IN THE MATTER OF THE ARBITRATION	)	OPINION AND AWARD
	)	
Between	)	**RONALD F. TALARICO, ESQ.**
	)	**ARBITRATOR**
ARCELORMITTAL	)	
	)	Grievance No.: BF-18-42
and	)	
	)	
UNITED STEELWORKERS	)	**Case 94**

GRIEVANT

Thomas Stout

ISSUE

Termination

HEARING

April 2, 2019
East Chicago, Indiana

APPEARANCES

For the Employer
John Klinker
Project Labor Relations Representative
Labor Relations
ARCELORMITTAL USA

For the Union
Jim Flores
Staff Representative
UNITED STEELWORKERS
District 7

ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esq., was mutually selected by the parties to hear and determine the issues herein. An evidentiary hearing was held on April 2, 2019 in East Chicago, Indiana at which time the parties were afforded a full and complete opportunity to introduce any evidence they deemed appropriate in support of their respective positions and in rebuttal to the position of the other, to examine and cross examine witnesses and to make such arguments that they so desired. The record was closed at the conclusion of the hearing. No jurisdictional issues were raised.

PERTINENT CONTRACT PROVISIONS

ARTICLE FIVE – WORKPLACE PROCEDURES

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Section J. Management Rights

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

In the exercise of its prerogatives as set forth above, the Company shall not deprive an Employee of any rights under any agreement with the Union.

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RAIL SAFETY

1. Purpose

1.1. The goal of Indiana Harbor is to establish and maintain a safe working environment for all employees, visitors and contractors who have to operate rail equipment. Indiana Harbor Health

and Safety will develop best practices and safe operating procedures to maintain a safe work place. Divisions are responsible for developing safe practices and procedures for movement within the division.

2. Scope

2.1 The contents of this document apply to all employees of ArcelorMittal Indiana Harbor who have rail movement in their division. All safe practices, procedures and rules shall be determined based on a HIRAC.

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5. Requirements and Procedures

5.1 Universal Safety Rules

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5.1.13. Equipment operator must always be aware of the ground person's location. In unsure, DO NOT MOVE THE ENGINE.

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5.1.17 Always expect the movement of trains, engines or cars at any time on any track from any direction.

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5.1.25 PROTECTING THE EQUIPMENT – It is the operators' responsibility to protect the movement of the train (head end protection). They must be in a position to control the movement of the equipment and at the same time warn pedestrians, trackmen, etc. along the tracks who may be in danger.

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5.1.30 When walking, employees must remain aware of their surroundings; not engage in any activity that will distract their attention; be alert for slipping and tripping hazards; walk around obstructions and open holes; use designated walkways where provided and choose routes that afford the safest walking conditions; use extra caution while walking on ballast and uneven ground especially in icy and snowy conditions or when visibility is reduced or when stepping on crossties.

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5.1.32 When walking between a gap in parked cars or rail equipment, there must be a minimum clearance of 20 feet between (2) two pieces of equipment.

5.8. Loading and Unloading

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5.8.4 Be aware of load movement at all times.

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5.8.7 Ensure tracks are clear of people and obstructions prior to moving cars.

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5.14. Working between cars

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5.14.5 Do not go between cars without informing the train operator. Confirmation must be received from train operator before proceeding.

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IH3 & 4 BLAST FURNACE DEPARTMENT
RAIL SAFETY RULES AND OPERATING PROCEDURES

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JOB PROCEDURE:

Basics:

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5. Protecting the Locomotive – It is the Operator's responsibility to protect the movement of the Locomotive. They must be in a position to control the movement of the Train and, at the same time, any personnel along the tracks who may be in danger.

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Radio Use and Care

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- **When asked for permission to cross tracks under your operation, clearly identify the individual/s who has authorization.**
- **All communication should be done verbally.**

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Personal Conduct Rules

1. **Management requires the cooperation of its employees in its efforts to make every employee familiar with all Plant safety and operating rules, in order that accidents may be prevented and effective performance promoted.**

2. **The following offenses are among those which may be cause for discipline, up to, and including suspension, preliminary to discharge.**

. . .

P. Neglect or carelessness in the performance of duties assigned or in the use of Company property.

BACKGROUND

The Employer is ArcelorMittal USA with Plant facilities located in East Chicago, Indiana. The Union, United Steelworkers, Local 1011, is the exclusive collective bargaining representative for all production and maintenance employees at the Plant. The Employer and Union have been parties to a series of collective bargaining agreements over the years the most recent of which is effective September 1, 2015. The Grievant is Thomas Stout who at all times pertinent to the within matter held the position of Operating Technician at the IH 3 & 4 Blast Furnaces with a plant service date of February 28, 2005.

On the morning of September 24, 2018 the Grievant was operating a locomotive with a remote control box along the highline, which is an elevated track system at the IH 3 & 4 Blast Furnaces. Grievant was part of a crew which was assigned to unload "nut coke" on the highline along with Ron Mulller, who was the unloader helper, and Logan Hubbard, who was training as the unloader helper with Muller. At that time, in an effort to not fill an adjacent coke pocket which was out of service, the Grievant had to move/align the locomotive south over the receiving bin. However, without any notification to the Grievant, Muller exited the work platform, and placed himself in between the hopper cars with both feet on the rail just seconds before the hopper cars began to roll as part of the necessary alignment over the receiving bins. One of the cars rolled over Muller's foot causing severe injury to the extent that he eventually lost the majority of his foot.

The Grievant was suspended preliminary to discharge on September 27, 2018. His suspension was based on violations of the Rail Safety Program, OSJP's, and Personal Conduct Rule 2P which prohibits "neglect or carelessness in the performance of duties assigned or in the use of Company property". The Grievant's suspension was subsequently converted to discharge on October 3, 2018. He was not permitted to continue working under the "Justice and Dignity" provisions of the Basic Labor Agreement.

ISSUE

Whether the Employer had just cause to terminate the Grievant? If not, what should be the appropriate remedy?

POSITION OF THE EMPLOYER

Mr. Arbitrator on September 24, 2018 while operating a locomotive on the IH 3 & 4 Highline, the Grievant failed to follow procedures which he had been trained at and severely injured Ron Muller. As OSJP-309 says any time a co-dependent operator moves a locomotive, he must communicate with his unloader to ensure they are aware of the upcoming movement. This language clearly demonstrates that communication must occur before each individual movement of a locomotive. By his own admission, the Grievant did not communicate his upcoming movement to Ron Muller on September 24th. As he said, he felt there was "no need". Instead, despite being unaware of Mr. Muller's location, prior to the adjustment, the Grievant moved the train without notifying Mr. Muller. OSJP-309's requirements of communication is that anytime an Operator moves a locomotive he is to ensure the unloader is aware of the upcoming movement. This is only one of many procedures violated by the Grievant on the day

in question. You heard about the Plant Rail Safety Program following departmental safety procedures and the numerous segments therein which the Grievant violated on September 24th.

Mr. Arbitrator, the purpose of procedures like these are to ensure a safe and healthy work place. Locomotives are inherently dangerous. If anyone should know this it is the Grievant. He is trained and is qualified as a locomotive operator. On the day of the incident, he was the most experienced individual in the area. The crew is responsible for training an employee with less than three months service. He chose not to follow the procedures with terrible results. Ample documentation has been presented showing that the Grievant was trained on locomotive safety and the procedures in question. You have been presented with the Grievant's records from the Pilot Training Program including the exam he took acknowledging the importance of safely operating around people. You have been presented with the Grievant's Training Matrix showing his training on departmental safety drills as well as the procedure for coke unloading and you have also been presented with documentation of the Grievant's retraining and the Department Rail Safety Rules and the coke unloading procedure within two years of him being terminated. The Union did not contest any of that. Nevertheless, the Grievant elected to disregard these procedures on September 24, 2018. He did not communicate to ensure that his unloader helper knew of the upcoming train movement. He did not protect the movement of the locomotive. He did not operate his locomotive in a safe fashion.

The Union discussed the updating of OSJP-309 following the incident. In response the Company will direct your attention an Award 98-07809 out of the Rock-Tenn Company. In that Award it was noted that the updating of instructions following a serious incident does not mean that but for those items which were adjusted in an updating procedure following the occurrence that the incident would not have taken place. OSJP-309, as written on the day of the incident,

clearly required employees to communicate any time they move their locomotive to ensure those in Mr. Muller's position are aware of the upcoming movement. The Grievant did not do so. As there are in tens of awards, there is a common law rule that a negative inference should not be drawn against a party because they take additional precautions following an accident to ensure that another accident does not take place. That rule should be applied here today.

As for Mr. Muller he should not have stepped on the rail. But his action by no means negate those of the Grievant. The Grievant was the one responsible for that locomotive. He was the one operating the control box. He was the one who stopped the locomotive, disembarked, opened the door and then caused the locomotive to move again. Had the Grievant followed procedures and ensured Mr. Muller was aware of the upcoming movement, we would not be here today. The Grievant had a responsibility to communicate his upcoming movement to Mr. Muller. He failed to fulfill that responsibility and there were dire consequences as a result.

Mr. Arbitrator the Grievant's testimony throughout this matter was suspect. The Grievant waivered on whether he saw Mr. Muller before moving. We heard him admit he did not communicate the move to Muller as he felt there was "no need". And we heard how he acted to move the locomotive again. Even taking into account the Union's argument regarding an "adjustment" an adjustment is a move. And that falls squarely within OSJP-309 as well as all other safety drills discussed today.

Mr. Arbitrator the Grievant's discharge was justified. An investigation was conducted immediately after the incident along with the formal investigation the following day. All before the decision was made to discharge the Grievant. In making this decision, the Company took into account the severity of circumstances and determined that discharge was the appropriate recourse. The fact that Mr. Muller has not yet been interviewed due to his unwillingness to

speak on that is a non-issue. Nothing he may say will contradict the underlying facts of which the Union has not disputed. Mr. Muller was operating as a coke loader operator on the day. He was fully trained and qualified on this job including safety procedures such as OSJP-309. And Grievant caused the locomotive to move crushing Mr. Muller's foot without communicating his upcoming movement.

The Company would also like to direct your attention to US Steel Award 45-110 through 112 at its Clairton Works facility. Out of its Clairton Works facility, this case has striking similarities as this case here. In the Clairton Works case, an employee with nearly the same seniority as the Grievant was discharged for committing an unsafe act. Specifically, the employee at the Clairton Works case failed to follow procedure for the operation of heavy equipment and struck another employee as a result. The Arbitrator noted that the employee who was struck had acted in an unsafe manner as Mr. Muller did here and ruled that one employee's contribution to an occurrence does not excuse another from failing to perform his duties and that failure resulted in an accident. The arbitrator in the Clairton Works Award took special note of the risk of death or grave physical injury much like what occurred to Mr. Muller and his foot here, and upheld the discharge.

Finally, the Company directs your attention to U.S. Steel Work 44 719 through 720 out of its Minnesota Orr Operations. In that case, an employee with more seniority then the Grievant and citable discipline history was discharged for careless operation of a vehicle. In upholding that discharge, the arbitrator referred to the operator's duty of care stating that the task at hand was "relatively simple but critical" and that there was "no acceptable margin for error" due to potential for "great damage and harm to others" if the task was performed improperly. That is the standard which should be applied here today. As a result of the Grievant's error in a

relatively simple yet critical operation, Mr. Muller was gravely harmed. His foot up to his heel had to be amputated. He has not been able to return to work for over six months and he will be physically disabled for the remainder of his life, all as a direct result of the Grievant's blatant disregard for policies and procedures which are set in place to keep employees safe.

For these reasons, the Company respectfully requests that you deny this grievance.

POSITION OF THE UNION

Mr. Arbitrator the evidence and testimony today show very clear that Mr. Muller's actions are the reasons why the incident happened. The video clearly shows that this movement was a simple move with an adjustment, and nothing more. The Company acknowledged that, when the movement started, the Operator was in compliance with the procedure cited. The fact that he overshot the pocket and had to make a realignment was common. It happens all the time. Its regular and routine. It does not require an employee to get the attention of the other employee. It happens and it happens quick. It's fluid.

You heard testimony from the only witness on the site, Mr. Logan Hunter. He testified that this movement happened very fast. Within seconds from Mr. Muller placing himself on the track the train moved. It clearly indicates that this was a consistent move for realigning. You heard testimony from the trainer, Michelle Jones, that adjustments happen all the time. It is part of the move. It is essentially pulling your car into a parking spot and then moving to adjust so that you park appropriately. That is what happened here. To say that it is two moves and requires communication is ludicrous. Absolutely silly.

Michelle Jones testified about the delay on the box. That went unrebutted by the Company. That clearly establishes that that delay in time clearly shows that that was a fluid

move. The video shows there was twenty seconds from the time the train stopped to the time that the Operator made the adjustment. Ten seconds of that you have to eliminate because of the delay. So within ten seconds it is clear and very possible that this was a one move situation, overshot and put back in place. In fact, Company witness Pat Mathis, testified that there was a delay as well. The testimony of Logan Hubbard on the time was not rebutted by the Company. He was very credible.

The timeline that the Union provided as to the video was unrebutted by the Company. It is clear and the evidence on the video speaks louder than anything. The Company wants to talk about credibility, Mr. Stout's credibility. But all you have to do is rely on the video itself. The video itself is credible. The discussion of adjustments is not needed. Once again, that was not rebutted by the Company. It is clear it happens. It is part of the business. It is part of operations that you have to make adjustments. It is also a fact that Mr. Muller, himself, is the only person here, unfortunately who is responsible for the injury that occurred. And, as of today, the Company confirmed for whatever reason Mr. Stout is the only individual who has been disciplined on this fully acknowledging that the other party was responsible for his injury as well. Simply put, Mr. Arbitrator, the Company disciplined the wrong person. And by way of doing that it is tantamount to disparate discipline.

There is no dispute between the parties that Mr. Muller was trained. In fact he was trained in every aspect that Mr. Stout was. The testimony from the three individuals who performed on-the-job training was unrebutted by the Company. In fact, the Company reached out and stipulated to that as true and accurate. And the Union could only have called one witness and his testimony should be given the greatest weight as to what happened. He was an employee with less than three months of time on the job. He knew in a split second that the actions of Mr.

Muller were wrong and essentially unavoidable when the engine moved. He also testified that there was no radio communication and that Mr. Muller did not communicate via the radio. He had a radio on but no communication was made or an attempt of communication by Mr. Muller to get the attention of the Operator. That in itself is a core rule when working around locomotive. A core rule. There were no other actions by Mr. Muller to get the attention of the Operator which is imperative. The operator and Mr. Muller had worked together for over a year doing this very same job. The Grievant testified that adjustments are made all the time. These are trains. They do not stop on the dime. Clearly over a years time, Mr. Muller and Mr. Stout had this happened and at no time prior to that did Mr. Muller ever enter the tracks. Unfortunately, on this date, for whatever reason, Mr. Muller made that mistake and it resulted in his injury.

The Union asks that you review the facts and details and when you do review the facts and the details that you rule in favor of the Union and grant this grievance. And if you feel that for some reason, there is some culpability on the part of Mr. Stout, then you have the authority to issue an appropriate level of discipline. Termination is not appropriate in this case. In fact, it is a strong belief of the Union that no discipline is required in this case because, once again, Mr. Stout followed the procedure. We ask that you make Mr. Stout whole in all aspects including a return to the job.

FINDINGS AND DISCUSSION

Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority, other contractual benefits and reputation are at stake. Because of the seriousness of this penalty, the burden is on the Employer to prove guilt of wrongdoing. Quantum of proof is essentially the quantity of proof required to convince a trier of fact to resolve or adopt a specific

fact or issue in favor of one of the advocates. Arbitrators have, over the years, developed tendencies to apply varying standards of proof according to the particular issue disputed. In the words of Arbitrator Benjamin Aaron, on some occasion in the faraway past, an arbitrator referred to the discharge of an employee as "economic capital punishment". Unfortunately, that phrase stuck and is now one of the most time honored entries in the "Arbitrator's Handy Compendium of Cliches". However, the criminal law analogy is of dubious applicability, and those who are prone to indiscriminately apply it in the arbitration of discharge cases overlook the fact that the employer and employee do not stand in the relationship of prosecutor and defendant. The basic dispute is still between the two principals to the collective bargaining agreement. In general, arbitrators use the "preponderance of the evidence" rule or some similar standard in deciding fact issues before them, including issues presented by ordinary discipline and discharge cases such as within.

It goes without saying that the operation of a steel mill is likely one of the most dangerous manufacturing operations that exist. Add to those dangers the operation of a railway system through the Plant to deliver raw materials and transport finished product to customers. With those conditions in mind the goal of the Company is to establish and maintain a safe working environment for all employees, visitors and contractors. As such, it comes as no surprise that voluminous safety rules and regulations have been promulgated to ensure a safe work environment for all. Moreover, consistent with those objectives the Company conducts continuous training with regard to safe operating procedures for all assigned duties. In fact, numerous exhibits demonstrate the extensive degree to which the Company provides training and retraining to all employees involved in the subject rail movement activities among other work functions.

Grievant has been accused of violating the Company's Rail Safety Program as well as various IH 3 & 4 Blast Furnace Department OSJPs (Operating Safe Job Procedures) and Personal Conduct Rule 2P with respect to the tragic incident that took place on September 24, 2018 where an employee lost a substantial portion of his foot when it was run over by a railcar. Grievant was the locomotive operator at that time and was using a remote control box to guide the train's movements. There is no dispute that Grievant received and successfully passed various training procedures adequately equipping him with the ability to safely perform his rail system duties. However, despite all of the comprehensive safety training that has been provided to all employees, "accidents" can and still do happen without necessarily being the result of "neglect or carelessness in the performance of assigned duties" as is set forth in Personal Conduct Rule 2P.

There is no question that the Grievant was the only employee controlling the locomotive that unfortunately and tragically ran over the foot of nut coke unloader helper Ron Muller. The Company's argument in support of discharge, succinctly, is that Grievant was well trained in all of the safety procedures involved when an operator moves a locomotive and, most importantly, that he failed to "communicate" with his unloader to ensure the unloader was aware of the upcoming movement. The Company admits that the requisite "communication" can take many different forms but emphasizes that some form of communication must be given before each and every movement of the locomotive. Grievant admits that he did not communicate this particular alignment/adjustment movement over the hopper to Muller because there was no need to do so since he had actually observed Muller's location. However, Grievant obviously was unaware that Muller at some point had exited the platform and had his feet on the track.

Michelle Jones, who has been a locomotive trainer since 2014, testified that it is generally not possible to align a locomotive precisely over a bin in one stop, and operators always have to back the locomotive up or move it forward ("adjust") in order to be aligned directly over the bins. Therefore, small adjustments are typical and expected moves and are not called out over the radio as is required for other activities. Aligning over the bin is essentially one fluid movement and not two separate movements. It was described as being akin to parallel parking a car in a designated space between two other cars. Other trainers stressed that the unloader helper should never step off the platform nor, most critically, never step on the track. The unloader helper trainee, Mr. Hubbard, testified that he immediately recognized that Muller's actions were wrong (having both feet on the track) and that injury was unavoidable when the locomotive moved.

Grievant testified that he had worked with Muller for approximately one year. He stated that when they were unloading the nut coke that he looked out the door and saw that he needed to make a backward adjustment of approximately 1½ feet to line up over the pocket. The Grievant testified that he had visual sight of Muller and the helper trainee before he made the small adjustment. Therefore, he felt there was no need to tell the two employees that he was making an adjustment because he saw them on the platform. However, for some inexplicable reason, Muller stepped off the platform, placed his hand on the car and stood with both feet on the rail. Muller never communicated his actions to the Grievant as he is required to. Moreover, HS – 604 5.8.4. also requires Muller, as well as the operator, to be aware of load movement at all times. It is also highly unusual for the coke unloader helper to be between the cars on the track.

The narrow issue presented within is whether the Muller incident was caused by the Grievant's carelessness and failure to follow applicable safety rules and regulations?

It is axiomatic in labor arbitration that an Employer must conduct a careful and unbiased investigation of the charge that ultimately leads to the conclusion that sufficiently sound reasons exist to discipline the employee **before** taking disciplinary action. What constitutes an adequate investigation is fact-specific although common elements include, inter alia, whether the Employer interviewed essential witnesses to the alleged misconduct.

After carefully reviewing the entire record I find there is one glaring deficiency in the Employer's investigation of this tragic incident, i.e. any information from the employee who suffered the severe injury due to the alleged carelessness of Grievant -- Ron Muller. Where an investigation is deemed to be inadequate most arbitrators will conclude that there has been a denial of "due process". That is not to say that the investigation has to be exhaustive in order to find that the Grievant was afforded due process. But, in this situation, I believe interviewing Muller would have been extremely critical for several reasons: (1) why did Muller leave the platform? (2) did Muller inform anyone that he was taking the risky action of leaving the platform? (3) did Muller have an understanding with the Grievant as to the form of communication between then when unloading the cars? (4) why did Muller step on the rail? and (5) was Muller cognizant of the fact that he was flagrantly violating established safety procedures when he stepped on the track?

The answers to these questions would very likely have had a significant impact on the Employer's assessment of Grievant's actions and whether they limited his culpability to any degree or, more importantly, whether they totally absolved him of culpability in this matter. Unfortunately, we will never know the answer to these vital questions because up to the date of the arbitration hearing, the Employer never contacted nor interviewed Muller. I understand that interviewing Muller immediately after the accident might have been difficult because of his

hospitalization and necessary surgeries. However, that does not excuse the Employer from interviewing or at least attempting to interview Muller at all. In fact, the Union was able to obtain a notarized statement from Muller that it attempted to introduce into evidence. Although I denied the admission of that document for various reasons, it does establish that Muller was physically capable of addressing the incident.

Given the significance of the evidence that could have been obtained from Muller **before** the Employer came to the conclusion that the Grievant's actions amounted to carelessness and a violation of various safety rules, I believe that failure constitutes a denial of "due process" in a very substantial way. It does not take a vivid imagination to conclude that Muller's information was a critical element of the Employer's investigation that went missing.

However, this is not to say Grievant is without fault in this matter. In fact, as the most senior and experienced member of his crew he made no effort or at best utilized an ineffective method to "communicate" with Muller, and obviously was not aware of his unusual location at the time of the incident. Under these circumstances even minor rule violations must be viewed as contributing to serious consequences.

Based upon all of the above just cause does not exist for Grievant's termination but a long-term suspension is appropriate.

AWARD

The grievance is sustained in part and denied in part. The Grievant shall immediately be reinstated to his former position but without the payment of any lost wages and benefits.

Jurisdiction shall be retained in order to ensure compliance with this Award.

Date: June 21, 2019
Pittsburgh, PA

Ronald F. Talarico, Esq.
Arbitrator