IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
INDIANA HARBOR

And ArcelorMittal Case No. 85

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1010, USW

OPINION AND AWARD

Background

This case from Indiana Harbor concerns the discharge of Grievant Elton Poe for a violation of his last chance agreement (LCA). The case was tried in the Company's offices in East Chicago, Indiana on December 12, 2017. Grievant was present throughout the hearing and testified in his own behalf. The parties agreed there were no procedural arbitrability issues. The issue on the merits will be addressed in the Findings.

On September 8, 2016, Grievant signed an LCA after having tested positive for alcohol following a derailment on April 30, 2016. Grievant had also been disciplined for an alcohol violation and a derailment in May 2015. Grievant's LCA focuses principally on Grievant's obligation to refrain from using alcohol and to obtain the necessary treatment for alcohol abuse. However, the LCA says:

> L. This agreement represents a final chance at employment for [Grievant]. 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 [Grievant's] immediate suspension preliminary to discharge. (underlining in original)
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> ...

N. In the event the Company terminates [Grievant] for violation of this agreement, the Union will have no right to challenge said termination other than to dispute the facts upon which the termination was based. The parties further agree that in the event a grievance arises challenging the termination made pursuant to this agreement, an arbitrator's jurisdiction will be limited to a finding of fact of whether [Grievant] violated this agreement. Should an arbitrator find that [Grievant] violated this agreement he/she shall have no authority to modify or otherwise vary the discipline imposed by the Company.

...

The dispute in the instant case arose on June 5, 2017, when Grievant derailed his train after running over a derailer. There is no contention in this case that Grievant violated any of the alcohol-related provisions of his LCA. Rather, the Company contends that by derailing his train, Grievant violated rules that prohibited running over a safety device, not protecting the train, and neglect or carelessness in the performance of his duties.

On June 5, 2017, Grievant was assigned to take empty hoppers from the north rail dump, to set some of them on the No. 7 blast furnace high line, and then to take the remainder of the hoppers to the south yard. As required, Grievant obtained clearance before entering the yard. He proceeded to the north rail dump and got the cars, and he placed empty hoppers on the high line. As he was leaving the high line to proceed to the south yard, Grievant ran over a derailer and derailed his train. The derailer had been taken off the tracks by a no. 7 blast furnace (7BF) employee before Grievant entered the high line, but the employee put the derailer back on after Grievant entered. Although not stated expressly at the hearing, the Company's expectation apparently was that once Grievant finished on the high line, he would take a different route to the south yard that would not necessitate going back over the area where the derailer had been removed. However, Grievant elected to go out the way he had come in. He had not been notified that the derailer had been put back on, and he derailed when he hit it.

There was a dispute at the hearing about the proper procedure to use when rail employees are assigned to take materials to 7BF. The Union introduced a document headed "Temporary Work Instruction for Internal Logistic Rail bringing Raw Materials to 7BF," which was dated December 7, 2016 and signed by Company and Union representatives. The procedures say that the derails are not to be put back on until the train taking material to 7BF has left the yard, which was not what happened in the instant case. The Company does not contest the authenticity of the document. Nor did it claim at the hearing that the procedures had been followed. But, the Company says the document is irrelevant because, even if the derailer should not have been put back on, Grievant should have seen the warning sign and/or the warning light, which would have told him the derailer was in place. Thus, the Company says it was Grievant's inattention or negligence that caused the incident, not the failure to follow certain procedures.

The Company showed a video taken from inside the cab of the train. It shows Grievant sitting in the engineer's seat looking in the direction of travel. The derailer sign is visible in the video. The Company introduced a still picture of the sign, although it apparently was not taken on the day of the incident. Grievant claimed the sign had been wiped clean before the picture was taken. Although the sign is visible on the video, the Union claims it could be seen only because the video in the cab was taken by an infrared camera, which enhanced its visibility. The Union points out that the cab itself is dark, but both Grievant and the inside of the cab could be seen clearly in the video because of the infrared camera. There is also supposed to be a flashing blue light on the sign. Grievant claimed the light was not working, but Manager of Rail Operations Tom Piotrowski said no one had told him anything about the light prior to the incident. The video does not show a flashing blue light. Piotrowski also said there is a headlight on the train that should have illuminated the derailer sign.

Following the incident, Shift Manager Jim Whited traveled to the scene and spoke to Grievant and the conductor. He completed a document titled "Derailment Investigation Report." The "Description of the Derailment" section reads as follows:

> 111 crew shoved 24 x 4 out of the N. rail dump and set 14 to the hiline. After setting the hiline, the crew tried to pull back though the rail dump and ran over the north rail dump derail

The report was signed as Reviewed and Approved by Jim Zima, Process Manager of Rail Operations. In addition to the investigation report, Whited had Grievant complete a statement, which reads as follows:

> On the above date [6-5-17] we were shoving cars to the high line from 1 west on our way back the rail dump the derail on (sic) without notifying us it was on there was no flag or blue light on the track, they took them off and put them on without notifying us that they were on.

On cross examination, Zima said he thought Whited interviewed the conductor in addition to Grievant. Zima said there was no written statement from the conductor. He also agreed that Whited did not complete the portion of the investigation report concerning weather and lighting. Nor does the report address the blue light issue.

Bill Calhoun, Division Manager of Internal Logistics, said he made the decision to discharge Grievant for violation of his LCA. He said he had seen both the investigation report and Grievant's statement before making the decision. He also said he attended the step 2 and step 3 meetings and the Union did not raise any due process claim at either one.

Grievant said a 7BF employee took off the derailer before he entered the high line. After the derailment, Whited approached him and Grievant asked who had told the 7BF employee to put the derailer back on while Grievant's train was still on the high line. Whited responded by asking Grievant why he had chosen to go out the way he had come in. Grievant said he responded, how were we supposed to know the derailer had been put back on? He also told

Whited there was no light on the flag. Grievant said Whited walked away from him and talked on his phone. Whited sent Grievant for a fitness-to-work test (which he passed) and then had him complete the statement quoted above. That was the only investigation he was aware of, Grievant said. Grievant testified that the north rail dump and the high line are in the same yard, and that he had clearance to be in the yard. Thus, Grievant said the derailer should not have been put back on the track leading out of the high line while he was still in the yard. The conductor testified that management tells train crews if they are to leave the yard by a different route than they entered, which did not happen here. The conductor agreed with Grievant's testimony that the blue light was not functioning.

Whited did not testify. Darryll Reed, Grievance Chairman, testified that he spoke to the employee who had put the derailer back on – who was out of the country on the day of the arbitration hearing – who said Whited had told him to put the derailer back on once the train pulled into the high line. A Union Representative for 7BF Raw Materials testified that he knows the blue light was not working on the derailer at issue. He said the crew leader told him they were trying to fix that light and others, but they did not have any replacements. He also said the pole lights for that area had been burned out for more than a year. The witness said he had complained to his supervisor about it, but nothing had been done.

Positions of the Parties

The Company argues that Grievant should have been in a better position to see the track in front of him. Rather then sitting in the engineer's seat, he should have looked out the door or stood on the platform outside the cab. Grievant, after all, knew he was on a last chance agreement. Moreover, the Company says common sense should have told Grievant that he

needed to pay attention to where he was going. Also, Grievant cannot shift the blame to someone else, the Company insists. Grievant had the responsibility to look where he was going, even if there was no blue light and even if no one had told him the derailer was back on. Grievant continued to have the responsibility to operate safety once he was in the yard. And, the Company points out, this was not a new derailer, so Grievant knew it was there.

The Company challenges the Union's ability to raise the lack of a thorough investigation for the first time in arbitration. But even so, the Company says, its investigation was proper. Grievant reported the derailment and the supervisor went to the scene. He spoke to both Grievant and the conductor and he obtained a statement from Grievant. Nothing more was required. The Company also cites cases – including one from Indiana Harbor – that say an employee on an LCA is not absolved from blame, even if other employees were also negligent.

The Union cites an Armco Steel case from Arbitrator Gabriel Alexander where he observed that one cannot establish negligence merely because an accident occurred or because an employee erred in his judgment. Rather, the Company must show the employee did not comply with a standard that was, or reasonably should have been, known to him. The Company cannot meet that burden in this case, the Union contends. Grievant had been cleared to enter the yard and at the time the derailment occurred, he had not ceded the yard. Thus, the derailer within the yard should not have been put back on without any notification to him. There was testimony from the Union that Whited told the 7BF employee to put the derailer back on. That must be true, the Union says, because Whited was present throughout the hearing and offered no rebuttal. Moreover, the Company had been informed that the blue light was not working, but still had not replaced it.

The Union argues that the Company did not conduct a proper investigation of the incident. Although Whited went to the scene and spoke to the employees for about two minutes, there was no accident investigation. The Union claims Calhoun testified that he made the decision to discharge Grievant solely on the basis of Whited's brief report. Thus, Grievant was never accorded due process. The Union cites Daugherty's seven steps of just cause and notes the importance of a thorough and unbiased investigation.

Findings and Discussion

There is no merit to the Union's claim of an improper investigation. The argument that there must be a thorough investigation stems from Carroll Daugherty's oft cited seven-steps-of-just-cause. Despite the prominence the seven steps have received, the tests are probably relied on more often by advocates than by arbitrators. And that is especially true of the investigation step. John Dunsford, a past President of the National Academy of Arbitrators, has noted that the thoroughness of the investigation and the need to separate the investigator from the decision-maker were undoubtedly products of Daugherty's experience as a railroad arbitrator, where there was no de novo arbitration hearing. The arbitrator did not hear testimony or make factual findings; rather, he acted in an appellate role and reviewed the disciplinary process the employer used.[1] When a final disciplinary decision is based on the results of an investigation instead of on facts adduced at arbitration, it is easy to understand why the investigation needed to be exhaustive, and why the investigatory and disciplinary processes needed to be separated. But this case, like almost all labor arbitrations, is different; Grievant had a hearing de novo in

[1] Dunsford, John E., *Arbitral Discretion: The Tests of Just Cause: Pt. I*, 42 NAA 23 (1990). Another past President of the Academy has referred to Dunsford's critique as "critically convincing." See, Nolan, Dennis R., *Standards for Discipline and Discharge*, in St. Antoine, Theodore J., Ed., *The Common Law of the Workplace, The Views of Arbitrators*, 2nd ed., at p. 171.

arbitration and the witness' testimony allowed me to make factual findings about what happened. Unlike the railroad cases that influenced Daugherty, my authority is not limited to determining whether the investigation was thorough.

That does not mean no investigation was required. Another past President of the National Academy of Arbitrators has argued that there must be "a meaningful, more than perfunctory factual investigation."[2] That standard is easily satisfied in the instant case. There was no question that a derailment occurred while Grievant was operating the train. Whited went to the scene and gave both Grievant and the conductor an opportunity to tell him what happened. He then obtained a statement from Grievant. Contrary to the Union's position in its closing argument, Calhoun testified that he had seen both Whited's derailment investigation report and Grievant's statement prior to deciding to discharge him. There was no evidence that anyone else saw the incident. It appears to be true that the Company did not conduct an accident investigation, which it apparently usually does. But the Company's practice of an accident investigation should not be confused with the Daugherty's thorough investigation "requirement." There is, in fact, no required pattern or forum for an investigation, probably even for those few arbitrators who might apply the investigation step strictly.[3]

It is true, as the Union apparently believes, that the Company could have spent time investigating whether the blue light was out on the derailer, or verified whether Whited or someone else ordered that the derailer be put back on. But from the Company's perspective, those factors did not matter. Thus, as I understand the Company's contention in this case, it

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[2]Oldham, James, *Due Process in Discipline and Discharge*, in St. Antoine, supra n. 1, at 208.

[3] It may be worth noting that the so-called seven steps of just cause apply to whether there was just cause for a discharge. But, as will be discussed later, this is not a just cause case. Rather, the issue here is simply whether Grievant violated his LCA. Even so, as a matter of due process, I would expect the Company to conduct a meaningful, non-perfunctory investigation of the facts before discharging Grievant, which it did in this case.

discharged Grievant because he ran over a derailer he knew or should have known was there, and which he should have avoided even if there was no blue light and even if he had reason to believe the derailer had not been put back on. From the Union's perspective, however, the blue light and what it calls a communication failure concerning the derailer are important factors in whether Grievant was negligent.

At base, the Union argues that even though it was Grievant's responsibility to never run over a safety device and to protect the train, his ability to do so was compromised by factors beyond his control. The blue light – which was probably the most effective notice that the derailer was set – was not working, the Union contends. Moreover, the Union says no one told Grievant the derailer had been put back on and it was reasonable for Grievant to assume it had not been because he was still in the north yard when he headed out of the high line. I accept that both of these facts are true. Thus, while the Company did not need to investigate whether the blue light was operable to satisfy any due process requirement, it did need to offer rebuttal to Grievant's and the conductor's testimony that the light was not working if it wanted to counter the Union's defense. Its failure to do so is sufficient to convince me the light was not working. I am also satisfied that no one told Grievant the derailer had been put back on.

Although the Union obviously disagrees, I cannot find that these factors spared Grievant from any responsibility for the accident. Even though the light was not working, the sign was in place and Grievant knew there was a derailer in that location. The Union argues that the absence of a light made it impossible for Grievant to see the derail sign. The Union acknowledges that the sign is visible in the still shot from the video, but it claims that was the result of using an infrared camera. The camera captured the inside of the cab, which was dark, but provided enough illumination to see both Grievant and the conductor. There was no evidence at the

hearing about the extent to which an infrared camera would illuminate something outside the cab that was also subjected to other light. That is, even though there were no lights in the cab, there was a light on the front of the engine which a Company witness said would have illuminated the sign. Grievant did not claim the train light was inoperable. Thus, on this record I cannot find that the sign was visible in the video simply because of an infrared camera.

What most likely happened is that when Grievant left the high line, he assumed – perhaps understandably – that the derailer he had gone by just ten minutes before would still be off. Had the blue light been working, Grievant undoubtedly would have seen it and stopped, even though he believed the derailer was not on the track. It is reasonable to conclude that Grievant's expectation that the derailer was off the track affected his level of concentration on what was ahead of him. There was no testimony of any problems with visibility that night. Grievant did not claim the area was foggy or that his vision was otherwise obscured. Thus, with a light on the front of his engine, if he had been paying close attention he should have been able to see the sign even without the light. And, someone in Grievant's position should have been paying close attention. Not only would failing to stop cause a safety hazard, but Grievant also knew that he was working under an LCA, and he knew he had derailed a train twice before. Nevertheless, if this were a regular just cause case, I might be inclined to see the lack of a light and the failure to communicate about the derailer as extenuating factors that would warrant a reduction in the discipline. Stated differently, while there might have been cause for discipline, the extenuating factors would mean there was not cause for discharge.

The problem is that this is not a case in which I am to determine whether there was just cause for discharge. In exchange for Grievant's reinstatement under the LCA, the Union and Grievant agreed that any subsequent violation of a policy or rule would justify suspension

preliminary to discharge. And, of significant importance, the LCA limits the arbitrator's jurisdiction to whether Grievant violated the LCA, which means whether he violated a rule or policy. It is important to understand that I need not find that Grievant's conduct would justify discharge in order to determine that he violated his LCA. If he violated a rule, then he violated his LCA irrespective of whether that rule violation, standing apart from an LCA, would be just cause for discharge. As I observed in ArcelorMittal Case No. 82, an employee on an LCA has no margin for error and his negligence is not excused because others might also have been at fault.

I find that Grievant violated Rail Safety Rules and Operating Procedure 1-19, by running over a safety device, and 1-32 by failing to protect the train. I also find that he violated Personal Conduct Rule 2.P: "Neglect or carelessness in the performance of duties assigned or in the use of Company property." Having determined that Grievant violated his LCA, my authority is exhausted. I do not have the right to modify the discipline.

AWARD

As explained in the Findings, Grievant violated his LCA. Therefore, the grievance is denied.

Terry A. Bethel
Terry A. Bethel
January 16, 2018