IN THE MATTER OF THE ARBITRATION BETWEEN

SUN COKE ENERGY, INC.
INDIANA HARBOR COKE COMPANY

And Jason Michelin Discharge Grievance

UNITED STEELWORKERS, USW,
AND ITS LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case from the Company's Indiana Harbor location concerns the discharge of Grievant Jason Michelin for an alleged violation of his last chance agreement. On October 18, 2018, Grievant was suspended pending termination for his failure to respond properly to door fires on the battery. On December 17, 2018, the parties entered into a last chance agreement (LCA) which provided, in relevant part:

> 2. Employee will be placed on this LCA for a period of two (2) years of active employment, commencing on the first date he returns to work....
>
> 3. Should Employee violate any of the terms and conditions stated in this LCA, repeat the conduct that led to his suspension pending termination, or violate any Indiana Harbor Coke Company General Safety and Plant Conduct Rules (2007) or other Company policies (including the Attendance Policy) during the term of this LCA, his employment will be immediately terminated. The Union and Employee understand and agree that they may only grieve and arbitrate a factual dispute related to the reason(s) for Employee's termination for violating this LCA. Neither the Union nor Employee may grieve or arbitrate whether termination is the appropriate discipline. Should the Company's factual position be

> upheld. The termination shall stand and the Union and Employee shall have no other rights of appeal....

Grievant was reinstated on January 6, 2019. On March 10, 2019 at 10:00 p.m., Grievant began a 12-hour shift that would terminate at 10:00 a.m. on March 11. His assignment included attendance at a 7:00 a.m. shift-starter meeting on the 11th. Grievant reported in time for his 10 p.m. shift on March 10th and worked until 10 a.m. the following morning. However, there is no dispute that he did not attend the 7:00 a.m. shift-starter meeting. A Union witness – Grievant was present for the hearing, but did not testify – said Grievant was in the restroom during the meeting. According to Rhonda Dehaarte, Human Resources Manager, the shift-starter meeting includes safety contacts, a discussion of issues from the previous shift, and job assignments. There is no dispute that Grievant received his job assignment following the meeting and no claim from the Company that he arrived late for that assignment. Rather, the Company contends that Grievant's failure to appear for the shift-starter meeting constituted a tardy under the Company's Attendance Policy and that being tardy violated his LCA, thus warranting his discharge.

The Company's no-fault Attendance Policy says, in pertinent part:

> **POLICY AND PURPOSE:**
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> One of our greatest responsibilities is to come to work regularly and be at your workstation, properly attired at your assigned time. Our attendance and punctuality standards are based on a no fault system. We are concerned only about the frequency of occurrences, not the reasons for absences or tardiness. Employees are expected to be at their assigned work area at the scheduled time with proper dress and wearing personal protective equipment. Failure to be dressed and ready for work at the start of the shift is considered late. Being late in reporting to work at the start of your shift or workday is the most common type of tardiness. Reporting to work late is considered tardy.... Each tardiness incident will count as one-half occurrence....

> **OCCURRENCE DEFINED:**
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> With the exception of approved leaves of absences, any absence will result in one occurrence for each day the employee is absent. Each tardy will be considered one-half occurrence...
>
> **What are the limits?** Employees are allowed up to **TWO OCCURRENCES** in a 12-month period before a counseling session and first verbal warning takes place. At **FOUR OCCURRENCES** the employee will be given a written warning and be notified that a final written warning at **SIX OCCURRENCES** is the next step in the progressive disciplinary process. A total of **EIGHT OCCURRENCES** in a 12-month period equals termination. (Bolding and capital letters in original)
>
> ...

The Company says that Grievant's failure to appear at the shift-starter meeting at 7:00 a.m. on March 11 was a tardy that constituted a violation of his LCA. Thus, on March 11, 2019, HR Manager Dehaarte sent Grievant a letter that read:

> This letter is prepared to inform you that your employment with the company is being terminated effective immediately based on the facts involved in your poor job performance and attendance on 3/11/2019 that resulted in a direct violation of your Last Chance Agreement.

A grievance over the termination led to this arbitration, which was held in Hammond, Indiana on July 12, 2019. Philip Phillips represented the Company and Matt Beckman presented the case for Grievant and the Union. The Union offered a final argument at the hearing and the Company filed a post-hearing brief, which I received on August 6, 2019.

Positions of the Parties

The Company says the only issue in the case is whether Grievant violated his LCA. That document says he "will be immediately terminated" for a violation of Company policies,

"including the Attendance Policy." There is no dispute that Grievant missed the shift-starter meeting, which means he was not, as the Attendance Policy requires, "at the assigned work area at the scheduled time...." Grievant was tardy, the Company says, which violated the Attendance Policy and, in turn, his LCA. The Company cites arbitrators' awards (including my own) to remind me that there is no issue in the case about whether there was just cause for discharge or whether Grievant's conduct was serious enough to justify discharge absent an LCA. The only issue before me, the Company argues, is whether Grievant violated the Attendance Policy; if he did, the Company insists, the discharge must stand. The Company dismisses the Union's claim that there was no violation of the Attendance Policy because Grievant's occurrence total did not subject him to discipline under the plan. The issue, the Company says, is not whether Grievant could be disciplined under the Attendance Policy; rather, the issue is whether he violated the policy and, it claims, being tardy was a violation.

The Union notes that I have said in other opinions that an employee on an LCA has no room for error; the Union insists that the Company must be held to the same standard. Although the Company claims that incurring half an occurrence is a "violation" of the Attendance Policy, the policy itself says that employees are "allowed" two occurrences in a 12-month period before any discipline is imposed. The Union says an employee does not violate the Attendance Policy until he reaches a number of occurrences that trigger discipline under the policy. That was not the case here, the Union points out. Grievant received half an occurrence for being tardy, but the half occurrence did not put him at the number of occurrences required before any level of discipline under the progressive discipline schedule. If the Company wanted to make receiving an occurrence a violation of the LCA, the Union says, then it should have used the word "occurrence" instead of the words "violate any...Company policies...." Grievant did not violate

the policy, the Union contends. The Union also points out that the parties agreed to a Letter of Understanding in 2012 that said, among other things, that the Company would "provide reasonable and appropriate arrangements for...personal needs for Employees during the course of a shift." This is relevant, the Union says, because Grievant had already worked seven hours and was in the restroom during the shift-starter meeting.

Findings and Discussion

The Company is obviously correct when it says the issue is not whether Grievant's conduct could have led to discharge absent the LCA. I understand the limitations on an arbitrator's authority when dealing with an LCA, and I have upheld numerous discharges for LCA violations that may not have warranted such severe discipline if the conduct stood on its own. I also understand that I cannot ignore the explicit terms of either the LCA or the Attendance Policy. But I do have the authority to interpret both documents in determining whether Grievant violated his LCA. The only alleged LCA violation is that Grievant violated the Company's Attendance Policy.[1]

There is no question that Grievant failed to attend the shift-starter meeting and the Union has not contended that his absence from the meeting should not be considered a tardy. The precise issue, then, is the meaning of the word "violate." It is clear from the Attendance Policy that it is intended to discourage employees from being absent or tardy, and that discipline will be assessed when those events reach certain thresholds. But, as the Union points out, some events – occurrences – are "allowed," meaning they can happen without the imposition of discipline.

[1] The termination letter Dehaarte sent to Grievant said he was being terminated "based on the facts involved in your poor job performance and attendance on 3/11/2019...." However, the Company's brief does not argue poor job performance; rather, its sole contention is that Grievant violated his LCA by violating the Attendance Policy.

Although there are arguments to be made for both sides, the more reasonable interpretation is that Grievant would violate the Attendance Policy for purposes of the LCA if he triggered a disciplinary action under the terms of the policy. An occurrence level that is allowed or permitted under the policy is not a violation, as that term is ordinarily understood. One violates a policy when he breaks it and, as noted, the Attendance Policy does not prohibit employees from having occurrences, as long as they remain below a certain level. As the policy itself says, "We are concerned only about the frequency of occurrences...." As I understand the LCA, it does not say that Grievant would have no occurrences during its two year term. Rather, the expectation was that Grievant would comply with (i.e., not violate) the Attendance Policy, which permits a limited number of occurrences.

The Company contests this interpretation in part by claiming that Grievant could have been tardy as many as four times without violating his LCA. The record does not reveal Grievant's point status at the time he entered into the LCA, or on March 11 when he missed the shift-starter meeting. But it is worth noting that the Company unilaterally imposed the no-fault attendance policy at issue in this case and it undoubtedly had significant leverage in dictating the terms of the LCA, given the severity of Grievant's conduct. Thus, if it intended to consider any occurrence under the attendance policy to violate the LCA, it should have said so expressly.

Although one might question whether an employee with Grievant's record should be rewarded with full back pay, I do not have the authority to modify the discipline in this case. Because I have found that Grievant did not violate his LCA, he is entitled to reinstatement with back pay. Grievant is to be reinstated at the same point on his LCA as he was at the time of his discharge, meaning that the expiration date of his LCA will be extended for a period equal to the time he was discharged.

AWARD

The grievance is sustained. Grievant is to be reinstated as explained in the Findings and made whole.

Terry A. Bethel

Terry A. Bethel, Arbitrator
September 5, 2019