IN THE MATTER OF THE ARBITRATION BETWEEN

CLEVELAND-CLIFFS PLATE LLC
CONSHOHOCKEN PLANT

And

Grievance 22-01-A
Derrick Perry Discharge

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 9462

Case 129

OPINION AND AWARD

Background

This case from the Conshohocken Plant concerns the discharge of Grievant Derrick Perry for violation of his last chance agreement (LCA). Grievant had worked for the Company (or its predecessors) for 11 years at the time of his discharge on January 26, 2022. The case was tried via Zoom on July 20, 2022. Marcus Valentino represented the Company and Maurice Cobb presented the case for Grievant and the Union. Grievant was present throughout the hearing and testified in his own behalf. The parties agreed that there were no procedural arbitrability issues. I will discuss the issue on the merits in the Findings. The parties submitted the case on closing arguments.

The Company initially discharged Grievant for an incident that occurred on December 27, 2021. On that day, Grievant was scheduled to work from 1:30 p.m. until 11:30 p.m. He apparently badged in at 1:19 p.m., and then badged out at 1:21 p.m. Subsequently, he submitted a form asking for pay for two hours that he had not worked. The Company charged that Grievant's action violated the following work rule:

Any employee found leaving or returning to Company property while on Company time and without authorization will subject an employee to discipline, including suspension and discharge.

On January 10, 2022, the Company agreed to rescind Grievant's discharge and impose a 5-day suspension. In return, Grievant signed an LCA, which reads, in relevant part, as follows:

MEMORANDUM
LAST CHANCE AGREEMENT
Concerning the Probationary Reinstatement
Of Derrick Perry, Clock #48571

Mr. Perry was scheduled to work 1:30p.m.-11:30p.m. on Monday December 27, 2021. Mr. Perry, clocked in on Dayforce and clocked out 3 minutes later. Mr. Perry showed no production for the shift. When questioned he then said that he got sick and left work. Mr. Perry violated three work rules.
The Management at Cleveland-Cliffs has agreed to rescind his discharge.... In consideration of this reinstatement, Mr. Perry agrees to the following conditions:

1. The five-day suspension stands, January 11 to January 15, 2022.

2. This Last Chance Agreement will remain in effect for **three-(3) years** following Mr. Perry's return to work.

3. If at any time throughout this entire probationary period January 15, 2022, through January 15, 2025, Mr. Perry violates the following work rules
Stealing, theft or intent to steal of defraud the Company of either Company property or time or theft of another employee's personal belongings will subject the employee to immediate suspension and discharge.

Any employee found leaving or returning to Company property while on Company time and without authorization will subject the employee to discipline, including suspension and discharge.

Absence policy- An employee who is absence (sic) for **ANY** *reason is required to notify his/her immediate supervisor, department manager or designated report off number, as the case may be, one (1) hour prior to the scheduled shift.*

4. Mr. Perry is required to use his badge to enter the plant and leave the plant every day, if there is an issue, he must report it to his manager immediately.

5. Mr. Perry is required to clock in and clock out for each shift, each day, at his DayForce computer where he is working on each particular day, if there is an issue, he must contact his manager immediately and complete an exemption form.

If Mr. Perry violates any of the 5 bullets, he will be terminated in violation of this agreement. Mr. Perry['s] acceptance of the conditions set forth in this agreement by affixing his signature in the appropriate space is made freely and not under duress.

I have read the conditions set forth and I am in complete agreement with them. I further understand that should I violate and/or break any one of the conditions, it will be deemed that I have violated this last chance agreement. [Italics, capitals, and bolding in original]

Grievant signed the LCA on January 10, 2022. Joanne Babaian, Human Resources/Labor Relations Manager, signed for the Company, and Ron Davis, Grievance Chairman for Local Union 9462, signed for the Union.

The instant case arose two weeks later on January 24, 2022, when Grievant was again assigned to a shift that ran from 1:30 p.m. until 11:30 p.m. There is no dispute that Grievant clocked out and left work at 5:00 p.m. on the 24th. Nor is there any disagreement that Grievant did not advise Shift Manager Steve Munsey or any other management official before leaving work. Grievant notified Munsey the next day, January 25, 2022, by sending him a text message at 10:13 a.m. that said: "Yesterday I had a family emergency and had to leave at 5pm." Grievant also asked if he could use four hours of vacation time to cover his absence. Grievant did not reveal the nature of his family emergency to Munsey or during a January 26 meeting (in which he participated by telephone) with HR Manager Babaian, Grievance Chairman Davis, and Local Union President Kameen Thompson. Grievant testified that he did not reveal the circumstances surrounding the emergency because of HIPAA. Davis testified that while Grievant did not

discuss extenuating circumstances during the grievance meetings, the Company did not "push" for information about his claim of a family emergency or ask what it was. The Company notified Grievant of his termination for violation of the LCA during the January 26 meeting.

Munsey testified that it was not customary for employees to leave work without permission, although he acknowledged that it was common for employees to be allowed to leave early when they asked for permission. In fact, Munsey had granted Grievant's request to leave early on January 20, four days before the incident at issue. Munsey said he could not recall other employees notifying him after they left the property that they had left work early. Paul Horning, Section Manager of Heat Treatment Finishing, testified that Grievant's absence caused the Company to lose money due to several hours of lost production and inspection. Horning said he believed Grievant violated the section of his LCA that prohibited him from "leaving or returning to Company property while on Company time and without authorization." This violation justified Grievant's discharge, Horning said. On cross examination, Horning agreed that Grievant clocked out prior to leaving work, so he was not on Company time.

Babaian testified that any of the enumerated offenses in the LCA would have been a violation, but that Grievant was fired for leaving without authorization and for not immediately telling his supervisor that he had to leave. There was no allegation that Grievant had stolen time from the Company. She also pointed out that at the time of the event on January 24, Grievant had been on his LCA for "a very short time." Babaian acknowledged that Grievant clocked out before he left, but she said that did not matter; the important fact was the unauthorized departure, which created a hardship for the Company. She agreed that the Company has an early quit policy, but she said Grievant did not use that policy, which required an authorization to leave.

Leaving without notice is a safety issue, Babaian said; the Company needs to know who is in the plant.

Grievance Chairman Davis testified that prior to the arbitration hearing, the Company focused on the part of paragraph 3 of the LCA that mentions the absence policy. Grievant's offense, the Company said, was not notifying the supervisor he was leaving work. In addition, the Company had pointed to paragraph 5 of the LCA, which specified where Grievant was required to clock in and out. Davis testified that prior to the arbitration hearing, the Company had not mentioned a violation of the language about leaving or returning while on Company time and without authorization. Davis also said that he believed that language did not apply to Grievant's conduct because he had clocked out before leaving and was not on Company time. Davis believed the language was aimed at employees who clock in and then leave without clocking out. Thus, Davis said he thought the Company had changed its position between the grievance meetings and the arbitration, and had raised its claim for the first time in arbitration.

Davis testified that he believed Grievant's conduct was governed by the Company's Tardy & Early Quit policy, and that he had raised the issue numerous times during the case. The policy defines an early quit as "leaving the job before the end of the scheduled turn, except where there is an agreed to 'Buddy Relief' policy." By the terms of the policy, employees are not put into the early quit "control program" until their third occurrence. They can be suspended for a sixth occurrence in a rolling 12 month period. Davis also testified about the Company's absence policy. As reflected in the LCA, the policy requires notification when an employee is absent for any reason, which is part of paragraph B of the policy. The policy also says in paragraph B:

> Under unusual condition, lack of prior notification may be acceptable if the employee can satisfactorily demonstrate that it was impossible

> under the circumstances to notify Cleveland-Cliffs. The employee must notify the supervisor or appropriate department manager as soon as possible thereafter.

Davis testified that Grievant was not given an opportunity to show it was impossible for him to notify management because they did not accept the reason he gave them during the discharge call. Davis also said the Company was sometimes "lax" about requiring employees to notify management and that supervisors – including Munsey – had permitted employees to notify after-the-fact. On cross examination, Davis said Grievant did not offer any extenuating circumstances during the grievance meetings. He told the Company that when the emergency arose, he wasn't thinking about giving notice. Davis also said it was common for employees to get vacation to cover absences like this one.

Grievant testified that it was not uncommon for employees to receive permission to leave early. He had received permission to leave several time between the date of his LCA and January 24. He said he left early on January 24 because of a family emergency. He did not notify his supervisor because he was distraught and not thinking. He was focused on trying to get to the emergency as soon as possible. Grievant said he did not go into detail about the emergency in the step 2 or 3 meetings because of HIPAA laws. He called Munsey the next morning, which was as soon as he remembered. Grievant said when he left on the 24th, management was not in the plant. On cross examination, he agreed that he sometimes contacted management by text, but he did not do so on January 24.

The Company argues that just two weeks after being placed on an LCA, Grievant left the workplace without permission and then did not inform his supervisor of his action until the following day. Nor did he explain his conduct in either step 2 or step 3 of the grievance procedure. The Company says Grievant knew he needed permission to leave, as he had

demonstrated when he left early just a few day earlier, on January 20, 2022. The LCA required Grievant to work as scheduled and to make a proper call-off. Grievant's conduct, the Company says, was a clear violation of his LCA, warranting discharge.

The Union says on January 20, Grievant was given permission to leave early, which shows that such requests are common. The difference is that on January 24, Grievant needed to leave quickly. The need to notify management slipped his mind because of the emergency situation. The Union points out that Grievant did not steal anything from the Company or anyone else. He clocked out prior to leaving, so he was not on Company time, meaning that he did not violate the rule the Company pointed to in the LCA. Under the circumstances, it was impossible for Grievant to get permission prior to leaving, so he did not violate the absence policy. At most, the Union says, this was an early quit, but under that policy employees are not put into the disciplinary program until the third occurrence. The Union contends that the Company did not have just cause to discharge Grievant.

Findings and Discussion

The step 2 minutes (and the virtually identical step 3 minutes) indicate that during the grievance process, the parties debated an alleged violation of paragraphs 4 and 5 of the LCA. Those provisions concern where and how Grievant was to clock in to work. Although the grievance minutes discussed the Company's belief that Grievant had not complied with those requirements, there was no mention of that subject in the arbitration. There was no evidence about whether Grievant had clocked in and out at the appropriate location. Thus, in the absence of any evidence to support a violation, I have not considered whether Grievant's conduct on January 24 violated paragraphs 4 and 5 of his LCA.

The Company's principal claim (although not its only one) at the hearing was that Grievant violated the second of the three italicized work rules quoted in paragraph 3 of the LCA: "*Any employee found leaving or returning to Company property while on Company time and without authorization will subject the employee to discipline, including suspension and discharge.*" There is no question that Grievant left work without authorization, but that conduct, of itself, did not violate this work rule. It is not enough for an employee to leave work or return without authorization; rather, that conduct must occur "while on Company time." It is not surprising that this rule would appear in Grievant's LCA. According to the documents submitted concerning the December 27, 2021 violation that led to the LCA, Grievant had attempted to claim pay for time he was not actually at work. Although he had clocked out that day, an employee could also attempt to steal Company time by clocking in and then leaving without clocking out. Thus, it makes sense that the Company would include the rule in a list of actions that would violate Grievant's LCA. But on January 24, 2022, Grievant clocked out when he left work and he did not claim that he should have been paid for not working. Grievant's absence was not "on Company time" and he did not attempt to steal pay to which he was not entitled. He did not violate the cited rule, or the first one listed under paragraph 3, which also deals with theft, including theft of time.

The remaining rule listed in paragraph 3 concerns the requirement in paragraph B of the absence policy that an employee notify his immediate supervisor when he is absent for "**ANY** reason." [caps and bolding in original] I understood Babaian's testimony to focus on this rule. The rule appears to apply principally to absences beginning at the start of a shift, since it requires employees to give notice one hour in advance of the start time. But the Union did not contend that the notice requirement has no application to employees who are absent because they leave

work during a shift. Rather, the Union's defense was that the rule is not uniformly enforced and, in the language of the absence policy, that prior notification was "impossible under the circumstances." That language does not actually appear in the LCA, but it is reasonable to conclude that the parties intended the impossibility defense to accompany the notice requirement. The Company could not have expected Grievant to give notice if it was impossible for him to do so. This interpretation is strengthened by the Union's reliance on the language at the hearing.

According to the paragraph B language, "lack of prior notification may be acceptable *if the employee can satisfactorily demonstrate* that it was impossible under the circumstances to notify Cleveland-Cliffs." (italics added). Grievant apparently made no claim in the grievance meetings about why it was impossible to give notice. At the arbitration hearing, he simply said he was distraught because of the family emergency and was not thinking of notice. That claim might have carried more weight if Grievant had provided some information, either in the grievance process or at the hearing, about the nature of the emergency. I understand that HIPAA limits an employer's ability to demand some kinds of medical information. But that does not mean an employer has no right to general information about why an employee is absent from work like, for example, notice that a family member was in a serious auto accident or was injured at school. And this is especially true when the employee leaves in the middle of a shift without telling anyone. Moreover, Grievant was on a last chance agreement that he knew required him to report absences to management. And he also knew that any violation of the LCA could result in his discharge.

A Union witness argued that Grievant did not need to establish impossibility because the Company did not press him for a reason during the grievance meetings. But the impossibility

language the Union relies on – quoted just above in italics – puts the burden on Grievant to establish why he could not provide notice. I understand that the Company has the burden of proof in a discharge case, but the Company proved that Grievant did not provide notice of his absence, which was the reason for his discharge. The impossibility of giving notice is in the nature of an affirmative defense that Grievant must establish. Grievant, after all, is the only one who knows why he did not tell the Company he was leaving, and why he failed to give any notice at all for more than 17 hours. Even if he was upset when he left work, a simple text message sent in a matter of seconds could have fundamentally altered the nature of this case.

The Union's claim that employees – including Grievant – are routinely granted permission to leave early misses the point. In the first place, the fact that they are granted permission indicates they have given management notice that they need or want to leave. But more important, unlike the typical case, Grievant was on a last chance agreement that significantly limited his freedom of action. Even if it is likely that Grievant's supervisor would have let him leave had Grievant asked, the point is that Grievant did not ask. I am also not persuaded by the Union's claim that other employees have not been disciplined for not giving notice until after they left work. Munsey said he did not recall that happening. Grievance Chair Davis said supervisors had allowed it, including Munsey, but he offered no names or examples. And even if post-notice could be acceptable, Grievant left at 5 p.m. on January 24 and did not tell his supervisor about it until 10:13 a.m. the next day. This was clearly an unreasonable delay and prevented the Company from doing anything to ameliorate the effects of Grievant's absence.

Finally, the Union argues that Grievant's conduct on January 24 should have fallen under the Tardy & Early Quit policy. That document defines an Early Quit as "leaving the job before the end of the scheduled turn, except where there is an agreed to 'buddy relief' policy." The

Union also points out that employees do not fall within the disciplinary procedure under the policy until their third occurrence. I have some doubt about whether this policy applies to these facts. The reference to a buddy relief policy – which typically requires oncoming employees to come in earlier than the regular schedule to relieve the on-duty employee – suggests that the policy applies principally to employees who leave shortly before the end of their shift in the absence of buddy relief. It is, frankly, hard to imagine that the policy was intended to apply to employees who walk off the job 6 and ½ hours before their shift is supposed to end. But even if the policy applies, nothing in it suggests that Grievant could leave after four hours without permission and without giving management notice. In short, Grievant was absent for more than half of his 10-hour shift and he had an obligation to notify management of his absence. And, even if his conduct would not have triggered discipline under the schedule in the early quit policy, it was nonetheless a violation of the absence policy referenced in paragraph 3 of Grievant's LCA, for which the parties agreed "he will be terminated."

It may be that, absent the LCA, Grievant's offense would have warranted a lesser penalty than discharge. But an arbitrator interpreting a last chance agreement has a narrowed focus. Grievant was discharged in December 2021 for what amounted to an attempted theft of time. The Company agreed to reinstate Grievant, but only under an agreement between the parties (and Grievant) that certain violations of Company rules *would* result in discharge. Although the contract requires proper cause for discharge, the effect of the LCA was to define what proper cause meant for Grievant. In particular, it meant that if Grievant failed to give notice of his absence, he would be discharged. I have no authority to ignore the terms the parties agreed to in the LCA. Thus, I must deny the grievance.

AWARD

The grievance is denied.

Terry A. Bethel

Terry A. Bethel, Arbitrator
August 5, 2022