IN THE MATTER OF ARBITRATION	)	
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	)	
CLEVELAND-CLIFFS CLEVELAND WORKS	)	
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	)	
and	)	Grievance No. 1026
	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 979	)	Case 133

Susan Bungard, for the Employer
Patrick Gallagher, for the Union
Before Matthew M. Franckiewicz, Arbitrator

OPINION AND AWARD

This arbitration proceeding involves the termination of Grievant Ian Rich.

A hearing was held on January 13, 2023 at Independence, Ohio. Both parties called, examined and cross examined witnesses, and offered documentary evidence. The Parties provided oral summations at the conclusion of the evidence.

Contract Provisions Involved

Last chance agreement signed August 3 2022:

> On June 10, 2022, Employee Ian Rich (grievant) was involved in an incident at work with several Employees. Subsequently the grievant was suspended with intent to discharge for violating Cleveland Plant rules. USW Local Union 979 (the "Union") filed a grievance protesting Mr. Rich's suspension.
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> After conducting Step 2 and Step 3 meetings between the Cleveland Cliffs Cleveland Works (the "Company") and the Union (jointly the "Parties") and numerous discussions, the Company agrees to allow Grievant to return to active employment under the terms of a Last Chance Agreement (L C A) as follows:
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> The Parties agree as follows:

1. Grievant's suspension shall be for time served for the alleged violations of the Cleveland Plant Rules.

2. Grievant shall sign a Management Referral with EASE@work to allow the Company to ensure he is maintaining compliance with all recommendations.

3. Grievant must fully comply with all the recommendations of EASE@work. If Grievant fails to adhere to the recommendaions of EASAE@work, he will be immediately suspended with intent to discharge. This shall be considered in violation of the L C A.

4. Grievant's return-to-work date will coincide with the receipt of a written release from Ease@Work indicating that he is mentally and physically able to return to work. The Grievant will be excused for any time missed from work to attend follow-up appointments with EASE@work.

5. After obtaining the written release described in paragraph 4, the Grievant will complete a return-to-work exam which will include drug and alcohol testing. Grievant will be subject to three (3) random drug and alcohol tests during the L C A. If he tests positive for illicit drugs, he shall be immediately suspended with intent to discharge.

6. Failure to submit to any random drug and/or alcohol testing when summoned to do so, shall be considered a positive test, and shall result in suspension with intent to discharge.

7. Grievant must keep his contact information current with the on-site clinic, his supervisor, and Human Resources/Labor Relations. If called for the random tests, he must report to the clinic within one (1) hour of contact. If he is unable to report to the clinic due to extenuating job-related circumstances, his supervisor will be contacted to verify the situation.

8. If there is objective evidence of any irrational behavior by the Grievant in the workplace that rises to the level of the July 10, 2022 incident, the Company will immediately suspend Grievant with intent to discharge.

9. In the event the Company suspends the Grievant for violation of this L C A, he will not be eligible to return to work under the Justice and Dignity ("J&D") provision of the Basic Labor Agreement.

10. The length of this L C A shall be eighteen (18) months from the date of reinstatement, less any time off for layoff, Family Medical Leave, Sickness and Accident leave, Workers' Compensation leave, or any other approved leave of absence.

11. The Parties agree that the terms and conditions of this L C A is without precedent or prejudice to either Party's position and cannot be relied in whole or in part in support of either Party's position relative to any other grievance.

The Facts

Grievant Ian Rich was hired on May 30, 2017. Rich's classification was Maintenance Technician Mechanical (MTM). His bid job was in Crane Repair.

Rich was suspended with intent to discharge on September 15, 2022 for alleged violation of the August 3, 2022 last chance agreement quoted above.

Grievant Rich had been suspended with intent to discharge in July, 2022. According to the Company, Rich threatened another employee with two spud wrenches. Grievant Rich denies threatening another employee, but testified at the arbitration hearing that he accepted the August 3, 2022 last chance agreement in order to avoid remaining off work for a lengthy period while his grievance over the earlier discharge was arbitrated.

Although Rich's bid Department was Crane Repair, during the negotiations for the last chance agreement the Parties agreed that he would not be returned to that Department.

Rich returned to work around August 16, 2022. Originally he was placed in Water Treatment, but after two days there the Company decided to move him to the Pipe Shop.

According to Senior Division Manager Primary Operations John Macino, based on a conversation with Section Manager Paul Arendash, he decided to move Rich to the Pipe Shop because there he would be working mostly with very senior employees, and would be with the same crew consistently.

Chairman of the Grievance Committee Anthony Panza stated that during the discussion that led to the last chance agreement he and Macino agreed that Rich would be returned to Water Treatment rather than his bid job. The Company did not consult with the Union before moving Rich to the Pipe Shop after two days in Water Treatment. Panza expressed his displeasure with the move to Macino, but felt the Union could not prevent it since the last chance agreement was silent about where Rich was to be assigned.

Panza believes that Water Treatment would have been more advantageous for Rich since the Pipe Shop covers the entire plant, while in Water Treatment he would have been in a smaller area with more relevance to his skill set.

Around August 18, Rich was spotted outside the Pipe Shop in Steel Production. According to Rich, he went there because he could get frozen food from a vending machine there. The Company apparently was concerned about his presence there since the incident that led to the L C A had taken place there. Macino, along with other Managers, met with Rich. Macino told Rich that it would be best for him to stay in his local area with his own crew, but if he needed to go elsewhere he should take a co-worker with him. Macino did not consider this conversation to constitute discipline, and did not invite a Union Representative to attend.

According to Shift Manager Maintenance Engineering and Utilities Justin Bingham, Rich stuffed "garbage" into a hole in the bed of a Company vehicle operated by a bargaining unit employee with whom Rich had had a contentious relationship. (Rich testified that he was unaware whose truck it was, but admitted placing a Cheetos bag in the truck rather than a garbage can.). Bingham discussed the event with Rich, but did not regard the discussion as disciplinary. Employee William Click testified that the "garbage" was actually a water bottle.

Around August 30 Rich missed an appointment with EASE@work. Rich told Bingham that he missed a meeting but did not feel he needed to do all this therapy. According to Bingham, Rich went on to say Fuck this mill, I don't need it, I can go to Kelly Steel. Everyone in the Union has it out for me, it's not a brotherhood. Bingham told Rich that he would vouch for Rich that he had been at work, and would get the appointment rescheduled and that there would be no discipline. Bingham did not contact a Union Representative regarding this incident. Rich's testimony was essentially in accord with Bingham's except that Rich denied that Bingham offered to reschedule the EASE@work appointment.

Around September 1, Rich was working with another bargaining unit employee and a contractor on curb stops. Rich reportedly threw a shovelful of stones and gravel into the road shortly after a truck had driven by. Bingham met with Rich and said you can't do things that draw attention to yourself, that's against success. Bingham did not consider this conversation disciplinary and did not involve a Union Representative.

On September 8, Rich was assigned to move barriers, pumps and hoses. He was reported to be unhappy with the assignment, cursing about it, and felt that it was not one a mechanic should be given. It was reported that Rich was kicking the hoses and that another employee had to calm him down. Bingham met with Rich and inquired why Rich was upset with the assignment and Rich explained. Once again Bingham did not consider this interaction to be disciplinary and did not contact a Union Representative.

On September 14, Bingham assigned Rich to re-roll hoses that had been rolled improperly. By his own account Rich had been assigned to roll the hoses the previous day and did so improperly, like a ball of string rather than coiling them like a fireman.

At first Rich said he would do the work but he did not do so, instead putting the hoses on a shelf without re-rolling them. Bingham told Rich he needed to re-roll the hoses. Rich replied I don't know who rolled them like that, I didn't. Bingham repeatedly told Rich he needed to re-roll the hoses. According to Bingham, Rich said Fuck the Pipe Shop. This isn't real work. In Crane they do real work and don't have to clean up. Employee Bill Click stepped in and told Rich to either roll up the hoses or go to the break room and calm down. Click himself began rolling the hoses. Ultimately Rich returned and said he would re-roll the last hose (of three total) and did so.

Bingham testified that about 15 minutes later Rich said to him, I just want you to know, the whole time I've been here, I've been fucking shit up because I don't want to be here, that's why I should be at Crane Repair. Bingham went to higher Management to discuss the possible transfer of Rich to Crane Repair, and in the process related the incident of September 14.

Shift Manager Maintenance Engineering and Utilities Joshua Laubenthal testified that on September 14 Rich said that I didn't roll the hoses up so I'm not gonna re-roll them. Screw the Pipe Shop, this isn't real work.

I want to do real work, I'm a Mechanic. Bill Click intervened and told Rich to go sit in the lunch room and calm down. Rich returned and rolled up one hose.

Laubenthal stated that later that day, in the office Rich came in and said I'm fucking shit up on purpose because I don't want to do it, that he had been doing it on purpose and kept doing it so that they would not make him do it any more.

Laubenthal took this seriously, and felt that an employee should not even joke about messing up since doing so could kill someone.

Laubenthal corroborated that he and Bingham went to higher Management about a possible transfer for Rich, and during the discussion related what Rich had said on September 14.

According to Rich he was embarrassed at having rolled up the hoses incorrectly, although he did not tell Bingham or Laubenthal so, and at first denied that he was the one who did so, although he later admitted it.

He acknowledged that he did not want to do the assignment and used profanity although not directed toward Bingham or Laubenthal. He stated that he might have said something to the effect that he was fucking up on purpose, and that he did ask to transfer out of the Pipe Shop. He stated that his comment about fucking up was in reference to the hoses, although he did not specifically say so to Bingham and Laubenthal.

According to Bingham no other employee requires so much attention, causes such disruption or acted in the manner Rich had. According to Laubenthal no other employee required the attention or caused the disruption that Rich did, no other employee acted in the manner Rich had nor cursed at him.

The hoses being rolled up are used for high pressure gasses and steam.

Various witnesses stated that profanity at the facility is not uncommon.

During the processing of the current grievance the Union asked for an in-person Step 2 meeting but the Company insisted that it be conducted remotely, the only time other than during the Covid pandemic that it had done so. The Union also requested to interview the supervisors involved but the Company denied the request.

The Company posted a picture of Rich and his vehicle at the main lobby with the caption "Banned Employee," the only time in memory it has done so.

There was no testimony that Rich threatened any employee subsequent to his reinstatement under the last chance agreement.

Issue

The issue, as agreed to by the Parties is: Did the Grievant violate the terms of his last chance agreement, and if not what should the remedy be.

Positions of the Parties as Reflected in Opening and Closing Statements

The Company maintains that because the Parties entered into a last chance agreement, the just cause standard does not apply, so that "one strike and you're out." It reasons that if the Grievant violated the last chance agreement, termination is the only possible penalty. It disputes any claim that it lulled the Grievant into a false sense of security by failing to discipline him over events prior to September 14, although it considers that any of these events could itself have justified his discharge. The Employer submits that during the 29 days after Grievant returned to work, it had to monitor him constantly and spent a great deal of time counseling him. It insists that the danger created when he announced that he purposely screwed up was serious enough to support termination. It maintains that it had no obligation to provide Union representation at meetings that were not disciplinary, and that it did not "bundle" incidents any one of which would be cause for termination since the Managers truly wanted him to succeed. It considers irrelevant what led to the last chance agreement, or whether the Grievant would have been happier in Water Treatment. It argues that the Grievant's conduct is governed by the last chance agreement that he voluntarily signed and it opines that he should have been on his best behavior to maintain his job but instead he violated the last chance agreement repeatedly. It contends that the last incident in which he stated that he was purposely fucking things up could not be ignored. It regards this as a threat to the Company itself, even if not to the Supervisors individually.

It asks that the grievance be denied.

The Union emphasizes that the last chance agreement was very specific as to what could trigger a suspension with intent to discharge: "irrational behavior by the Grievant in the workplace that rises to the level of the July 10, 2022 incident." It posits that although Grievant Rich denies the alleged July 2022 misconduct, he entered into the last chance agreement in order to avoid prolonged delay in the processing of his grievance. It accuses the Company of bias and a "vendetta" against the Grievant, citing the refusal of the interview requests for Supervisors, the "Banned Employee" posting, and the refusal of a face-to-face Step 2 meeting. It asserts that the Company unilaterally assigned the Grievant to the Pipe Shop contrary to the understanding that he would be returned to Water Treatment. It maintains that Grievant Rich has abided by the terms of the last chance agreement, and that the Company has not proven that he threatened another employee.

It asks that the Grievant be reinstated and made whole and the Company be directed to cease and desist discrimination against the Grievant.

Analysis and Conclusions

The issue in this case is quite narrow, and it is exactly the issue the Parties stipulated to at the outset of the hearing, namely: Did the Grievant violate the terms of his last chance agreement and if not what should the remedy be.

Before addressing that question, I believe it will be helpful to identify some considerations raised by the Parties that are not relevant to the resolution of that question, and which therefore do not affect the outcome of this case.

First it is immaterial whether or not Grievant Rich menaced another employee with spud wrenches in July 2022 and I make no findings in that regard. The whole point of a last chance agreement is to avoid litigating the original grievance. The Company, the Union, and the Grievant all felt it was in their best interests to avoid arbitrating the spud wrench allegation, and that grievance is now gone. Whatever actually happened in July 2022 no longer matters, and all that is relevant now is what happened after, not before, the last chance agreement was entered into.

Second, the Union accuses the Company of bias or a vendetta against Grievant Rich, based on its refusal to meet in person at Step 2, its "Banned Employee" posting, and its refusal to permit the interview of Supervisors. I note that all of these actions occurred after the alleged misconduct in this case, and therefore could be viewed as a reaction to that alleged misconduct rather than any prior animosity toward the Grievant. More importantly, although in a typical "just cause" case, disparate or harsher treatment of the Grievant than a comparable employee would be an important consideration, under the last chance agreement the Company has the prerogative to carry out such disparate treatment. Under the last chance agreement, the Company has the right to suspend with intent to discharge for conduct that violates the last chance agreement, even if a different employee, not subject to a last chance agreement, would receive only a lesser form of discipline for the identical conduct.

Third, the assignment to the Pipe Shop rather than Water Treatment does not excuse the Grievant. Although the Union and the Company had an understanding that the Grievant would be placed in Water Treatment, and he was initially assigned there for a couple days, the Union does not contend that the reassignment to the Pipe Shop was itself a violation of the last chance agreement or otherwise beyond the Company's Management rights. At most the Union claims that the Company's bad judgment in this regard placed the Grievant in a circumstance where he was less content and therefore more inclined to engage in inappropriate conduct. But bad judgment on the Company's part is not a defense to violation of the last chance agreement on the Grievant's part. The question is not whether the Company acted wisely or unwisely in transferring Grievant Rich from Water Treatment to the Pipe Shop, but instead whether while in the Pipe Shop Grievant Rich engaged in conduct that subjected him to suspension with intent to discharge under the terms of the last chance agreement.

Fourth, the Company points to other acts by the Grievant in the Pipe Shop prior to September 14, which it claims would have constituted violations of the last chance agreement. I do not decide whether any of these incidents would have amounted to violations of the last chance agreement. At the time these events occurred, the Company chose to address them through non-disciplinary counseling rather than to treat them as violations of the last chance agreement. It cannot now second guess those decisions, any more than the Parties can now second guess whether they should have entered into the last chance agreement in the first place.

Having addressed the non-issues, I turn to a discussion of the specific question to be resolved in this case, that is whether or not the Grievant violated the terms of his last chance agreement. The pertinent portion of the last chance agreement is Paragraph 8, which provides: "If there is objective evidence of any irrational behavior by the Grievant in the workplace that rises to the level of the July 10, 2022,incident, the Company will immediately suspend Grievant with intent to discharge."

The pertinent facts are essentially undisputed and are as testified to by Shift Manager Justin Bingham. After initially resisting the assignment to re-roll the hoses (which Rich had previously rolled improperly like a ball of string rather than coiling them fireman style), so that Bingham had to repeat the direction multiple times,

and after the time out wisely suggested by Bill Click, Rich returned and told Bingham that since he had been in the Pipe Shop he had been purposely "fucking shit up" because he did not want to be in the Pipe Shop and hoped that he would be transferred to Crane Repair. Although Grievant Rich testified that he was only referring to the hoses, he did not say so, and instead his statement that he had been fucking shit up since he been there would reasonably be construed as meaning that he had intentionally botched multiple assignments, not just the hose coiling, all with the motivation of prompting the Company to assign him to a different Department.

As the Union correctly points out, the allegation that prompted the last chance agreement was that Grievant Rich had threatened another employee with physical violence. The Union also correctly points out that in the current case the Grievant is not accused of having threatened an individual employee with physical violence. But to hold that the Grievant therefore did not violate the last chance agreement would be an overly narrow reading of the last chance agreement. The last chance agreement does not use the terms "violence" or "threat." Nor does it state that the Grievant may be suspended with intent to discharge only for misconduct of the same kind or type as that involved in the original allegation.

At the same time, the last chance agreement also does not state that the Grievant may be suspended with intent to discharge if he commits any form of transgression whatsoever. Thus for example if the Grievant reported to work one minute late, that presumably would not suffice to establish a violation of the last chance agreement on his part.

What the last chance agreement does specify is a two part test for conduct that would be grounds for suspension with intent to discharge. First the last chance agreement states that the conduct at issue must constitute irrational behavior in the workplace. What the Grievant acknowledged on September 14 was that on multiple occasions he had deliberately bungled assignments, that is, that he had engaged in sabotage, with the motive of procuring his reassignment to a different Department. It requires no extended discussion to conclude that this amounts to "irrational behavior in the workplace."

The second aspect of the last chance agreement is that the conduct involved "rises to the level of the July 10, 2022, incident." It is important to observe that the last chance agreement does not limit the conduct at issue to the same "type" or "kind" as that involved in the July 2022 incident but rather applies to conduct of the same "level," that is conduct of the same degree of seriousness.

Deliberate sabotage of work assignments endangers not only the efficiency of the operation and the quality of the product, but also the physical safety of fellow employees. I need not decide whether, as argued by the Company, deliberate bungling of assignments amounts to a threat to the Company itself, or to employees. As noted earlier, the misconduct is not limited to threats, but encompasses misconduct of an equal level of seriousness. Intentional "fucking up" of work assignments amounts to serious misconduct which, even for a first offense, would warrant serious discipline if not termination, much like a threat of physical violence to a fellow employee. I therefore conclude that the Grievant's admitted "fucking up" of multiple assignments was of an equally serious level of misconduct as the earlier allegation of a threat of violence.

I therefore conclude that the Company has established a violation of the last chance agreement by the Grievant and that the grievance therefore should be denied.

Award

The grievance is denied.

Issued January 28, 2023

Matthew M Franckiewicz