
IN THE MATTER OF ARBITRATION

OPINION AND AWARD

between

ARCELOR MITTAL, USA
(WEIRTON)

Grievance No. 11MEU0033
(Discharge of Frank Pulice)

and

UNITED STEELWORKERS
LOCAL UNION 2911

Gil Vernon, Arbitrator
Case 51

APPEARANCES:

On Behalf of the Company: Peter Post, Attorney – Ogletree
Deakins

On Behalf of the Union: Pete S. Visnic, Attorney

I. ISSUE

The issue presented by the grievance before the Arbitrator can be framed as follows:

“Was the Grievant discharged for proper cause and, if not, what is the appropriate remedy?”

II. RELEVANT CONTRACT LANGUAGE

Section J. Management Rights

The management of the plants and the direction of the working forces, including the right to hire, transfer and suspend or discharge for proper cause, and the right to relieve employees from duty, is vested exclusively in the Company.

Section I. Adjustment of Grievances

9. Suspension and Discharge Cases

- d. The Company will not make use of any personnel records of previous disciplinary action against the Employee involved where the disciplinary action occurred two (2) years prior to the date of the event which is the subject of suspension or discharge, except records relevant and necessary to establish progressive discipline of the action in dispute, but in no event longer than five (5) years.
- e. Should the arbitrator determine that an Employee has been suspended or discharged without just cause, the arbitrator shall have the authority to modify the discipline and fashion a remedy warranted by the facts.

III. BACKGROUND AND FACTS

Grievant, Frank Pulice, at the time of his discharge from employment after some 40 years of service, was an incumbent of Operations Technician I. In this position, he operated a diesel locomotive that moved railroad cars carrying steel product and raw materials over the more than one hundred miles of railroad tracks in and around the Weirton plant. When he was not working as an engineer, Grievant worked as a conductor, assembling and spotting cars, coupling and uncoupling cars and setting and releasing brakes on the cars.

The incident which precipitated his termination involved his operation of a locomotive on March 23, 2011. In the pre-shift briefing, Grievant was reminded by the Yardmaster that construction workers were still working on crossing signals in the vicinity of Birch Street. The Yardmaster also said the construction would finish up that day and that later, when Grievant would be passing through this area, he would call the construction crew to tell them to remove the "blue flag" and derailer so Grievant's train could pass.

"Blue Flag" protection procedures are set forth in Company safety rules and indeed universal in the railroad industry. When workers occupy a track a "blue flag" is put up 150 feet on each accessible side of the occupied track as an absolute warning to train and equipment operators not to enter the work zone. In this case a 'derailer' was also installed on the rail as an extra safety measure. If an engine or car proceeds past the blue flag the derail guides the wheels off the rail onto the ground (which off course stops the train after some distance).

Given the circumstances, the Grievant was required to proceed no faster than 5 to 10 mph and in any event no faster than a speed that allowed a complete stop of the train within one-half the distance of his line of sight (sometimes referred to as restricted speed).

At about 11:00 a.m. on the day in question, Grievant had just passed the Freedom Bridge with his engine forward pulling loaded box cars weighing 1100 tons and started to climb a 2.78% grade. In the cab with him were Rich Chipps, the Conductor, and an assistant Yardmaster John Boka was riding for familiarization and training purposes. He rounded a curve about 550 feet from the blue flag/derailer. At some point he put the train into "emergency" (a full application of brakes). The train passed through the blue flag and over the derail. The engine and one box went on the ground finally stopping some 80 feet past the blue flag.

The Company naturally began an accident investigation. The train brakes were found to be in working order. There was no speedometer on the train. Grievant was adamant, animated and agitated (during the investigation and at a March 24 meeting with the Company) that the accident was not his fault. He blamed it on the Yardmaster for not following through by calling the construction crew to vacate the track. He also claimed the track was wet.

The Company had an engineer calculate the braking distances. To summarize, the Company believed the Grievant easily could have stopped even if going 25 mph on a wet rail. Although the Company believed the rail was dry as it last rained several hours earlier.

On March 24, 2011, the Company gave Grievant and the Conductor initial suspensions with intent to discharge. On April 2, 2011 Grievant sent the following letter to several managers involved in the disciplinary process:

To Brian James, Susan Falbo, and John Young,

I am so sorry for my behavior during the meeting on March 25th. My behavior, and the things I said to you, was unacceptable. I was very upset about the accident, to say the least. I wasn't able to sleep or eat at the time and I know that I gave the wrong impression.

Since then, I have been able to take an objective look at the facts of the accident and realize that it was ultimately my responsibility as the railroad engineer to stop the train safely. I feel that in this situation, I stopped the train as soon as I saw the blue flag. I do not feel that I was speeding but had to gauge the speed to pull the hill on a slick track, carrying the weight of the cars and engine. Unfortunately, there wasn't enough room to stop without derailling the train.

Ultimately, it is my responsibility to run the engine safely. It was not and has never been, my intention to injure myself, my co-workers or anyone else that could be affected by the derailment. I am sorry for the expense to the company.

I do understand your position and that you are responsible for decisions that affect safety and productivity of the mill.

Respectively,

Frank R. Pulice

On April 4, 2011 the Company converted Mr. Pulice's "suspension with intent to discharge" to a "discharge". The Conductor was given a 15-day suspension, later reduced to a 10-day suspension.

A grievance protesting the Company's action against Grievant Pulice was ultimately processed to arbitration. A hearing was held on July 8 in Weirton, West Virginia.

At the arbitration hearing it was revealed that the Company considered the following incidents in assessing what discipline was appropriate for Grievant in connection with the March 24, 2011 derailment:

- 4/7/08 – 19 Car Loads of coils damaged in the yard and the incident was not turned in (Engineer).
- 4/9/08 – Cars ran off and fouled the track and the loco ran into the cars which caused a derail of the loco and cars.
- 5/30/09 – Riding the wrong side of a car through a known “close clearance” area and forced Mr. Pulice to jump off of a moving train to avoid being crushed (Conductor).
- 5/30/09 – Failure to set two brakes for less than 10 cars.

The April 7 and 9 2008 incidents resulted in a 3-day suspension. The May 30, 2009 incidents resulted in the Company considering a 10-day suspension and disqualification from the Operations Technician position. In lieu of this the matter was ultimately resolved with a 5-day suspension, a one-year last chance agreement and retraining. The last chance agreement expired in September 2010 without any intervening incidents.

IV. OPINION AND DISCUSSION

Running a blue flag is a serious matter with grave potential. Grievant’s initial attempt to shift the blame to the Yardmaster was misplaced. Even if the Yardmaster had called requesting the track be cleared, there are a myriad of circumstances that might make that impossible to do (such as stalled equipment). For this reason, the blue flag is inviolable.

It is also ultimately irrelevant that there was no operative speedometer in the engine. The speed limit of a locomotive isn't an absolute like the speed limit of a highway. It is easy to run a train down the track, the hard part (indeed a major part) is stopping it. There are a variety of factors impacting the ability to stop besides speed including tonnage, grade, load patterns and track conditions. The engineer must constantly be assessing these factors. This is one of the reasons procedures concerning speed are written in relative terms related to the line of sight.

Indeed, operating a train in such a manner is serious misconduct. Grievant was either operating at excessive speed or if he wasn't speeding he wasn't alert enough to notice the blue flag in time to stop or perhaps a combination of both. It just isn't known how much he was speeding or how inattentive he was.

Whatever the case was, one thing can be certain. The Conductor also has responsibility to watch for signals and signs as well as to control and monitor the speed of the train. Clearly he failed and shares responsibility in the incident. For this he was given a 15-day suspension that was later reduced to a ten-day suspension. The disparity between the Conductor's suspension and the Grievant's termination is one of the arguments the Union relies on in arguing proper cause does not exist in this case.

The Arbitrator agrees that this consideration militates in Grievant's favor. Grievant has certainly distinguished himself with a history of discipline for unsafe acts that the conductor doesn't appear to have. Yet the disparity when considered with other factors such as the fact the last chance agreement had expired, that his problems were relatively recent, that he had been responsive to disciplinary efforts under a limited LCA and his long tenure, all serve to leave the Arbitrator with the inescapable conclusion in these unique combined circumstances that termination was not for proper cause but that something less, including disqualification from railroad operating positions and reassignment to a different position, would have been proper.

The Grievant, as a remedy, is entitled to reinstatement to another position without back pay. At the Company's option, his reinstatement will be contingent on a last chance agreement similar in nature to the expired one (although it could be for a term up to two years). Grievant must embrace this last opportunity to demonstrate he can work without being a danger to himself, fellow employees and other Company assets. A discharge slip would be an unfortunate way to end such a lengthy career but an obituary would mark a more tragic termination of his employment.

AWARD

The discharge is converted to a
disqualification without back pay subject
in accordance with the Opinion.

A handwritten signature in black ink, appearing to read "Gil Vernon", written in a cursive style.

Gil Vernon, Arbitrator

Dated this 29th day of August 2011.