge of this Grievant.

The Justice and Dignity language of Article Five, Section I. 9. b. applies in this case. The Grievant was improperly denied the benefits of the Justice and Dignity provisions when he was not permitted to continue to work until this matter reached a final resolution.

The remaining issues raised by the Union are moot, primarily do to the Union prevailing on the merits of this grievance.

The grievance should therefore be sustained in its entirety. The proper remedy is for the Grievant to be reinstated to his former position at his earliest convenience. The record of this discharge and the charges brought against this Grievant shall be expunged from the Company's records. The Grievant shall receive full back pay and benefits, including seniority, he would have earned had he not been wrongfully discharged.

AWARD

The grievance is sustained in its entirety with respect to the discharge and denial of Justice and Dignity benefits. As described in this document, the record of the charges and of the discharge are hereby ordered expunged from the Company records. The Grievant is to be reinstated to his former position with the Company with full back pay and benefits, including seniority, as though he had not been wrongfully discharged.

At Fort Wayne, Indiana
July 21, 2021

David A. Dilts

David A. Dilts
Arbitrator