IN THE MATTER OF ARBITRATION	)	
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	)	
CLEVELAND CLIFFS (COATESVILLE WORKS)	)	
	)	
	)	
	)	
and	)	Case 132
	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION	)	

Kerry Hastings, Esq., for the Employer
Maurice Cobb, for the Union
Before Matthew M. Franckiewicz, Arbitrator

OPINION AND AWARD

This arbitration proceeding involves the termination of Grievant Wesley Eggleston II.

A hearing was held on September 14, 2022 at Coatesville, Pennsylvania. Both parties called, examined and cross examined witnesses, and offered documentary evidence. Both parties filed briefs. The record closed with the exchange of briefs on October 11, 2022.

Background

Grievant Wesley Eggleston II was employed by the Company for about 14 years prior to his discharge. His most recent position was Senior Operating Technician (SOT) at Labor Grade 5 in Quality Assurance, the most responsible bargaining unit position. This position could be characterized as lead person or crew chief, but it is undisputed to be a bargaining unit rather than Management position. Eggleston had not been disciplined over the course of his employment prior to his termination.

The Company actually suspended Grievant Eggleston with intent to discharge twice.

On March 30, 2022 it issued him the following letter:

> The Company recently conducted an investigation into complaints received by the Human Resources department regarding your behavior in the workplace. The investigation has been concluded and it has been determined that you engaged in actions that violated Company

> Policy and Rules, including but not limited to disrespectful conduct, the incitement of insubordination, and interfering with an ongoing investigation.
>
> Based upon the seriousness of your actions and the facts of the investigation - I have determined that you are unable to meet Cleveland-Cliffs standards of employment. Therefore you are placed on a five (5) day suspension beginning on April 1, 2022 with the intent to discharge you on April 5, 2022.

On April 6, 2022 the Company issued Grievant the following letter:

> The Company recently conducted an investigation into complaints received by the Human Resources department regarding your behavior in the workplace. The investigation has been concluded and it has been determined that you engaged in actions that violated Company Policy and Rules, including but not limited to disrespectful conduct, the incitement of insubordination, and interfering with an ongoing investigation.
>
> Additionally, prior to your confirmation of discharge, the Company, in the course of a general investigation into overtime practices and irregularities, has discovered evidence of time-theft. The notice of this separate investigation into the general overtime irregularities was delivered to you and your Union representation at your Step 2 hearing. At this time we are amending the notice of suspension with intent to discharge to include this very serious charge. We are amending this notice out of courtesy - it is the Company's position, as stated in the hearing, that this is a violation of Company Policy and Rules and therefore the original notice meets that standard.
>
> Based upon the seriousness of your actions and the facts of the investigation - I have determined that you are unable to meet Cleveland-Cliffs standards of employment. Therefore you are placed on a five (5) day suspension beginning on April 7, 2022 with the intent to discharge you on April12, 2022.

On April 12, 2022 the Company issued a termination letter to Grievant Eggleston. The letter stated, in pertinent part:

> This letter confirms the disposition of the Company Disciplinary Committee on Thursday April 7, 2022, regarding Wesley Eggleston 46228. The Company Disciplinary Committee ruled that the five-day suspension Mr. Eggleston received for violation of Cleveland-Cliffs Company Policy and Rules, including but not limited to disrespectful conduct, the incitement of insubordination, and insubordination, interfering with an ongoing Company investigation, and theft of time, is hereby converted to discharge.

The Employer contends that Grievant Wesley Eggleston II committed theft of time and four violations of the Company's EEO policy (use of the "N word"; using race to induce co-workers to obey him rather than a manager; violating the confidentiality of an EEO investigation; and retaliating against employees he believed had reported him to Human Resources). It considers each of these an independent basis for termination. The Union denies that the Grievant engaged in any form of misconduct whatsoever.

The discussion below is limited to the alleged theft of time, and I make no findings or conclusions regarding the other accusations against the Grievant.

The Facts

At the time of his termination, Eggleston's normal shift was from 5:00 a.m. to 1:00 p.m. He had volunteered to work overtime from 9:00 p.m. on March 6, 2022 to 5:00 a.m. on March 7, 2022. This meant that he was scheduled to work a double shift, from 9:00 p.m. on March 6 until 1:00 p.m. on March 7.

A Company video camera trained on the parking lot at the Test Lab shows a white vehicle entering the parking lot and backing into a parking space at about 8:51 p.m. on March 6, 2022. The driver runs toward the Test Lab building. He appears to be wearing only a shirt with no jacket or PPE, and does not appear to be carrying anything.

Area Manager Human Resources and Labor Relations Marcus Valentino testified that the person in the video was Eggleston and the vehicle was Eggleston's Chrysler 300. The video was not distinct enough for me to be able to determine the make of car nor to identify the person running toward the Test Lab.

A different camera inside the Test Lab in the area where Eggleston clocks in, with a time stamp of 9:01 p.m., shows Eggleston, this time clear enough to be identified, in a blue T shift with no jacket or PPE. Eggleston generally keeps his PPE beyond the time clock in an upstairs office in this building.

The Test Lab parking lot camera shows the same individual leaving at 8:53 p.m., and driving out of the parking lot. (The two cameras are not time synched.)

Another camera image taken from Gate 3, with a time stamp of 9:02 p.m. on March 6, shows a white vehicle driving from right to left past Gate 3, headed south on Strode Avenue. Eggleston's work area at the Test Lab is in the direction from which the vehicle came. According to Valentino the vehicle in this video is Eggleston's Chrysler, although once again I could not identify the type of vehicle in the video. According to Valentino there is no work area to the south of Gate 3 to which Eggleston could have been driving, and so this video is inconsistent with an intent on Eggleston's part to go to a work area.

The camera at the Test Lab parking lot time stamped 4:46 a.m. on March 7, records a white vehicle, apparently the same one seen earlier at 8:51 p.m. on March 6, driving into the parking lot and backing into the same parking space. The driver walks toward the Test Lab, this time wearing what appears to be a jacket but no PPE, and carrying something, possibly a bag with food.

The video from the clock-in area shows Eggleston (again identifiable in this video) wearing the same blue T shirt with a jacket over it, and carrying a bag and a cup.

According to Valentino, as part of its investigation the Company reviewed video taken by other cameras for the period between 9:00 p.m. on March 6 and 5:00 a.m. on March 7, but found no evidence of Eggleston being in the mill. Furthermore the Company was not able to identify any work performed or documents generated by Eggleston during the 9:00 p.m. - 5:00 a.m. shift.

Valentino testified that in connection with the grievance, the Union requested, and the Company provided, videos used in connection with the discharge, but most of the recordings did not show Eggleston at all during the pertinent hours.

Valentino testified that minimal supervision is present during the overnight shift.

Eggleston prepared and signed a Daily Exception Report claiming eligibility for 7.5 hours of overtime, from 9:30 p.m. to 5:00 a.m. A supervisor signed the exception report, but the supervisor apparently accepted Eggleston's representation since the supervisor himself does not begin work until 6:00 a.m. Eggleston was in fact paid for the hours claimed.

Grievant Wesley Eggleston II testified that his job entails many different roles in many areas of the plant, and that he could have been grinding or working up plates or getting signatures or doing paperwork. He stated that the paperwork is "intense" and has to be done "to the T." He asserted that he could have gone in through Gate 5 after departing from the Test Lab parking lot. He explained the difference in his clothing and the food he carried in at the start of his normal shift, saying he has clothes in several areas of the plant and that his wife drops things off for him by leaving them in the car. He stated that he does not wear PPE in the Test Lab and changes clothes in offices.

The Company's Rules of Conduct & Major Company Policies provide in part:

> An employee will be subject to disciplinary action ranging from a written warning to discharge from the Company depending on the seriousness of the offense, the employee's record with the Company and other related factors if he/she commits any of the following acts:
>
> 3. Stealing, theft, or intent to steal or defraud the Company, of either Company property or time or the property of a fellow employee.
>
> First Offense: Five (5) day suspension subject to discharge.

Issue

The issue, as agreed to by the Parties, is whether Cliffs had just cause to discharge Grievant Wesley Eggleston and if not, what shall be the remedy.

Position of Management

The Employer asserts that it is a large, complex operation with hundreds of employees and that it is not feasible for supervisors to watch every employee all the time, so that it needs to be able to trust the employees. It emphasizes that Grievant held a position of considerable responsibility.

The Company notes that when Grievant Eggleston arrived shortly before 9:00 p.m. on March 6 he was not wearing the PPE required to perform his job, nor was he wearing a jacket, and that when he returned for the start of his regular shift he still was not wearing PPE but was wearing a jacket and carrying food, both of which must have come from outside the plant.

It stresses that there is no video evidence of him entering the plant following his departure at roughly 9:00 p.m. on March 6 until his arrival around 5:00 a.m. on March 7, and there is no documentation or other evidence that he performed any work at all on the 9:00 p.m. - 5:00 a.m. shift, despite his testimony that his work involves extensive documentation that must be totally accurate. It observes that while under the collective bargaining agreement it may not call employees as witnesses, the Union is free to do so, yet the Union offered no witness or statement that a co-worker saw Eggleston at work during the shift at issue.

The Employer submits that in his testimony the Grievant offered no explanation but only "vague hypotheticals" of work he might have done. It argues "Although Grievant testified about a number of work activities he might have done that night (in multiple areas of the plant), he never claimed he actually performed any of those activities or explained how he performed them without being captured on video entering the plant or generating any documentation whatsoever." It urges that it is inexplicable that the Grievant would drive off from the plant at 9:00 p.m. and not be detected re-entering the plant until 5:00 a.m. if in fact he performed any work on this shift.

The Company reasons that if Grievant donned PPE after punching in (as he was required to wear PPE while working) he should have been wearing the PPE when he returned to the Test Lab at 5:00 a.m., rather than the same shirt and a jacket. It regards the Grievant's return to the Test Lab shortly before the start of his normal shift as hardly a coincidence. It insists that the explanation is that the Grievant knew there was little supervision on the night shift and skipped this shift, returning to the plant immediately before his regular shift when day supervisors would be present.

It urges that if just cause for discipline has been shown, the proper degree of discipline is a matter for Management, and the arbitrator should not substitute judgment. It points to the work rule providing that theft of time is a dischargeable offense. It depicts the offense as intentional and dishonest.

It asks that the grievance be denied.

Position of the Union

The Union maintains that it was common and acceptable for inspectors to drive between various locations around the plant in their own vehicles. It posits that Grievant Eggleston parks outside the plant to avoid tire damage from debris.

It faults the Company for relying on videos that were "extremely limited," given the scope of the plant. It notes that videos from any other cameras have not been presented. It insists that after clocking in, Eggleston drove past Gate 3 toward another area of the plant as he often does.

As to PPE, the Union contends that PPE is not required in all areas of the plant or for all employees. It asserts that the only PPE universally required was safety glasses, safety footwear and hard hats, and that Eggleston had these in his passenger's seat as well as in offices at various places at the plant.

It finds nothing unusual in Eggleston carrying food and a drink, since employees often grab a snack while traveling between points at the facility, although in this case Eggleston's wife dropped off the food for him.

The Union depicts the Grievant as hard working and an asset, who was picked by the Company for a position of responsibility.

It emphasizes that the Employer has the burden of proof that it had just cause to terminate Grievant Eggleston, and must show clearly and convincingly that he intended to steal time. It insists that the Company did not conduct a fair investigation and that Eggleston was unjustly and unfairly terminated.

It asks that the grievance be sustained and that Grievant Wesley Eggleston II be reinstated and made whole for lost wages, benefits and seniority.

Analysis and Conclusions

It is undisputed that Grievant Eggleston was scheduled to work a double shift on March 6 - 7, 2022, and that he would receive premium pay for the extra shift.

Video evidence shows Grievant Eggleston arriving by car at the Test Lab parking lot at around 9:00 p.m. on March 6 for the start of his first shift, clocking in, and immediately walking back out to his car and driving away. He is not seen again on any video inside or entering plant property until he returns to the Test Lab parking lot at around 5:00 a.m. on March 7 for the start of his normal shift. (The only other video evidence shows him driving past but not entering a plant gate, shortly after 9:00 p.m. on March 6.)

The most logical and obvious inference to draw from this evidence is that after clocking in, the Grievant left the premises, and did not return until the start of his normal shift, and performed no work whatsoever during the 9:00 p.m. - 5:00 a.m. shift.

The Union criticizes the Company for offering no video evidence other than that mentioned above. Such video evidence would show nothing, and this is exactly the point. I credit the Company's testimony that it examined all the other videos for some indication that the Grievant actually did re-enter the plant sometime between 9:00 p.m. on March 6 and 5:00 a.m. on March 7, and found no such indication.

Further, the Company looked in vain for some evidence of work actually performed or documentation of work performed by the Grievant during that shift, and again found nothing.

The Union offered no testimony or other evidence of any actual work performed by the Grievant on the 9:00 p.m. - 5:00 a.m. shift, but only speculation as to what the Grievant might have been doing during that time period. It is not surprising that at a hearing some six months after the fact the Grievant did not recall what he was doing during that time frame, nor could it produce a co-worker to corroborate that he or she had seen the Grievant at work during a particular shift six months earlier. But the Company inquired with the Grievant into the incident much closer to the time of its occurrence. When the particular shift was fresher in his memory, the Grievant should have been able to recall some task he performed, or some fellow worker he had worked with on March 6 - 7.

As noted above, the next time the Grievant was seen on video on plant premises after around 9:00 p.m. on March 6 was at around 5:00 a.m. on March 7, again at the Test Lab parking lot. If in fact the Grievant had been at the plant all along, it would be an extraordinary coincidence that he would return to the Test Lab exactly at the starting time for his regular shift.

Moreover, as with the evidence that the videos from other cameras showed nothing, the significant consideration on the 5:00 a.m. March 7 video is what it does not show. Although I do not find it significant that the Grievant had put on a jacket or brought in something to eat and drink, a compelling fact is what the Grievant is not wearing. There was undisputed testimony that while working the Grievant would be required to put on PPE. But he was not wearing PPE when he returned to the Test Lab at 5:00 a.m. on March 7. It does not make any sense to posit that after leaving the Test Lab in street clothes on March 6, the Grievant re-entered the plant somewhere else, put on PPE, and then took the PPE off, knowing that he would have to put on PPE again after he re-entered the Test Lab at 5:00 a.m. It would be much easier to just keep the PPE on the whole time. The Grievant's lack of PPE when he returned to the Test Lab at 5:00 a.m. on March 7 supports the inference that he had not been at work since leaving the Test Lab at 9:00 p.m. the preceding evening.

For the reasons discussed above, I find that the Company has sustained its burden of showing that the Grievant absented himself from the plant between 9:00 p.m. on March 6 and 5:00 a.m. on March 7, with the apparent intent of receiving pay for time not worked. This constitutes misconduct for which the Company acted within its contractual prerogative in imposing discipline. Under the circumstances I conclude that the Company also acted within its prerogative in administering the ultimate discipline of termination, rather than imposing a lesser penalty under a progressive discipline regimen.

The Company characterizes the Grievant's conduct as "theft of time." The phrase "theft of time" has become popular with employers over the last several decades. While the word "theft" entails strong connotations of dishonesty, the phrase "theft of time" has been applied to a spectrum of conduct, ranging from what used to be called "loafing" (such as a Monday morning rehash of the prior day's football game, or playing solitaire on a company computer; to "sleeping on the job" in the sense of nodding off at one's desk, or in the sense of sneaking off to a secret location for a nap; to ghost work by obtaining wages for time when the employee is not even present on the job, as the evidence indicates the Grievant did.

On this scale, the Grievant's activity is at the most grievous end. It constitutes a conscious and deliberate effort to obtain money without any intention of performing any service whatsoever. No employer can operate successfully by paying people for doing nothing.

Surely the Grievant knew the risk that he was taking when he drove off on March 6, gambling his job against a shift's worth of premium pay. The cat and mouse game that may once have prevailed in the steel industry is long gone. The statement attributed to Franklin Roosevelt "a fair day's pay for a fair day's work" cuts in both directions. The Company has a right to demand a fair day's work in return for the wages it pays an employee. A deliberate attempt to obtain a fair day's pay (at premium rate) for no work at all constitutes a dischargeable offense, even for an employee with an otherwise long and distinguished employment record.

Accordingly, I conclude that the grievance should be denied.

Award

The grievance is denied.

Issued October 23, 2022

Matthew M Franckiewicz