BEFORE
EDWIN H. BENN
ARBITRATOR

IN THE MATTER OF THE ARBITRATION **BETWEEN** **ARCELORMITTAL USA** **("COMPANY")** **AND** **USW LOCAL 1010** **(UNION")**	**CASE NOS.:** Grv. No. PR 18-007 Arb. Ref.: 19.333 (Suspensions)

MINI-ARBITRATION OPINION AND AWARD

APPEARANCES:

For the Company: Christopher Kimbrough

For the Union: Matt Beckman

Place of Hearing: East Chicago, Indiana

Date of Hearing: March 11, 2020

Date of Award: March 13, 2020

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I. ISSUE

Did the Company have just cause to issue discipline statements to twenty-four employees for one day and one employee for three days for failing to properly inspect Pugh ladles and marking Pre-Load/Inbound Inspection Forms which certified that the Pugh ladles had been properly inspected? If not, what should the remedy be?[1]

II. FACTS

The involved employees work at the Company's Pugh Ladle facility at Indiana Harbor. Pugh ladle rail cars (also known as "bottle" cars) carry iron at 2,500 - 2,700 degrees Fahrenheit which are transported by rail carrier from the Company's blast furnaces at Indiana Harbor to the Company's Riverdale, Illinois facility where the Company's steel shops are located. If iron cannot be transported to Riverdale, the steel operations at Riverdale are shut down and production is lost.

The Safe Job Procedure for Inbound Riverdale Mechanical Inspection (Pre-load) & Air Testing (No. 404018) requires that with the performance of a 20 psi reduction and leakage test on the cars, "[o]nce the leak test is performed, it is time to walk to the train to make sure that all brake shoes are contacting and all pistons have extended 5-7".[2] The Pre-load/Inbound Inspection Form to be completed by employees requires that employees "verify piston stroke - 5-7".[3] If within that range, the

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[1] Adam Shropshire, Jason Schaefer, Efrain Cruz, Anthony Knoll, Eric Denham, Jeremy Klekot, Paul Liapis, Curtis Canterbury, Mario Cadena, Moises Galvez, Marco Bravo, Harry Tsiakopouios, Robert Hanchar, Keith Hopkins, Armando Gomez, Victor Bermudez, Jerry Fogus, Jesus Perez, Javier Torres, Lawton Stephen, Bruce Menard, Steven Bodo, Frank Sanchez and Roland Graham received one-day discipline statements. Michael Ramirez received a three-day discipline statement on the basis of his having prior discipline on his record. Joint Exhibit 4.

[2] Company Exhibit 1 at p. 3, par. 7d.

[3] Company Exhibit 2.

employee performing the inspection is to mark "OK" on the inspection form and if not within that range, the employee is to mark the car "Bad Order" on the form.[4]

On August 10, 2018, inspection revealed that eight cars had to be taken out of service because the piston strokes were greater than the allowed seven inches. As a result, there was a delay in transporting iron to Riverdale causing lost steel production for five hours amounting to $850,000 lost production. Further inspection showed that of the 30 Pugh ladles in the fleet, a total of 21 cars were not in range for piston stroke requirements and the cars had to be taken out of service.

According to the Company's Manager of Rolling Stock and Mobile Equipment Repair, the process of movement of the ladles by rail carrier from Indiana Harbor to Riverdale and back to Indiana Harbor means that the ladles are at Indiana Harbor every two to three days. More specifically, there are six inspections performed in the round-trip process and a number of different individuals are involved in the overall transport process. The ladles are inspected: (1) prior to leaving Indiana Harbor; (2) upon receipt of the ladles by the railroad carrier (by railroad employees) for transport to Riverdale; (3) upon arrival at Riverdale (by bargaining unit employees); (4) prior to leaving to return to Indiana Harbor; (5) upon receipt of the ladles by the railroad carrier (by railroad employees) for return transport to Indiana Harbor; and (6) upon return to Indiana Harbor.[5] The determination on August 10, 2018 that the brakes were out of compliance with the piston strokes exceeding seven inches occurred at Indiana Harbor when the ladles returned from Riverdale via the rail carrier – *i.e.*, the last step in the transport process and the sixth step in the total inspection process.

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[4] *Id*. The Company asserts that the testing range is consistent with Federal Railroad Administration safety regulations.

[5] The railroad carrier's inspection is a walk through.

The Company matched the employee inspection reports to the ladles found out of range for piston stroke requirements. The reports showed the 5-7 inch inspection portions to be marked "OK". After examination of other cars in the fleet which disclosed further cars out of compliance, the disciplinary actions in this matter followed for those 25 employees assigned to inspect the ladles.[6]

The Union grieved the disciplinary actions; the parties were unable to resolve the dispute and this case was presented under the Mini-Arbitration procedure found in Article Five, Section I.10 of the parties' collective bargaining agreement.[7] Under that provision, awards in the Mini-Arbitration procedure "... shall not be cited as a precedent in any discussion or at any step of the grievance procedure."

III. DISCUSSION

A. The Standard And The Burden

Because this is a discipline case, the burden is on the Company to show just cause for the disciplinary actions issued to the employees. That burden requires the Company to make two showings. First, the Company must demonstrate that the employees engaged in the charged misconduct. Second, if the Company makes that showing of misconduct, the Company then has to demonstrate that the amount of discipline was appropriate.[8]

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[6] Joint Exhibit 4.

[7] Joint Exhibit 5.

[8] *The Common Law of the Workplace* (BNA, 2nd ed., 2005), 54-55, 190:

> In a discipline case the employer best knows why it penalized an employee, often with grave repercussions for the individual. For these reasons the burden of proof in such cases traditionally has been placed on the employer.
>
> * * *
>
> The employer bears the burden of proving just cause for discipline. That includes proof that the level of discipline imposed was appropriate.

See also, Elkouri and Elkouri, *How Arbitration Works* (BNA, 5th ed.), 905 [footnote omitted]:

[*footnote continued on next page*]

B. Has The Company Shown That The Employees Engaged In Misconduct?

The Company has not sufficiently shown that the employees engaged in the charged misconduct.

There is no dispute that upon inbound inspection after return of the ladles from Riverdale on August 10, 2018, the piston strokes on eight ladle cars were determined to be out of compliance with the 5-7 inch requirement. It is also not disputed that the resulting investigation showed 21 total ladles in the 30-ladle fleet were out of that 5-7 inch requirement.

Delays in production aside, transporting cars with brakes in non-safety compliance is very dangerous. And aside from the usual potential hazards to people and property caused by brake failures and derailments, brake failures causing a derailment during transport of molten iron as here could cause much more extensive injuries and damage. Therefore, the need to properly inspect brakes is *absolutely* crucial.

That being said and as the Company recognizes, the evidence that the disciplined employees did not perform their duties correctly when they marked the Pre-Load/Inbound Inspection Forms which require that employees "verify piston stroke - 5-7" as "OK" is based on circumstantial evidence. There is no *direct* evidence for the ladles linked to the specific employees who were disciplined, that those employees improperly performed inspections on the piston strokes and recorded the piston strokes as "OK" but that at the time their inspections were performed, the piston strokes were actually out of compliance with the 5-7 inch requirement.

[*continuation of footnote*]

> There are two areas of proof in the arbitration of discharge and discipline cases. The first involves proof of wrongdoing; the second, assuming the guilt of wrongdoing is established and the arbitrator is empowered to modify penalties, concerns the question of whether the punishment assessed by management should be upheld or modified.

The fact that only circumstantial evidence of misconduct exists does not by itself require a sustaining award. The Company correctly argues that circumstantial evidence may be sufficient to allow the drawing of inferences that misconduct occurred. *See* Hill and Sinicropi, *Evidence In Arbitration* (BNA, 2nd ed.), 9, 13:

> Circumstantial evidence is any form of evidence which raises an inference with respect to some fact other than the testimony which is offered as evidence to the truths of the matters asserted.
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> * * *
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> ... [E]vidence is not any less probative merely because it is circumstantial. ...

However, "... mere suspicion is not enough to establish wrongdoing." *How Arbitration Works, supr*a at 453.

Therefore, the question here is whether the evidence presented by the Company is "mere suspicion" or do the Company's showings rise to the level of being "evidence which raises an inference" from which it can be concluded that misconduct occurred? Because of the timing of when the out-of-range piston strokes were discovered and because a number of different individuals other than the disciplined employees had control over the ladles after they were inspected and departed Indiana Harbor, the circumstantial evidence in this case falls short and amounts only to "mere suspicion" that the disciplined employees did not actually properly perform their inspection duties on the *specific* cars as claimed by the Company. That is not enough to demonstrate the charged misconduct.

The Company's Manager of Rolling Stock and Mobile Equipment Repair testified that the process of movement of the ladles by rail carrier from Indiana Harbor to Riverdale and back to Indiana Harbor is a two to three day process with control of the ladles exercised at different times by multiple individuals in addition to the

employees in this matter and there were *six* inspections that had to be conducted in the process – (1) prior to leaving Indiana Harbor by the disciplined employees; (2) upon receipt of the ladles by the railroad carrier by railroad employees for transport to Riverdale; (3) upon arrival at Riverdale by bargaining unit employees; (4) prior to leaving to return to Indiana Harbor by bargaining unit employees; (5) upon receipt of the ladles by the railroad carrier by railroad employees for return transport to Indiana Harbor; and (6) upon return to Indiana Harbor by bargaining unit employees. The deficiencies in the length of the piston strokes in the eight ladles were discovered at the very last step of round-trip on August 10, 2018 – the return to Indiana Harbor. The number of ladles found to be out of compliance (eight on August 10, 2018) was high. Indeed, the total number was very high when the full fleet was inspected with 21 of 30 not meeting the piston stroke requirements. Those numbers lead to a good argument as made by the Company that it can be reasonably inferred that the ladles were not properly inspected when they left Indiana Harbor.

However, in the end, showing of "reasonable inference" of misconduct rather than "mere suspicion" of misconduct has not been shown here by the Company as required by its burden to demonstrate misconduct. In order to meet its burden, the Company must show that the *specific* employees who were disciplined failed to properly inspect the *specific* cars to which they are tied for discipline purposes. The Company has not done so. Showing that the employees performed inspections on the cars in the past or even on the day of the outbound movement from Indiana Harbor to Riverdale when the cars later came back showed out of compliance piston stroke measurements is just not enough. On August 10, 2018 when the out of compliance measurements were caught at Indiana Harbor on the return movement from Riverdale, those eight ladles had been moved and controlled over the prior several days by railroad employees (the outbound and inbound movements to and from

Riverdale) and employees at Riverdale in the steel processing procedures. Thus, the Company has shown that when the ladles *returned* after handling by others and upon the sixth and last inspection in the process, the piston strokes were out of compliance. That is just not enough to show that when the cars previously departed Indiana Harbor for the run to Riverdale the cars actually were not in compliance and were missed by the disciplined employees. The Company's showing goes not only to the ladles returning on August 10, 2018, but to other ladles in the fleet which were inspected as a result.

The Company has not shown anything more than suspicion that when the cars departed Indiana Harbor on the initial leg of the trip Riverdale, the piston strokes were not as the employees represented. Under the facts of this case and with other individuals in control of the ladles after the employees performed their outbound inspections, a suspicion – even a strong one – is just not enough to meet the Company's burden to show that the disciplined employees did not properly perform their inspections on the specific cars as charged. There were too many intervening factors and other individuals in control of the ladles to fairly conclude that the employees failed to properly inspect the specific piston strokes prior to the cars leaving Indiana Harbor as required. The Company has shown that when the cars *returned* they were out of compliance. But given the number of movements and other individuals involved in the total process of moving the iron from Indiana Harbor to Riverdale and return, the Company's showing does not sufficiently demonstrate that when the cars departed Indiana Harbor the piston strokes were out of compliance and that inspection forms completed by the employees for the specific cars were not accurate.

The same logic holds for the cars in the fleet other than those found out of compliance on August 10, 2018. Too many hands other than the disciplined employees controlled those cars after they departed Indiana Harbor. There is just not

enough evidence to show that disciplined employees did not properly certify what they contend they observed when they performed the inspections on the specific cars. The suspicion is certainly there, but there is just not enough evidence to show that the suspicion of misconduct can be elevated to a be reasonable inference of misconduct.

Misconduct has not been sufficiently shown. Just cause for the discipline has not been demonstrated. The grievance is therefore sustained.[9]

C. The Remedy

Arbitrators have a broad degree of discretion in the formulation of remedies.[10] The purpose of a remedy is to make whole those who have been harmed by a demonstrated contract violation.[11]

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[9] Given the result, the Union's arguments concerning the lack of a complete investigation and disparate treatment are moot and need not be addressed.

[10] *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960):

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

See also, Local 369 Bakery and Confectionery Workers International Union of America v. Cotton Baking Company, Inc., 514 F.2d 1235, 1237, *reh. denied*, 520 F.2d 943 (5th Cir. 1975), *cert. denied*, 423 U.S. 1055 and cases cited therein:

> In view of the variety and novelty of many labor-management disputes, reviewing courts must not unduly restrain an arbitrator's flexibility.

Additionally, *see Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57, 62, 67 (2000) [citations omitted]:

> ... [C]ourts will set aside the arbitrator's interpretation of what their agreement means only in rare instances. ....
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> * * *
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> We recognize that reasonable people can differ as to whether reinstatement or discharge is the more appropriate remedy here. But both employer and union have agreed to entrust this remedial decision to an arbitrator. ....

Finally, *see* Hill and Sinicropi, *Remedies in Arbitration* (BNA, 2nd ed.), 62 ("... [M]ost arbitrators take the view that broad remedy power is implied ....").

[11] *See e.g., Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867): [*footnote continued on next page]*

In the exercise of my discretion to formulate remedies, the remedy shall be that the disciplinary actions issued to the 25 employees shall be rescinded; reference to those actions shall be expunged from the employees' records; and the employees shall be made whole in all respects.

IV. CONCLUSION

The Company has not met its burden to demonstrate that the employees engaged in misconduct. Strong suspicion of misconduct exists, but given the number of different individuals in control of the ladles during various phases of the shipment process along with the number of required inspections and the fact that the improper variances of the piston strokes were not discovered until the last step of the transport process when the lades were returned to Indiana Harbor from Riverdale, there is just not enough circumstantial evidence to sufficiently infer that the employees improperly inspected the piston strokes on the specific ladles for the initial outbound movement of the ladles to Riverdale. The alleged misconduct was on the *front end* of the process. With the others involved in the process, catching the variances on the *back* end of the process does not mean that it has been sufficiently shown that the employees engaged in misconduct on the *front* end of that process as charged. The disciplinary actions shall therefore be rescinded and the employees made whole.

[*continuation of footnote*]

> The general rule is, that when a wrong has been done and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed. ...

See also, Calamari and Perillo, *The Law Of Contracts* (West, 3rd ed.), 591 [citing Uniform Commercial Code § 1-106; 5 Corbin § 992; McCormick, Damages 561; 11 Williston § 1338] ("For breach of contract the law of damages seeks to place the aggrieved party in the same economic position he would have had if the contract had been performed.").

However, there is a certain degree of irony here. At the hearing, the Union introduced a new "Pre-Load/Inbound Inspection Form" now utilized by the Carrier that in addition to requiring that the inspecting employee mark "OK" for verification of the 5-7" piston stroke, also requires that the employees record the precise measurements for the drive end and the idler end, thereby forcing the employees to certify that they measured the piston stroke and that the distances are within safe range.[12] The Company objected to use of this new form as constituting inadmissible subsequent remedial measures.

The Company is correct that if the change of the form to now require the employees to record the measurements of the piston stroke is a subsequent remedial measure, then the change of that form cannot be used to find that the Company failed to meet its burden. The reason for this exclusionary rule "… rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety" and therefore should not be used against a party in litigation.[13]

I have not used the new form which requires that employees record the piston stroke distance as the basis of finding against the Company and therefore the rule

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[12] *See* Union Exhibit 3.

[13] Advisory Committee Notes to Rule 407 of the Federal Rules of Evidence. Rule 407 of the Federal Rules of Evidence which prohibits use of subsequent remedial measures provides:

> Rule 407. Subsequent Remedial Measures
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> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
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> - negligence;
> - culpable conduct;
> - a defect in a product or its design; or
> - a need for a warning or instruction.
>
> * * *

These provisions are posted at:
https://www.law.cornell.edu/rules/fre/rule_407

prohibiting use of subsequent remedial measures to determine fault does not apply. The irony here is that the purpose of discipline is to send a corrective and rehabilitative message to employees that they must comply with their employer's rules – here, the requirement that they properly inspect the piston strokes on the ladles.[14] While the Company has not prevailed and the discipline has not been upheld, the purpose of the discipline given to the employees was to make certain that in the future they properly perform their inspection functions – in this case, the crucial safety-related inspection process. That purpose has been accomplished by use of the new form. Now the employees are required to record the lengths of the piston strokes. To do so, they must perform the inspection and measure the distance of the strokes. When the Company changed the form to require recording the distance of the piston strokes and even though discipline has not been imposed, that is precisely what any discipline in this matter would have accomplished (perhaps even more so) – *i.e.* to send the message to employees that they *must* properly and fully inspect the cars as required by the Safe Job Procedure for Inbound Riverdale Mechanical Inspection (Pre-load) & Air Testing (No. 404018).

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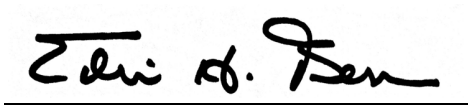
[14] *Hyatt Hotels Palo Alto*, 85 LA 11, 15 (Oestreich, 1985):

> One of the underlying philosophies of progressive discipline is that the purpose of disciplinary action is rehabilitation of an employee who has gone astray and to correct unacceptable, work related behavior. Its purpose is not punishment motivated by thoughts of revenge or "setting an example" for other employees, or to avoid legal liability for past neglects. ...

V. AWARD

The grievance is sustained. The disciplinary actions shall be rescinded and the employees shall be made whole.



Edwin H. Benn
Arbitrator

Dated: March 13, 2020