ARBITRATOR'S AWARD

Case 55

In the Matter of the Arbitration
Between

James Rascoe, represented by
United Steelworkers of America, Local Union 1011

and

ArcelorMittal, USA, Indiana Harbor West,
East Chicago, Illinois

Case No. HCM 11-094

May 23, 2012

David A. Dilts
Arbitrator

APPEARANCES:

For the Union:

Bill Carey, Staff Representative
Mike Ferrantelli
Rick Rascoe
Dwayne Locher

For the Company:

Tim Kinach, Labor Relations Manager
Cherree Leffel, Senior Labor Relations Representative
James Stapay
Robert Smundin

Hearings in the above cited matter were conducted on Monday, April 23, 2012 at the Company's offices located at 3210 Watling Street, East Chicago, Indiana. The parties stipulated that the present matter is properly before this Arbitrator pursuant to Article 2, Section F, paragraph 7 of their 2008 Collective Bargaining Agreement. The record in this case was closed upon completion of the hearings on April 23, 2012.

ISSUE

The parties stipulated that the issue before this Arbitrator is:

Was the Grievant, James Rascoe, discharged for proper or just cause for conduct which occurred on the morning of August 24, 2011? If not, what shall be the remedy?

BACKGROUND

On the morning of August 24, 2011 at approximately 5:15 a.m. there was an incident which occurred between the Grievant and two supervisors, James Stapay and Robert Smundin. The incident began in the "DMC room" of the 84 inch Hot Strip Mill (HSM) when Supervisor Stapay advised the Grievant that he should cease work on problems in the motor room and go to work on a delivery table which was necessary for production to began on that date.

There were words exchanged and contact between the Grievant and Supervisor Stapay. The parties are not in agreement to the exact words exchanged or whether the contact was initiated by the Grievant as a "chest bump" or incident brushing of the supervisor's person as the Grievant attempted to exit the motor room. There was a continuation of words being exchanged and the Grievant was ordered to the shanty to await security to escort him from the plant. The Grievant is then charged with having chest bumped Manager Smundin as the Manager went to call security. At approximately 5:40 a.m. security escorted the Grievant from the plant. Subsequently, on September 7, 2012 the Grievant was suspended pending an investigation into the incident of August 24, 2012. Upon completion of the investigation, the Company discharged

the Grievant on September 13, 2012 citing violation of Plant Personal Conduct Rules 2q and 2r., which state:

> 2. The following offenses are among those which may be cause for discipline, up to, and including suspension preliminary to discharge:
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> . . .
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> Q. Insubordination (refusal or failure to perform work assigned or to comply with instructions of supervisory forces.)
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> R. Use of profane, abusive, or threatening language/behavior towards supervisors or other employees or officials of the Company or any non-ArcelorMittal personnel.
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> . . .

The Union filed a timely grievance concerning this matter, and being able to reach a mutually acceptable settlement of the grievance, the parties stipulated that this matter is properly before the Arbitrator pursuant to their negotiated grievance procedure contained in Article Five, Section I of their 2008 Collective Bargaining Agreement. Hearings in this matter were conducted on April 23, 2012 and the record was closed upon completion of the arbitration hearing.

COMPANY'S POSITION

The Company has properly promulgated rules barring insubordination and the use of profane, abusive or threatening language against supervisors. On August 24, 2011, the Grievant engaged in egregious misconduct in violation of those rules (Joint exhibit 3, Rules 2q and 2r).

Failure by an employee to conform his behavior to these clear expectations should result in very serious consequences. Arbitrators universally accept the principle that threats and intimidation toward supervision are proper cause for the termination of employment (supported by arbitral precedent on this point).

The credible testimony of two supervisors was clear. Both Mr. Stapay and Mr. Smundin were present during the incident of the morning of August 24, 2011 and both supervisors testified that the Grievant failed to carry-out orders he was given to work on the delivery table and to go where he was instructed to go as the events unfolded that morning. Further, both supervisors testified that the Grievant became loud and verbally abusive toward Mr. Stapay culminating in the Grievant "chest bumping" Mr. Stapay just outside of the motor room and the Grievant chest bumping Mr. Smundin as the Manager went to call security.

The Grievant was the aggressor in multiple altercations with two members of supervision on the same date. Both supervisors instructed him to calm down, yet he did not heed these repeated warnings. The Grievant was insubordinate. He used abusive language toward and repeatedly threatened supervision, and even resorted to physically assaulting and intimidating two members of supervision.

The Union alleges that the language used by the Grievant should be characterized as common mill talk. This is simply not accurate. Mill talk may include cursing, however, to be considered mill talk, it should not be directed at someone as it was in this instance. Clearly mill talk does not excuse threats against members of supervision. It is commonly accepted arbitral authority that threats alone against supervision are dischargeable offenses. However, this Grievant went well beyond simple threats.

Therefore, it is the position of the Company that all of the events of the day must be considered together to fully understand the totality of this Grievant's misconduct. The Company considered the entirety of the Grievant's misconduct on the morning of August 24, 2011 and reached the unmistakable conclusion that his conduct was antithetical to the safe and reasonable operation of the Company's business and warranted the suspension and subsequent discharge.

There is no evidence of mitigating circumstances in this case, and the likelihood of rehabilitation of a person prone to this type of conduct is virtually nil. The Company therefore respectfully requests that the Arbitrator find that the Company had just cause for discharging this Grievant and deny this grievance in its entirety as being without merit.

UNION'S POSITION

It is the Union's position that the Company violated the Collective Bargaining Agreement when they, without just cause, suspended and then discharged the Grievant.

Union witnesses Ferrantelli and Rascoe testified that an argument ensued at 5:15 a.m. at the end of a twelve hour shift when Supervisor Stapay told the Grievant and Mr. Ferrantelli to stop working on one job and start working on another. During the course of that argument Supervisor Stapay pushed the Grievant.

The Grievant responded angrily to this physical assault and told Stapay that he better not do that again, as he tried to flee the small DMC room they were in. Stapay blocked the Grievant's path out of the room thus preventing the Grievant from exiting the room. The Grievant was able to move around a chair and brushed past the supervisor and got out of the

DMC room – from this the maintenance manager and Supervisor Stapay accused the Grievant of chest bumping Supervisor Stapay and the DMC room and then later chest bump Manager Smundin as the Manager went to call security.

The two bargaining unit members who witnessed these events in the DMC room have consistently stated that the Supervisor started the incident when he pushed the Grievant. On the other hand, the Company witnesses have told conflicting tales that have changed over time, mostly by leaving out crucial specific details of the events of that morning.

The Grievant is a brash, opinionated electrician who has complained to upper management about what he considers mismanagement in the 84 inch Hot Strip Mill; but that is not just cause for discharge. Perhaps it is motivation for the actions taken, but certainly not just cause.

The Union believes that Management has failed to discharge its burden of proof in this matter and that the Arbitrator should grant this grievance in its entirety. As remedy the Union requests that the Grievant be reinstated with full back pay and benefits and that all records of this wrongful disciplinary action be removed from the Company records.

ARBITRATOR'S OPINION

The record before this Arbitrator is one of conflicting testimony. The Company claims that the events of the morning of August 24, 2011 was a simple matter of the Grievant becoming hostile, ending in his chest bumping his Supervisor, not just once, but twice and then proceeding to chest bump Manager Smundin twice. The Company further claims that the Grievant did not

execute clear and unmistakable direct orders given to him by Supervisor Stapay and Manager Smundin.

The Union's claims in this matter are far different from the Company's. The Union portrays the incident as a heated discussion over changing jobs, leading to the Supervisor pushing the Grievant which gave rise to name calling, and the Grievant trying to flee a small DMC room to reach the open shop floor in the motor room. The Union claims there was nothing which occurred that could be interpreted as insubordination.

In this case, the claims in the testimony of the Company's witnesses and the Union's witnesses are as though they witnessed two different events. If the Company's witnesses are to be believed, then the Grievant's actions are in violation of the Plant rules. If the Union's witnesses are to be believed, Supervisor Stapay initiated the altercation by pushing the Grievant which is serious misfeasance by the Supervisor which cause, at a minimum, for mitigation of the penalty, and perhaps setting aside any measure of discipline if the supervisor's actions were the triggering event. The Arbitrator will review each parties' version of the events before drawing conclusion concerning the facts in this case.

Company's Version of the Facts

The case that the Company proffered in this matter is simple and straightforward. Supervisor Stapay went to the Grievant at about 5:15 a.m. on August 24 and asked him to stop what he was doing and go get a charging table running which was essential to starting the line. The Company's witness to the beginning of this event was only Supervisor Stapay who testified

that the Grievant became hostile and intimidating. As the Grievant charged toward Stapay, the Supervisor put his hands up to protect himself and the Grievant ran into Stapay's hands. Stapay also testified that the Grievant chest bumped him twice. Stapay claims that the Grievant chest bumped him out of the DMC room door (several inches if not a foot) and then chest bumped him again just outside of the door (2 feet or so).

Manager Smundin testified that he saw the Grievant chest bump Stapay out of the motor room door and then chest bump him a second time some 6 to 8 feet outside of the motor room doorway. Pictures were offered into evidence of the motor room doorway from a view on the mill floor. There is an obstruction which ends a few feet from the motor room door. On the left hand side of that obstruction it is clear that only a portion of the motor room door (left hand side) is visible (picture 1, exhibit 4).[1] However, picture 6 of exhibit 4 shows another view of the area shown in picture one. From the ground level and immediately next to the obstructing bank of equipment, the motor room door is not visible at all in the picture. On cross examination, Mr. Smundin stated that the first observation was made while he was on the right hand side of the obstruction. Pictures 20 and 21 of exhibit 4 allow for only ariel views of the other side of the obstruction and are not persuasive that such a claimed observation of the doorway to the DMC room was possible.

Smundin also testified that the Grievant chest bumped him twice after the argument with Supervisor Stapay. There was no credible testimony from any other witness who saw this alleged chest bumping of Mr. Smundin. The Grievant denies that he followed Mr. Smundin as

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[1] This picture is an aerial view, taken at least eight feet in the air, if not more, and at least twelve feet or so from the bank of equipment in front of the motor room door.

claimed, further the Grievant denies that he chest bumped Mr. Smundin. This element of the charges is little more than allegation without benefit of supporting facts and evidence.

Union's Version of the Facts

The record of evidence in this case is conclusive that there was an incident beginning at 5:15 a.m. in the DMC room in the 84 inch HSM and ending at approximately 5:40 a.m. with the Grievant being escorted from the plant by security. There is also no doubt that the Grievant directed profanity at Supervisor Stapay. Beyond these very few facts, little else is consistent between the Company's portrait of the events of 5:15 a.m to 5:40 a.m. and the Union's assertions in this matter.

The Grievant and Union witness Mr. Ferrantelli tell consistent tales of the Supervisor pushing the Grievant and screaming at him. The Union witnesses both testified that Supervisor Stapay was screaming at the Grievant and that the Supervisor pushed the Grievant resulting in the argument becoming heated. From the evidence offered by the Union, a reasonable inference could be reached that Supervisor Stapay instigated the incident with a physical assault of the Grievant. If this testimony is credible, then the normal presumptions that a supervisor's credibility is properly granted deference because he has no stake in the proceedings is not applicable in such a circumstance. If the Supervisor's pushing of the Grievant is what initiated the events of March 24, as claimed by the Union, then the Supervisor is the aggressor and would be reasonably expected to have received discipline for his conduct. Again, there is the testimony of the Grievant, contradicted by the testimony of the Supervisor. The Grievant's testimony,

however, has a corroborating witness in another bargaining unit member. On balance, this charge is not proven with a clear preponderance of the credible evidence, albeit, it comes closer than Management's version.

A third Union witness, Mr. Locher, was called to refute claims in a written Management statement outlining the event of March 24 in which Mr. Locher was alleged to have made certain statements. Mr. Locher refuted the claims that he made the statements found in the second paragraph of the second page of that document, in which he allegedly was instructed by the Union on how to respond to questions about the August 24 incident.

Insubordination

The Company alleges insubordination, which is a serious charge of misconduct for which discharge is often sustained. The Company argues that the Grievant did not follow the instructions of his supervisor. In fact, to prevail on a charge of insubordination there must be a showing that there was direct order and that order was understood and could be executed. There is no such showing in this case.

The Supervisor engaged in a debate concerning stopping one job and beginning another. From this record, this Arbitrator is persuaded that at no time did the Supervisor take charge and make clear that there was an order and that the Grievant was expected to follow that directive under pain of being insubordinate. Instead, the Supervisor became embroiled in a debate and an altercation, one in which he played an alleged, but likely role. When a supervisor becomes a participant in an argument, it is no longer clear what an order is and position in the debate is.

This is the responsibility of management to close debate and initiate directives to get the work done. Moreover, it is the primary responsibility of Management to be in charge so that orders can be made, and be required to be followed. From this record it is clear that this did not happen and insubordination cannot be reasonably inferred from this record of evidence.[2]

If proven, insubordination is proper cause for discharge for the first offense. In this case, any claim of insubordination is truncated by the fact the Grievant was first sent home for other reasons before the order could be carried out, or Management assure themselves of the Grievant's understanding that he was under a direct order that he failed to follow. Engaging in a debate over the order, makes insubordination a difficult matter to persuade a trier of fact find under facts and circumstances such as these.

Conclusion

After careful consideration of the evidence in this record, it is clear that Management has not discharged its burden of proof to show that the Grievant assaulted either Management official. There was no witness to the alleged chest bumping incident with Manager Smundin. The Arbitrator was not persuaded by Manager Smundin's testimony at hearing. There are serious questions about his claimed observations of the doorway to the DMC room and to the position of

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[2] For further discussion see Elkouri and Elkouri, *How Arbitration Works, sixth edition*, Washington, D.C.: Bureau of National Affairs Inc., 2003 pp. 1023-1036. Insubordination is the failure to follow a direct order, and requires that order be known by the employee and possible for him to follow, beside the health and safety implication. For an intervening altercation to arise, and the employee be sent home without the opportunity to execute the order is not insubordination.

Mr. Stapay when the second chest bump was alleged to have occurred. Mr. Smundin was the only witness who put Mr. Stapay eight feet or so from the DMC doorway. Stapay, the Grievant and Mr. Ferrantelli had Mr. Stapay much closer to the DMC doorway. The pictures taken, using the ariel views, provides little insight into how much of the DMC door was visible at floor level from picture 1, 20 or 21 of exhibit 4. This is critical to the corroboration of Mr. Smundin's testimony; and is not present in this record.

Mr. Ferrantelli's testimony was from a member of the bargaining unit. However, Mr. Ferrantelli really had no stake in the outcome of these proceedings, and he testified that Mr. Stapay pushed the Grievant in the DMC room. This Arbitrator is persuaded that the push did occur, otherwise, Stapay would have simply denied it – but he didn't. Mr. Stapay claims that the contact was not initiated by him, but rather, the Grievant walked into his hands after he raised them in fear for his physical well-being. To put this into perspective. Both the Grievant and Mr. Stapay are well over six feet tall, and well over 250 pounds, and this Arbitrator is persuaded that Mr. Stapay was the larger of the two. To be enclosed in a very small room with only one exit, can be a fearful venture for someone, especially as a heated conversation escalates. Whether, it is the Supervisor's testimony which should be credited or that of the Grievant and Mr. Ferrantelli – it is clear that Supervisor Stapay made contact with the Grievant using his hands. This Arbitrator is not persuaded that this was either a defensive response or an offensive assault, it matters only this could be interpreted as the latter without stretching bounds of reason under these facts and circumstances.[3] To prove assault under these circumstances is, at best, a difficult proposition.

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[3] See, pp. Elkouri and Elkouri, *op. Cit.* pp. 1000-1002 for further discussion of managerial contribution to the offending behavior.

The record also lacks proof that the Grievant chest bumped Stapay. The Union's claims that the Grievant was attempting to exit the room, is reasonable, and corroborated by the testimony of Mr. Ferrantelli. The differentiation between an offensive chest bump and a brushing over the body of another to escape cramped quarters is in the eye of the beholder. This Arbitrator is not persuaded that the Grievant's actions were as alleged by the Company

What the Arbitrator is persuaded of is the Grievant's use of demeaning profanity and gestures. In essence the Grievant admits as much and Mr. Ferrantelli's testimony makes clear that the Grievant used much of the language with which he was charged. The Arbitrator is not persuaded that this is common usage "mill talk" as the Union would have him believe. The words the Grievant admits which are the most egregious is "I'll knock you on your fat ass" but this the Grievant claims was issued as a warning to what would happen if Stapay assaulted him again (an allegation not proven by the Union). The common profanity and vulgarity that used in the normal course of activities in a mill do not include threats or abusive language which creates hostility of any form. The Arbitrator is persuaded that this use of inciting language is inappropriate, but occurred in the heat of the incidents of August 24, to which Management personnel must also claim ownership. In any event, the use of the language in violation of Rule 2R was abusive and profane and worthy of a measured disciplinary response, but certainly not discharge.

This Arbitrator is persuaded that the Grievant was involved in an altercation with Supervisor Stapay, but the evidence does not support that there was an altercation with Manager Smundin. The record also shows that there was inappropriate use of profanity and abusive language by this Grievant. Discipline is warranted, but this Arbitrator is not persuaded that

discharge is a reasonable penalty under these facts and circumstances.

The tests of just cause require the penalty to fit the offense.[4] The proven offense here is worthy of progressive discipline and is not one for which discharge would be appropriate under similar facts and circumstances. The determination of penalty must be within the context of the proven misconduct and therefore classes of misconduct may well result in variations of penalties depending on the facts, circumstances, and mitigating circumstances (including managerial involvement which contributes to the offense, as here).[5]

This Arbitrator is persuaded that Management has failed to show just cause for a finding of insubordination or an assault on a supervisor or manager by this Grievant. The Arbitrator is persuaded that the Grievant violated Rule 2R proscribing the language used by him on August 24, 2011 and that violation was significant. The appropriate penalty for the proven misconduct is no more than two calendar weeks of suspension.

Therefore, the Grievant is ordered reinstated with full back and benefits to his former position with the Company less two calendar weeks of pay, and without loss of seniority. The Company's records will be amended to show that this disciplinary action was a two week suspension.

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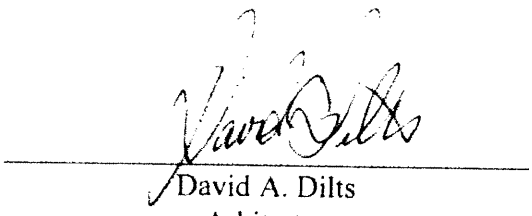
[4] See Arbitrator Daugherty in *Enterprise Wire Co.*, 46 LA 359, question 7 concerns the propriety of penalties.

[5] Penalties are subject to arbitral review and the factors which are used to make those reviews are discussed in Elkouri and Elkouri, *op. Cit.*, Chapter 15, Section 3, F.

AWARD

The grievance is sustained in that the penalty of discharge is not supported by this record of evidence for the proven misconduct (abusive and profane language in violation of Rule 2R). The discharge is ordered reduced to two weeks suspension, and the Company records will be amended to reflect that reduction in penalty, and charges. Further, the Grievant is to be reinstated to his former position with full back pay and benefits less the two week suspension, including full seniority since August 24, 2012.

At Fort Wayne, Indiana
May 23, 2012



David A. Dilts
Arbitrator