IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA

And

ArcelorMittal Case No. 63

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 6787, USW

OPINION AND AWARD

Introduction

This case from the Burns Harbor Plant concerns the discharge of Grievant John Wilson for harassment and creating a hostile work environment. The case was tried in Chesterton, Indiana on June 11, 2013. Richard Samson represented the Company and Rick Bucher presented the Union's case. There are no procedural arbitrability issues, and the issue on the merits is whether the Company had proper cause to discharge Grievant and, if not, what the remedy should be. In addition, the Union claims that the Company improperly denied Grievant Justice and Dignity. The parties submitted the case on final argument.

Background

On September 28, 2012, a black employee – JM – found a noose in his shanty in the pickle line. He reported the discovery to labor relations, which notified Debra Proper, Manager of Employee Services, who was also the Company Co-Chair of the Civil Rights Committee. Proper began an investigation of the incident at about 9:00 a.m. the same day, along with another members of the Civil Rights Committee. The Union Co-Chair was not available; however, the

Union made a representative available for employees who wanted representation during their interview. Proper and her colleague interviewed 38 employees on September 28, and an additional 15 employees on October 1. Proper said they asked all employees interviewed if they wanted a Union Representative, and each one declined. Proper said she told the employees they were investigating the noose incident, and asked a series of questions: did they know who was responsible for the noose?; did they have an opinion about who might have done it, or who might know who did it?; were they aware of anyone in the department making derogatory comments?

None of the employees knew who had hung the noose. Eleven employees said they thought Grievant might have done it, and 17 employees said Grievant had made derogatory comments about black employees and gay employees. Proper said the interviewers did not mention Grievant's name to the employees being interviewed. The interviews did not reveal who had placed the noose, and the Company still had not solved that puzzle by the time of the arbitration hearing. The Company does not allege in this case that Grievant was involved in the noose incident. However, Proper said Company officials believed they had discovered another problem during the interviews: whether Grievant had harassed other employees and created a hostile work environment.

After the interviews were completed, Proper prepared a spread sheet summarizing the comments of each interviewee, including the 17 employees who said they either heard Grievant make derogatory comments about blacks and gays, or had heard others say he did. The employees reported that Grievant had used such terms as "nigger", "nigger bitches", "fucking faggots", and "basketball playing nigger." Seven employees reported that they had personally heard Grievant make racial or gay slurs. The Company decided to investigate the matter further, and hired Brenda H. Feis, a Chicago employment attorney, to conduct the investigation. On

October 24 and 25, 2012, Feis interviewed the 17 employees who said Grievant had made racist or homophobic comments. Feis said one purpose of the interviews was to determine who had actually heard Grievant make inappropriate comments. In the end, eight[1] employees said they had personally heard Grievant make racial or other offensive statements.

Although I have read all of the interview summaries, I will not describe each interview in detail. A brief summary is sufficient:

1. JC, a black male, said he had never heard anyone use the term "nigger" and, while he agreed with other employees that a group of white employees sit in the lunch room and make fun of other employees, he said it was not racial or sexual. JC said he had witnessed Grievant and a gay employee arguing, and Grievant told the gay employee that he could "suck my dick."

2. RF, a white female, said she had heard Grievant refer to black employees as "niggers", and has also heard him say "I hate blacks", and "Blacks are worthless and lazy." She described a similar comment made by Grievant and other employees in the past. She also said some black employees had made racial comments. Many employees, including her, had made comments about gays.

3. EN, a black male, said he and his friends avoid Grievant because he is a "known racist." Grievant called him a "nigger" in front of another employee and has also referred to him as "colored." He heard Grievant refer to President Obama as a "basketball playing nigger." Other employees have told EN Grievant has called them racial epithets and that he often makes racial comments.

4. PW, a white male, said he had heard Grievant say in the lunchroom that he "hates homos and can't stand fags." He also said he had observed the escalating tension between Grievant and a gay employee. PW said four or five years ago he had reported name-calling incidents to two general foremen, and said it was a serious problem. The foremen did nothing to address the issue.

5. CC, a white male, has had run-ins with Grievant, who has called him "faggot", "queer", and "cocksucker." CC is gay. He said Grievant is the ringleader of a group of white employees who sit in a lunchroom called the "fish bowl." Grievant makes derogatory comments or

[1] The Company said there were 7 employees who made such statements. The Company's list did not include employee PW, whose statement is summarized below.

gestures about employees who walk by. Recently, CC said, during an argument Grievant grabbed his crotch and said to CC, "You fucking faggot! You can suck my dick!" He also saw Grievant kick a chair away from a lunchroom table when Grievant saw a gay employee approaching, and say that he did not want "that fucking faggot sitting next to me." CC said he has heard Grievant call a black employee a "nigger bitch," and had heard other comments he could not remember. He claimed Grievant's wife (also an employee) told him Grievant was a homophobe.

6. PE, a white male, was described by Feis as "offer[ing] the most credible and direct evidence of racist and homophobic conduct by [Grievant]." PE sais Grievant often referred to black employees as "dumb niggers" and he called another employee a "dumb black bitch." PE described Grievant as a "known racist." PE said Grievant also made homophobic comments, like "faggots" and "dick suckers," and he said Grievant "hates gays." Grievant does not make these comments in front of his targets, PE said; he treats the employees "fine", but then makes derogatory comments behind their backs.

7. JM, the black male who found the noose in the shanty, said he has not heard Grievant use racial slurs, but other employees have told him about them. He had, however, heard Grievant say "disgustedly," that he did not like gays.

8. SH, a black female, said she had heard about racist comments from other employees – including some allegedly directed at her – but had not personally heard Grievant make any. She said about 5 or 6 years ago she had heard Grievant refer to a gay employee as "that faggot."

After completing her interviews, Feis prepared a memorandum that included a description of the process, a section titled "Summary Conclusions," and a summary of the witness interviews. The "Summary Conclusions" dealing with Grievant say that he was the only employee who made "racist and anti-gay slurs"; that both black and white employees said he was known to be a racist; that he was often described as "two-faced"; and that some employees would not implicate Grievant because of a sense of Union loyalty or a reluctance to get involved in an employee's termination.

In addition to the seventeen employees Feis interviewed on October 24 and 25, Feis interviewed Grievant and BH on December 11. The Company had interviewed both employees during its initial investigation, but Feis had not interviewed them during her October interviews. She said BH had not said anything in his December 11 interview with the Company that warranted talking to him during her investigation in October. However, in her October interviews, some employees had said BH had heard Grievant call employee TH a "black bitch." Feis said she interviewed BH to address those allegations, and that she interviewed Grievant to allow him to respond to the allegations against him. Feis reported that "they both came armed to refute all allegations and to paint [Grievant] in a positive light."

According to Feis' summary of the interviews, BH started defending Grievant even before she asked him specific questions. He said Grievant was not a racist and that Grievant would not use the N-word. He had heard only one employee use that term, who was now deceased. However, he said everyone used the words "nigger-rigged" 150 times a day. He had never heard Grievant use a racial slur against anyone. But he said "everyone" uses "anti-gay language." BH told Feis that he thought employee SH had started rumors against Grievant to get him fired. Feis discounted that allegation, noting that neither BH nor Grievant knew what would have motivated SH to do so.

Feis said Grievant denied all of the allegations against him, and claimed never to have used the N-word. He said he was offended by Feis' use of the word during the interview. Nor had he ever heard any other employees use the word. Grievant denied being a racist, pointing out that his daughter and a niece both have black boyfriends. He denied calling TH a "black bitch" or saying that Obama was a "basketball playing nigger." Grievant also denied using anti-gay slurs, and he said he has gay friends and relatives. But he admitted telling a coworker he

should get a refund from Disney after a gay man flirted with his son at Disney World. Like BH, Grievant said he thought the allegations were "cooked up" by SH. At the end of the interview, Feis said she asked Grievant if he denied all of the allegations, and he said, "If I did any of it, I don't recall doing it."

Feis' testified that she found Grievant not to be credible. His demeanor was "unusually defensive" and he "bent over backwards" to say he loved gays and blacks. Grievant denied ever using racial language, but that statement contrasted with numerous employees who said he did. Moreover, Grievant did not deny referring to black employees as "colored." Feis also did not believe Grievant's claim that he had never used derogatory remarks about gays. Feis said Grievant's last comment – "If I did any of it, I don't recall doing it" – was "like saying he did it."

When the Company received Feis' report, it prepared a Declaration for seven of the employees (all of those listed above except PW), which were summaries of what each employee had told Feis. The employees were asked to read their Declaration and, if it was accurate, to sign it. The employees were also told they could make changes. All of the Declarations said, "I declare under penalty of perjury that the foregoing statements are true and correct to the best of my personal knowledge and belief." All seven employees signed their Declaration, although some made revisions. Employee JC crossed out a sentence that said, "I have never heard any other employee at ArcelorMittal make similar comments in the workplace." Employee SH added a note that said when she heard Grievant refer to two employees as "that faggot," she did not know who they were. Feis' summary of Employee PH's interview recorded him as saying he had heard Grievant call SH a "dumb back bitch." He amended his Declaration to say that he had heard that from another employee. Feis' summary of Employee RF's interview said RF had

"heard Grievant refer to black employees as 'niggers.'" RF amended her Declaration to say that she had "been told" Grievant did so, but did not recall whether she had heard Grievant say it.

Mary Baylor, the Union Co-Chair of the Civil Rights Committee, testified that prior to the noose incident, no employee had complained to the committee about Grievant using racial or gay slurs. Grievant testified that he has never used the N-word or other racial slurs. He acknowledged calling other employees "colored," but only because everyone dresses the same way (green coat, helmet and safety glasses) and it is a way of differentiating between employees. He said he had used the word "black," but not "black bitch." Grievant also denied ever using gay slurs. He said in recent contract negotiations, the President of the Union said employees should hug their grievers, and when someone hugged him, Grievant asked "are you gay." But this was just a joke, and was not name calling. Grievant also acknowledged that there were two occasions when, during a heated exchange, he had told other employees to "suck my penis," or "suck my cock." But these were not gay slurs, he said. Grievant said his statement to Feis that, "If I did any of it, I don't recall doing it," was in response to her question of whether he might have said the words, but did not remember doing so. He said he essentially just repeated what she said back to her.

Positions of the Parties

The Company says it places no weight on the noose incident. It's relevance was solely to describe how the Company came to investigate Grievant's conduct in the workplace. Its investigation was thorough, the Company says. The Company interviewed 54 employees, 17 of whom had heard reports that Grievant used racial or gay slurs or had heard him do so first hand. The Company then continued its investigation by hiring Feis to interview employees. Feis, the

Company points out, was a neutral third party with no reason to slant her findings in the Company's favor. Her report showed there was a serious problem on the pickle line, which was attested to by the seven employees who signed Declarations about Grievant's conduct. The Company points out that the Union could have called those employees to testify, but it did not do so, thus leaving their assertions unrebutted.

The Company dismisses Grievant's testimony as "self-serving." But even so, he still admitted telling employees to suck his cock, and told Feis that if he did what was alleged, he did not remember it. The Company says this latter comment was some of the most important evidence against Grievant. Grievant was presented with allegations that he said the worst words one can say to describe black people, and his response was not a vehement denial, but a statement that if he did it, he didn't remember it. The Company also says it was proper to deny Justice and Dignity. Doing so protected the seven employees who signed Declarations.

The Union questions the adequacy of the Company's investigation, pointing out that there are over 90 employees in the pickle line, and the Company only interviewed 54 of them. The Union also says other employees were mentioned in the interviews who should have been interviewed. The Union argues that it is hard to believe Grievant could have engaged in this behavior without someone having reported him earlier, especially since employees had been reminded about how to report harassment. The Union also says Grievant was the victim of disparate treatment because some of the interviewees named other employees who had made derogatory comments about women, but none of them were charged with misconduct or even interviewed.

The Union says it agrees that if someone made the comments attributed to Grievant, he should be removed from the workplace. But it says the Company has not carried its burden of

showing that Grievant made the improper comments, let alone proving that he created a hostile work environment. No one ever complained and it is implausible that all of this could have gone on without someone bringing it to the Company's attention. The Union also says there are many inconsistencies in the statements and Declarations of the interviewees. Finally, the Union says there was no justification for denying Grievant Justice and Dignity. If the possible response of a discharged employees is grounds for denying Justice and Dignity, then the Company could do so for every discharge.

The Company responded that Proper testified the Company interviewed 54 employees because those were the ones that had access to Grievant's work area.

Findings and Discussion

There is no basis for a finding that the Company's investigation was inadequate. The Company interviewed 54 employees, some of them twice. The Union did not rebut the Company's assertion that it interviewed the pickle line employees who had access to Grievant's work area. Nor did it show that Grievant was somehow prejudiced by the Company's decision not to interview the remaining employees.

There is no credible claim that Grievant was unaware of the Company's policy on harassment, or of the consequences of violating the policy. The Company policy reads, in pertinent part:

> [E]ach and every employee is entitled to be treated with dignity and respect as a valued individual, free from harassment of any type....
>
> As used in this policy, harassment is defined as offensive or intimidating conduct of a verbal or physical nature relating to gender, race, color, religion, national origin, age, mental or physical disability, veteran status or any other unlawful, basis, which has the purpose or effect of unreasonably interfering with an employee's working conditions or

> performance; creates a hostile, intimidating, or offensive work environment or otherwise adversely affects employment opportunities. [The Company][2] views such conduct, whether it is by an employee or a non-employee, as an extremely serious matter, and any employee who violates this policy will be subject to disciplinary action, up to and including termination of employment.

In addition to the Corporate Policy, the Company also cites Burns Harbor Policy Section 20, which says, in part, "Any employee engaging in sexual harassment or other forms of harassment of a fellow employee...will be subject to immediate suspension and discharge."

Both the Company and Union endorse the principles of Section 20, and the Union acknowledged that if the Company proved someone made the comments attributed to Grievant, he should be removed from the property. But it argues that the Company failed to carry that burden of proof in this case. The Company's entire case, the Union points out, is based on hearsay. Feis and Proper testified about what employees told them, not what they actually saw and heard. The employees' Declarations were also hearsay, and some contained double hearsay, because they reported what someone else had told them. An employee cannot be discharged solely on the basis of hearsay testimony, the Union says.

As is often true in steel and iron ore industry disciplinary cases, especially those that involve disputes between employees, the employer's ability to establish misconduct is affected by Article 5-I-8-c:

> The Company agrees that it shall not, in an arbitration proceeding subpoena or call as a witness any bargaining unit Employee or retiree. The Union agrees not to subpoena or call as a witness in such proceedings any non-bargaining unit employee or retiree.

Under other collective bargaining relationships with the same language, the practice has been to admit a statement when the party offering it is contractually precluded from calling its author (assuming there is no other reason to exclude it). However, the weight given the statement

[2] The Policy refers to ISG, a predecessor to ArcelorMittal, but there is no dispute it continues in effect.

depends on the circumstances. I have followed that policy with steel and iron ore industry collective bargaining relationships, including this one. Thus, I admitted the Declarations, the spread sheet, and the two reports from Feis.

Although in-person testimony that allows cross-examination is preferable, the employee statements in this case are entitled to substantial weight. It is often difficult to obtain information about employee conduct from coworkers; some employees don't want to get involved, others are concerned about the reaction of other employees, and some are loathe to implicate fellow union members in misconduct.[3] The willingness of coworkers to submit statements charging a coworker of misconduct, then, is of some consequence, absent evidence that an employee has an ulterior motive. This is especially true in a case like this one, where the seven employees who signed Declarations knew their identity would be revealed to everyone, including Grievant. Their willingness to sign statements in such circumstances adds a level of credibility to their allegations. There is no reason to suspect that the employees would risk the consequences of giving negative information about a coworker, and then fabricate the allegations.

I do not attribute much significance to Grievant's admission that he told other employees to suck his penis or his cock. I believed his testimony that those statements were made in anger, and were not intended as a gay slur. The words were used as an expletive and, like other expletives with sexual terminology – e.g., "Go f--- yourself" – they were not intended to have any sexual connotation.[4] I am also not convinced that Grievant's statement that, if he did it, he did not remember it, was as important as the Company claims. I have heard numerous cases in which employees made similar comments – sometimes on cross examination in arbitration – and

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[3] These same factors often explain why employees have not reported such incidents to management. Also, in the instant case there was a perception – noted by Feis – that pickle line management was not concerned about such issues.

[4] This analysis does not apply to Grievant's encounter with CC, who said Grievant called him a "faggot" and told CC to "suck my dick." This was obviously a homophobic slur.

they always followed a question like the one Grievant said Feis asked, namely, "is it possible you said it but don't remember it." Nevertheless, on the whole, I thought Grievant was not a credible witness. His denials were general and did not address specific charges, especially those made by CC and PE. Nor did he offer any explanation about why so many employees would have been willing to lie about him.

The weight of the evidence convinces me that Grievant has used racial and gay slurs among and about his coworkers. In some instances, he made the comments directly to an employee in a protected class; CC said Grievant called him "faggot", queer", and "cocksucker," sometimes in front of other employees, a fact confirmed by JC, who witnessed one occasion, as well as by EN and PE. RF said she heard Grievant use racial slurs, although in her declaration she backed off earlier claims that she had heard Grievant refer to black employees using the N-word. But EN said Grievant called him the N-word to his face, and had referred to President Obama as a "basketball playing nigger." Such comments give credence to several allegations that Grievant was known as a racist and a homophobe.

Grievant's use of racial and homophobic slurs and epithets continued over a significant period of time. His conduct was not isolated and was sufficient to create an atmosphere that reasonable people would have found intimidating or abusive, even if they were not the targets of Grievant's abuse. Grievant violated the Corporate Policy (he "create[d] a hostile, intimidating, or offensive work environment") and Burns Harbor Policy 20 (he engaged in "harassment of a fellow employee"). In these circumstances, I find that the Company had proper cause to discharge Grievant.

The Union seeks to undermine the Declarations by arguing that employee SH wanted to get Grievant in trouble, and that she tried to get other employees to report that he had used racial

slurs. There is no credible evidence that SH solicited other employees. Moreover, SH did not allege that *she* heard Grievant make derogatory comments about black employees or gay employees. If she was willing to lie to get Grievant fired, then presumably she would not merely have solicited other employees to make false allegations against Grievant – she would have done so herself. It is also noteworthy that no pickle line employees testified *for* Grievant. This includes employee BH, who Feis said was quite anxious to defend Grievant during their December 11 interview. The Union criticized Feis' credibility determinations, but still did not offer BH as a witness, so I could evaluate his claim that Grievant was not a racist and would not use the N-word.[5]

The Union also alleges that there are discrepancies between the interviews summarized on the spread sheet and the reports of later interviews, including the Declarations. Some of the inconsistencies the Union pointed to were from employees who were not asked to give Declarations, and who did not claim to have firsthand knowledge of Grievant's conduct. I have not relied on those statements. Other changes – like RF's change to her Declaration concerning whether she had heard Grievant use the N-word – are more material. But they do not undermine the Company's case against Grievant. Nor do they cause me to question the credibility of the Declarations.

The Union also argues that Grievant was the victim of disparate treatment. Several employees, the Union points out, said during interviews that other employees used similar language or made negative comments about women in the workplace, but were not disciplined. In most instances, employees who claimed to have first-hand knowledge of such conduct refused to provide names. Some employees, however, identified coworkers who had made disparaging

[5] This is not meant to suggest that the Union's advocate failed to do something. Rather, I understood his decision not to call BH as a determination that his testimony could not withstand cross examination.

comments about women (although Feis noted that these comments were less vulgar and seemingly less offensive to those who heard them), and several employees said anti-gay language was widespread. At least two employees complained that pickle line management was indifferent to such behavior. Given the atmosphere employees described, those claims seem credible. But the fact that other employees also engaged in offensive behavior does not prejudice the case against Grievant. Grievant's conduct was more pervasive and probably more hateful than that attributed to other employees, and it cannot be excused; it was not mill talk. This is not meant to comment on the appropriateness of the Company's decision not to pursue other cases. However, on this record, its decision not to do so does not undermine Grievant's termination.

Finally, the Union argues that it was improper to deny Grievant Justice and Dignity. I understand the Company's reluctance to retain Grievant in the workplace pending completion of this case. But the contract language controls and the parties' agreement does not provide an exception for cases like this one. Nor, in my view, does the "including" clause contemplate that circumstances like those at issue here would warrant a denial. There is also some merit to the Union's claim that Justice and Dignity could be denied in a large percentage of cases if the standard was whether some retaliation was possible. I certainly do not condone Grievant's behavior, but I cannot read the contract to exclude him from Justice and Dignity.

In sum, I find that the Company proved Grievant harassed other employees and created a hostile work environment, which gave the Company proper cause for discharge. But I also find that the Company improperly denied Grievant Justice and Dignity, which requires make-whole relief.

AWARD

The grievance is sustained only to the extent that the Company is directed to make Grievant whole for the improper denial of Justice and Dignity. Otherwise, the grievance is denied; the Company had proper cause to discharge Grievant.

s/*Terry A. Bethel*
Terry A. Bethel
September 11, 2013