IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
INDIANA HARBOR EAST

And ArcelorMittal Case No. 82

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1010

OPINION AND AWARD

Background

This case from Indiana Harbor East concerns the discharge of Grievant Kevin Hamming for a violation of his last chance agreement (LCA). At the time of his discharge on August 5, 2016, Grievant had about 27 years of service and was employed as a Maintenance Technician Electrical (MTE) in field forces. On August 2, 2016, Grievant was assigned to work on two locomotives in the rail yard adjacent to the mobile equipment garage. Another MTE, Lloyd Trumbo, was assigned to work with Grievant. There were three locomotives out of operation that day, and Robert Hynes, the Shift Manager in the mobile equipment garage, was anxious to return them to service. Trumbo said he and Grievant usually worked together, but because of the need for locomotives, he decided he would work on one of the locomotives in the yard while Grievant worked on the other one.

The Company introduced two videos that show the incident at issue, one taken from inside the cab of Grievant's locomotive, and one showing the incident from cameras outside the locomotives. The portion of the yard involved in this case has two parallel tracks that run

between the garage entrance on one end and then merge into a single track on the other end. At some point when the distance between the tracks begins to narrow as they merge, there is no longer sufficient room for two locomotives to pass. It is difficult to estimate the length of the track between the two end points, especially given the size of the locomotives. However, the portion of the tracks over which the two locomotives traveled would appear to be about 100 yards or so long. There are derailers on the track just short of the entrance to the garage, which are intended to prevent a locomotive from entering the garage and endangering employees working there. If a train needs to enter the shop, the derailer must be disengaged. There are no derailers before the merge and, in fact, the video shows the locomotives entering the merge to a point at or near where it becomes a single track.

The outside video begins with Grievant already in one of the locomotives, and Trumbo leaving that engine to proceed to the other one. Trumbo said he told Grievant he was going to work on the locomotive on the adjacent track. Both men moved their locomotives back and forth on the tracks, passing each other as the two locomotives went in opposite directions. At the merge end, the tracks gradually become closer as they merge into a single track. The outside video shows the locomotives pass each other two or three times, usually about half way between the two end points. The collision occurred after Trumbo operated his locomotive into the merge and then briefly stopped. Meanwhile, Grievant was operating his locomotive toward the merge and, on the inside video, can be seen looking at the instrument read-outs as opposed to the track in front of him. Throughout the movement that resulted in the accident, Grievant mostly looked at the controls, although he did glance up in the direction of the track on two occasions. The first time was quite brief, and Grievant apparently did not see Trumbo's locomotive, which was stopped in the merge. The second time, it was apparent from his reaction that Grievant knew he

was about to make contact with Trumbo's locomotive. Grievant entered the area where the tracks draw close together just as Trumbo was leaving the same area. This is where the collision occurred, with Grievant's locomotive striking the side of Trumbo's locomotive. The collision caused about $40,000 worth of damage to Trumbo's locomotive.

As a result of the accident, the Company gave Trumbo a 3-day suspension. However, Grievant was working on a last chance agreement entered into on April 4, 2016. The LCA resulted from Grievant having caused a derailment on September 24, 2015, and then failing a fitness for work evaluation when he tested positive for marijuana. The LCA reinstated Grievant without back pay and says, in relevant part,

> Although the Union and the Company recognize that cause existed for his suspension and discharge, the Company has decided to return Mr. Hamming to work on a last chance basis. This last chance reinstatement will provide him with one final chance to prove he can become a responsible employee of the Company. This return to work is conditioned upon strict observance of the following terms:
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> ...
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> I. Mr. Hamming will be found in violation of this Last Chance Agreement and be subject to immediate suspension preliminary to discharge without protections of the special Justice and Dignity Procedure outlined by the Collective Bargaining Agreement if within a period of two (2) years after the date of signing this document he violates any other Company rules or regulations.
>
> ...
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> M. This agreement represents a final chance at employment for Mr. Hamming. The terms of this agreement will be expressly adhered to. Failure to meet any of the conditions set forth above or any repetition of the conduct which led to this suspension/discharge action or violation of any other Company rules or regulations will be cause for Mr. Hamming's immediate suspension preliminary to discharge.

The parties stipulated that the issue in the instant case is whether Grievant's conduct on August 2, 2016 violated his LCA. The Company charged Grievant with a violation of Personal Conduct Rule 1.P: "Neglect or carelessness in the performance of duties assigned in the use of Company property." In particular, the Company contends that Grievant was not paying attention to his surroundings and that he failed to work safely and apply common sense.

Grievant testified that the locomotive was having problems receiving GPS pulses and that he had to watch the display to catch the error codes, which flash on the screen for a short period of time. Trumbo also testified that in Grievant's situation, the MTE has to monitor the displays while the engine is moving. Grievant said his need to monitor the displays prevented him from sitting in the location normally used by the operator, which interfered with his vision outside the train. Grievant also claimed that he had very little training about how to operate the locomotive. Trumbo showed him how to operate the remote control box and from then on, he "learned by doing."

The Union called other witnesses who also raised concerns about the level of training. The Company introduced an exhibit titled Rail Operations Training Checklist Form, which covered four areas, called Tasks: Safety, Engine, Communication, and General Awareness. Each Task has several Sub-Tasks, representing specific areas. The sections on Safety and Communication on Grievant's form were crossed out. A trainer recorded that Grievant had been given instruction on Locomotive Familiarization, Remote Box Familiarization, Operate Locomotive in Manual, and Operate Locomotive in Remote. He had also been given instruction in switch types and boarding/de-boarding locomotives. John Wilkerson, a Locomotive Operator and Internal Logistics Griever, testified that the Training Checklist was not intended to be used to qualify an employee as a train operator. It was developed to provide feedback from the

trainer. Wilkerson said a trainer complained that the Company had instructed him to train the MTEs to use the remote control box, but they had not used it to move the locomotives during training. Wilkerson said he approached Tom Piotrowski, Manager of Rail Operations, and discussed creating a locomotive operation training program for MTEs, although nothing had been done. Wilkerson said he did not believe the MTEs had sufficient training and that operation of locomotives in the maintenance yard should be done by hostlers.

Piotrowski testified that the Company did not intends to train MTEs to be train operators. Instead, they were given familiarization training in how to operate the locomotive back and forth in the confines of the yard; there was no intention to use them to haul material throughout the plant. He noted that locomotive operators train for four to six months; in contrast, MTEs are given only a day or two of training. The Checklist Form, Piotrowski said, was not used to qualify the MTEs as operators; rather, it was a way of recording what kind of instruction the operators had been given.

The Union also questioned the safety of running two locomotives in the yard at the same time. Trumbo testified that he had been working in the garage for 46 years, although not all of that time was spent on locomotives. August 2, 2016, he said, was the first time MTEs had operated two engines at once in the yard. Shift Manager Hynes said it was the first time in his memory that two locomotives were moving in the yard at the same time. He said it never crossed his mind that Trumbo and Grievant would run both locomotives at once. And, Trumbo acknowledged that Hynes had not instructed them to do so. However, the Union points out that Hynes told the two employees he was in a bind and needed to get the locomotives back in service. According to Field Forces Griever Kevin Brackett, Hynes told him if Trumbo and Grievant had gotten both locomotives finished at the same time, it would have been an "attaboy."

Brackett said he did not attend the accident investigation meeting, but that the safety committee determined the accident was caused by a lack of procedures. Following that, Brackett said, Hynes told him he was surprised the issue of fault had gone any further.

The Company contends that the video clearly shows Grievant was not paying attention to where he was going, which resulted in an accident that caused serious damage to a locomotive. The Company says Grievant was working under an LCA that said "any" violation of a Company rule was cause for suspension preliminary to discharge. There can be no doubt, the Company says, that it properly invoked that provision in this case. The Company says the Union's defenses are "red herrings." Grievant had sufficient training for his limited operation of a locomotive, and no job procedure was necessary to tell Grievant to look where he was going. The Company also points out that even if it had installed derailers at the merge, Grievant was not watching where he was going, and would have hit the derailer. That would have resulted in a derailing which would also have been a rule violation. The Company relies on USS-48,135, where the USS-USW Board of Arbitration noted that an employee working on an LCA has "no margin for error." That was the case here, the Company contends, and Grievant's rule violation justified his discharge under the LCA.

The Union relies, in part, on the Company's use of stale discipline to justify Grievant's discharge. Article 5-I-9-d of the Agreement forbids the Company from "mak[ing] use of" disciplinary records more than two years old. But, the Union points out, the third step minutes include the fact that Grievant received a 5-day discipline in 2011. The Union says there have been several industry awards overturning discipline when employers have relied on stale discipline, and it argues that should be the result in the instant case.

On the merits, the Union denies that Grievant failed to pay attention. His job required him to monitor the remote control box while the train was in operation, which meant he could not constantly look at the track. Grievant was performing his job, the Union insists, not neglecting it. The Union also notes that once a locomotive merges onto a single track, an MTE could operate it outside the yard and across a road, which would create a safety hazard. Given the need to monitor the remote control box, the Union argues that the Company should have installed derailers where the tracks merge. Had it done so, the Union claims, the collision could have been avoided. The Union also cites a lack of adequate training and the Company's failure to create job procedures for the movements that led to the collision.

The Union relies on language in the Company's response to Trumbo's grievance over his 3-day suspension stemming from the same accident. In denying the grievance, the Company said, "[Trumbo] left locomotive on a section of track that did not allow for clearance of another locomotive on adjacent track to pass by which caused a side swipe." This means, the Union says, that the Company realized Trumbo was the one at fault in the accident, not Grievant. Grievant cannot be disciplined, the Union argues, when the accident was not his fault. Finally, the Union says Grievant has 27 years of service and there was nothing he could have done to avoid the accident.

Findings and Discussion

As the Union points out, there are industry awards that have sustained disciplinary grievances when an employer uses stale discipline in its evaluation of a case. The Company says its statement, quoted above, that Grievant did not have a "clean record" was simply a response to Grievant's claim that his record was clean. The Union cites USS-47,210, et. seq., in which the

employer had cited stale discipline in the Step 2 Minutes. The employer claimed it was an error caused by a change in computer programs. However, the Board of Arbitration did not have to rule on the issue because it found the grievant had not violated his LCA. The Board said:

> Because of the Board's determination ... that the Company has not shown proper cause to issue the discipline at issue in this case, it is unnecessary to further consider whether the Company relied on the stale discipline or Grievant otherwise was prejudiced by its inclusion in the Step 2 minutes. The Board notes, however, that if a violation of his LCA had been established, there would have been no reason for the Company to rely on earlier discipline for violation of the LCA.

In the instant case, the Company did not include the stale discipline in the third step minutes in error; rather, the Company says it was simply a response to one of the Union's claims about Grievant's work history. Thus, the Company contends that it did not "make use of" stale discipline in deciding to discharge Grievant.

It is fair to believe that the Company cannot cite stale discipline without some justifiable reason, and then merely claim that it did not make use of it in determining the appropriate discipline. But, as the Board of Arbitration suggested in USS-47,210, quoted above, in the instant case, the Company would have had no need to rely on stale discipline. Grievant was working under an LCA that provided he could be discharged for *any* violation of Company rules. If the Company could establish that Grievant violated his LCA on August 2, 2016 – which was its sole claim in this case – then the rest of his work record would not have been relevant. The lack of any need for the stale discipline also lends credibility to the Company's claim that it did not consider the 2011 event when deciding whether to discharge Grievant and that it included the information merely to rebut a claim made during the grievance hearing. In these particular circumstances, then, I find that the Company's mention of stale discipline was not prejudicial and does not justify resolving the case without consideration of the merits.

There are factors in the case that support the Union's claim. In particular, it was necessary for Grievant to look at the remote control box while the train was in operation, which meant he could not constantly watch the track in front of him. In addition, it is clear that Trumbo was partially at fault, as the Company acknowledged in its answer to Trumbo's grievance. But neither of these considerations absolves Grievant. Although Grievant could not constantly look at the track in front of him, he knew that unlike the other occasions when he operated a locomotive in the yard, there was another locomotive running on an adjacent track. Moreover, Grievant knew that the two tracks merged and he understood that the locomotives would go into the merge before reversing. In fact, at one point, Grievant sat on the merged track for about 30 seconds before starting back toward the other end of the track. Thus, both Grievant and Trumbo knew there was a possibility of collision, and both should have realized that, if they were going to operate two locomotives at the same time, and if they were going to go into the merge area – which both of them did – then they would have to be especially cautious.

On the run just prior to the collision, Grievant was heading toward the garage end of the tracks and he passed Trumbo, who was headed toward the merge end. They stopped at opposite ends of the track for about eight or nine seconds, and then Grievant began the return trip toward the merge shortly before Trumbo began to move from the merge area. If Grievant had looked up as he left, he would have seen Trumbo still sitting in the merge. Also, if he had looked for Trumbo's locomotive during the period of about nine seconds it took to traverse from the garage end of the tracks to the collision, he would have seen Trumbo's locomotive in front of him, and he would have realized they were going to meet in the area where the distance between the tracks started to narrow. The point is that even though Grievant had to look at the remote control box, he knew there was another train in the area and he had to be mindful of that locomotive's

position. At the very least, Grievant should have looked to see where Trumbo was before he started his run, and he should not have moved until Trumbo exited the merge area.

This does not mean there isn't blame to go around. The same things said about Grievant also apply to Trumbo, although it is not clear from looking at the video that Trumbo actually parked his train without leaving adequate room to pass, as the Company alleged in its grievance answer. It is probably more accurate to say that he stopped when he realized Grievant was going to hit him. And, if Hynes had pressed the two employees to get the locomotives repaired quickly, it might have occurred to him that they would try to run both trains at the same time. But the fact that there were others at fault does not mean Grievant had no culpability. If he had looked carefully even once, he could not have missed seeing that Trumbo's locomotive made it unsafe for him to proceed.

I am not influenced by the Union's claim that Grievant was not adequately trained. As the Company pointed out repeatedly at the hearing, it was not trying to qualify Grievant to be a locomotive operator. All he needed to learn was how to move the train forward and backward on a short track. He had adequate instruction for that purpose.[1] In fact, he had been doing the job for about a year and had not complained about improper training. Moreover, Grievant's difficulty was not that he did not know how to operate the locomotive; rather, his problem was that he did not look to see where Trumbo's locomotive was before he started moving.

As already noted, the Company suspended Trumbo for three days as a result of the incident. It may be that, but for the LCA, a suspension would also have been the appropriate discipline for Grievant's conduct. The problem, however, is that Grievant agreed to and was

[1] Despite the weight Wilkerson seemed to put on the use of the checklist, there is no reason to believe the Company used it to try to qualify Grievant or any other MTE. I understood Piotrowski to mean that he had the trainer use the list so he would have some record of what kind of instruction the MTEs had received.

working under an LCA that said any violation of a Company rule would be cause for suspension preliminary to discharge. I am convinced on this record that Grievant operated his locomotive negligently on August 2, 2016, and that his negligence contributed to the accident. This was a material breach of his LCA. As is generally recognized, employees on an LCA have no margin for error. Moreover, arbitrators have no authority to ignore or rewrite the terms of an LCA, or add criteria the parties did not include in the LCA, like length of service. In these circumstances, then, I must deny the grievance.[2]

AWARD

The grievance is denied.

Terry A. Bethel

Terry A. Bethel, Arbitrator
April 2, 2017

[2] The Union cited several other cases which it contends show that violation of an LCA does not necessarily lead to discharge. But in each of those cases, the Board of Arbitration found that the employee had *not* violated the LCA. In USS-45,699, the Board accepted an employee's explanation that she did not purposely avoid a drug test; in USS-45,704, the Board decided that an employee was unable to get to work because of a snow storm that blocked his driveway; and in USS-46,840 et.seq., the Board said there was no showing of a safety violation when an employee injured her ankle by stepping into a divot. In the instant case, however, Grievant was negligent and his negligence contributed to the accident. Thus, there was a clear violation of his LCA.