IN THE MATTER OF THE ARBITRATION BETWEEN

MITTAL STEEL COMPANY

And Mittal Award No. 10

UNITED STEELWORKERS, USW
LOCAL UNION 1165

OPINION AND AWARD

Introduction

This case involves the discharge of Grievant Robin Jennings for gross insubordination, gross neglect of duty, restricting production, and a violation of safety rules. The case was tried in Coatsville, Pennsylvania on March 20, 2007. Patrick Parker represented the Company and Lew Dobson presented the case for Grievant and the Union. Grievant was present throughout the hearing and testified in his own behalf. The parties agreed that the issue in the case is whether the Company had just cause for discharge and, if not, what the appropriate remedy should be. The Union also says Grievant should have been granted Justice and Dignity. Although there is no dispute about the issue on the merits, the Company argues that the Union advanced arguments at the hearing that are precluded because they had not been raised prior to arbitration. Those issues will be discussed in more detail below. The parties submitted the case on closing argument.

Background

The incident at issue occurred on the 2 p.m. to 10 p.m. shift on November 29, 2006. On that day, Grievant, an Operating Technician (op tech), was operating the strand caster. At the time of the incident there was no foreman in the caster, a result of the 2002 negotiations in which the parties agreed to transfer additional work to the bargaining unit. Much of the Company's information comes from a written statement from the bargaining unit Senior Operating Technician (SOT), who was in charge of the caster on the night of November 29. Under the terms of the Agreement, the Company is precluded from calling bargaining unit employees in arbitration and, therefore, had to rely on information gained from the SOT in its investigation.

The operation of the caster was described in some detail. In brief, once the tundish is opened, the operator fills the mold and tries to keep a certain level in both the tundish and the mold. The op tech operates the strand manually until it reaches a speed of 40 inches per minute, which is when he puts it in automatic mode, where it remains until near the end of the cast. Mark Shepard, Area Manager of the Strand Caster, said in the incident at issue here, Grievant opened the heat and took the speed almost to 40 inches per minute. He then lowered the speed and asked to have the tundish lanced (also called a "shot"), a function performed by the SOT, who was directly above Grievant. Grievant told the SOT the tundish was choking, which the SOT questioned because the strand was moving at over 30 inches per minute. The SOT's statement said the strand had been going 39 inches per minute, but that Grievant cut it to 35 inches per minute and then asked the SOT to lance the submerged entry nozzle (SEN) in the tundish. Shepard said lancing the SEN is "like an emergency operation," and is only done occasionally. In any event, the SOT lanced the SEN twice, a procedure that is dangerous in

itself, not only to the SOT but also to equipment. Grievant then cut the speed to 30 inches per minute. At some point, Grievant asked for a third shot.

The SOT's statement says it did not look like there was a clotting problem with the tundish, so he went down to see what was happening with the speed. The SOT observed the lever raised high at 30 inches per minute. Grievant was not doing anything to raise the speed. Grievant told the tundish operator to lower the level in the tundish, which was apparently an indication that Grievant did not intend to, or thought he could not, operate at 40 inches per minute. The SOT, who was behind Grievant, told Grievant he wasn't doing anything to increase the speed, and the SOT told him to do so. Grievant responded that the speed would not increase. The SOT repeated the instruction, and Grievant again said the speed would not increase. The SOT then told Grievant to give him the lever, meaning that the SOT would try to increase the speed. Grievant responded that it was his job. The SOT again told Grievant to give him the lever and Grievant again refused, and then abruptly aborted the heat.

Shepard said the abrupt shut-off created a "good possibility of harm" because no one was prepared for it. Even in an emergency, he said, employees get into position for a shut off, something they were not able to do here. This created a significant safety hazard, and employees could have been burned. Molten metal could have overflowed the mold and employees were less than a foot away. Shepard also identified a document titled Caster Event Dump, which he said showed that Grievant reduced the speed from almost 39 inches per minute to 35 inches, then to 32 and then to 30. There was no indication of any mechanical problem that would have caused him to reduce the speed. Nor was there any such indication on the Caster Trend report. Shepard also said there was no need to shut off the caster because Grievant knew it would cast at 30 inches per minute, albeit not as efficiently. Aside from the safety risk, Shepard said shutting off

the cast affects the Company's sales. The Company produces steel plates and, Shepard said, it can sell all it makes. When the cast is shut down, the Company loses that product and it can never be made up.

Shepard said the Company charged Grievant with insubordination because he was twice given a direct order to increase the speed and, later, to give the SOT the lever, but he refused. He restricted production and was guilty of neglect of duty when he shut off the caster. The Company can reheat the heat, but that slows the shop and creates a gap when no steel is made. In addition, 40% of reheated heats are downgraded or scraped, although this one was not.

On cross examination, Shepard agreed that a lost heat could be made up on a scheduled downturn, assuming the caster was still in good condition. He also said employees are expected to exercise judgment and discretion. Shepard said no one but the SOT complained about Grievant's action, or told Shepard what Grievant did was wrong or unsafe, even though Shepard interviewed the other employees on the crew. The Union also directed Shepard's attention to the Warning or Suspension Discipline Notice given to Grievant, which says the length of the suspension was five days and which concludes, "Mr. Jennings is given a **five-day Suspension** with the understanding that any future infractions will subject him to progressive discipline up to and including discharge from the Company." (emphasis in original). Shepard said the matter got to discharge because Grievant refused to acknowledge any wrongdoing. If Grievant had, Shepard said, he would have been placed on a last chance agreement and not discharged. Shepard also agreed that there were still problems when the heat came back after being reheated, and it required three lances to bring the cast up to speed. He acknowledged that the Company had never given a five day suspension for aborting a heat until this case.

Brain DeHaut, Interim Division Manager of Steelmaking, reiterated the danger of aborting the heat and the problems with loss of production. He also said sending a heat back costs the Company about $3000 in lost equipment and it adds to the energy cost. He said the decision to discharge was influenced by the safety infraction and the loss of production. He also said employees had to follow the directions of the SOT since there was no foreman on site in the caster.

Grievant said the report showing he had gotten up to 39 inches per minute was wrong. He said he never got over 30 inches per minute. Grievant testified the heat was cold when it came on, which meant it could choke off. That was what happened here, he said, so he asked for a shot. He said he had been taught to put the flow at 10 inches per minute when there was a problem that needed fixed, which is what he did here. The speed was 10 inches when he shut down. Grievant also denied he was not trying to raise the speed, as the SOT claimed, and he denied that the SOT asked him for the level; he said he heard no such request. Grievant also said he never told the SOT that operating the level was his job, not the SOT's. Grievant said his job requires discretion and judgment, and he gave an example of a recent episode in which the SOT had told him to do a job, but Grievant refused and was later proven to be right; the job would have been unsafe if he had followed the SOT's direction. Grievant said the SOT was no more knowledgeable than Grievant and that the SOT was team leader solely because of seniority. On cross examination, the Company pointed out that the third step minutes don't say Grievant claimed not to hear the SOT ask for the lever. However, Grievant said his testimony at the third step was the same as at the arbitration hearing.

James Moss, an op tech, said other employees have aborted heats, including him, and have not been disciplined. He also denied that Grievant's action endangered anyone's safety,

and he said Grievant was shutting down the heat at the same instant when the SOT asked for the level. Grievant did not confirm this testimony, Moss said, because he did not hear the request. On cross examination, the Company noted that the third step minutes do not mention Moss's testimony that the request and the shutdown were simultaneous. Moss also acknowledged that after the incident he went to Shepard and told him he would have given the SOT the lever if he had been asked. Moss also denied that the level in the mold was stable, regardless of what the reports said. Moss said he looked in the mold and the level was dropping. John Miller, a Union Assistant Committeeman, said you can cast at 30 inches per minute, but that 40 inches is recommended. He also denied that the SOT could tell whether the lever was in the proper position simply by looking at it.

On rebuttal, Albert Fuller, Manager of Human Resources and Labor Relations, said he was positive that in the third step meeting, Moss said nothing about the mold level being too low. On surrebuttal Moss reiterated that he had made the comment. Fuller also said Grievant never said anything about not hearing the SOT ask for the lever prior to arbitration.

One of the procedural violations the Union raised was that the Company would not let Grievant work from December 2 through the 5, while it investigated the case. This was followed by a subsequent five day suspension once the Company decided on the appropriate discipline. The Union also alleged that Fuller contacted Grievant after the third step meeting and asked Grievant about resolving the dispute, commenting that he should not tell the Union. Fuller said when he prepared the minutes he gave a copy to Dobson, which included some of the Union's procedural arguments. Later, Dobson called back and said he did not intend to raise the procedural matters, so Fuller took them out of the final version. Dobson did not comment on those minutes. Fuller agreed on cross examination that about a week before the hearing, Dobson

called and said the Union might raise some procedural arguments, including Grievant's time off work From December 2 through 5.

The Company relies on the Union's failure to object to the omission of the Union's procedural argument from the minutes. However, the Union notes that the requirement to correct the minutes applies in the second step, but not the third. There was no second step grievance meeting in this case; the grievance went immediately to third step.

Positions of the Parties

The Company says the Union's procedural arguments are barred because the Union did not object to the minutes or demand that other information be included. The Company also relies on Article 5-I-4-c which says that at each step of the proceedings the parties will provide a "detailed statement" of facts and provisions on which it relies and, "Facts, provisions or remedies not disclosed at or prior to Step 3 of the grievance procedure may not be presented in arbitration." This bar includes not only the procedural arguments, the Company says, but also Grievant's claim that he did not hear the SOT and Moss's testimony about the mold level..

The Company says Grievant not only ignored the SOT, he also sabotaged the caster by shutting it down without reason. In addition, he created a significant safety risk for him and his coworkers. The Company says the parties agreed to give some supervisory responsibility to the bargaining unit and, if employees can ignore the SOT with impunity, then SOTs are of no value to the Company.

The Union says Fuller knew about the procedural arguments, and that nothing in the contract required the Union to insist that they be in the third step minutes. In addition, the Union claims that Article 5-I-4-c does not say the disclosure of facts and provisions must be in writing.

The Union cites in particular the Company's decision to keep Grievant off work during the investigation and then to suspend him again, which it says requires me to sustain the grievance. On the merits, the Union says the Company must prove all four alleged violations because it is impossible to say whether Grievant would have been discharged if he had committed only 1 or 2 or 3 offenses. The Union argues there is no evidence Grievant restricted production or caused the Company to lose a customer. There is no evidence that anyone felt threatened by Grievant's actions, which the Union says were part of the judgment he was trained to exercise.

The Union agreed that the Company could not call the SOT to testify, and it says the Union will not call a bargaining unit employee to testify against another bargaining unit employee. Thus, the Company was left with nothing but a statement. On rebuttal, the Company cited Moss's testimony that there were actually four employees present that day, and it asked why the Union did not call the fourth employee, since the Company could not. The Union says there is no just cause for any discipline, but certainly none for discharge. The Union also says none of the exceptions to Justice and Dignity apply in this case.

Findings and Discussion

It is not entirely clear why Grievant did not increase the speed of the strand, and why he did not give the lever to the SOT. There is no evidence of trouble between the two men, and there is nothing in the testimony that suggests Grievant was disgruntled or otherwise had some intent to damage the Company or its products. If there were such evidence, the decision in this case would be easy. The result is harder yet because of both Grievant's and Moss's testimony. Grievant's story that he did not hear the SOT ask for the lever was not credible. The same is true of his claim that the strand was actually moving more slowly than the computer report indicated.

Moss did not help Grievant by falsely claiming that the mold level was falling when the computer showed it was not. Computers are not infallible, but it is hard to believe both data sets would be incorrect the same time. In addition, I did not believe Moss's testimony that the shut down and the request for the lever were simultaneous, something he had not mentioned before the arbitration hearing.

It may be, as the Union claims, that it was not required to reduce these defenses to writing in the absence of second step minutes, but that misses the point. This was, after all, an insubordination case. It is inconceivable that the Union would not have documented Grievant's claim that he did not hear the SOT's instruction. That was the basis of the insubordination charge and, if Grievant really had not heard the direction he could not have refused to comply, which is the basis for insubordination. Moss's claim that the request and the shutdown were simultaneous might also have been a determinative defense. In addition, given the potential weight of the evidence about the strand speed or the mold level, it is simply too hard for me to believe that the Union would not have made these claims part of the written record prior to the hearing. I need not say whether the Union's failure to include this information in the record prevents it from raising the claim; it is enough to say that given the exclusion, I simply did not believe the testimony and can give it no weight.

Arbitrators sometimes say that significant disciplinary action cannot be based solely on hearsay evidence. However, steel industry arbitrators have recognized that statements from bargaining unit employees are entitled to some weight when tendered by the Company in arbitration, because the Agreement prohibits the Company from calling an employee as a witness. And that is particularly apt in this case given the absence of any management person in authority and the agreement to vest some supervisory responsibilities in the SOT. Based on the

statement and the non-credible testimony of Grievant and Moss, I find Grievant was guilty of misconduct on November 29, 2006. I need not address each alleged offense separately because each one stems from the same conduct, which had differing effects. The shutdown produced safety problems and interfered with production. The refusal to increase speed may have interfered with production also, but only for a brief period of time; only a small quantity of steel was scrapped. The refusal to turn over the level was also improper, and even though this happened before the shutdown, it was closely related to that occurrence.

There are, however, some mitigating factors. Grievant has 18 years of service (albeit mostly with predecessor employers) and has only one previous disciplinary action – a suspension for absenteeism – within the limitations period provided for by the Agreement. In addition, there was credible testimony that other employees have stopped a cast abruptly with no disciplinary action. I am also influenced by other factors, including the unrebutted allegation that Fuller contacted Grievant to offer a settlement after the grievance procedure was completed. The Union is the party to the Agreement, not Grievant, and it was the Union's decision to pursue the grievance. I am also concerned about the suspension prior to discharge, which apparently lasted 9 days. I am not willing to give either of these procedural arguments preclusive weight, but they do introduce irregularities into the discharge procedure that are worthy of some consideration. In addition, I note there was evidence that the heat was cold and, even after it was reheated, the operator had trouble with it.

I reject the Company's argument that the procedural arguments should have no weight because they were not disclosed at the third step hearing. Fuller's testimony was that he included them in the original third step minutes, but later removed them. This obviously indicates they had been discussed in the third step, meaning that Article 5-I-4-c does not preclude

the Union from presenting such evidence. The Union apparently said it did not intend to rely on them, but about a week before the hearing Dobson called Fuller and said he might raise some procedural arguments. Given the nature of the Union's procedural claims – which were either true or not – the notice was sufficient to allow the Company an opportunity to consider whether it had rebuttal evidence.

Finally, I am somewhat confused by the discipline procedure in this case. The file contains a "Notice of Disciplinary Action" dated December 7, 2006. The form indicates that Grievant was given a "Five Day Suspension Subject to Discharge," and a hearing on his case was set for December 11, 2006, the last day of the suspension. This is a common procedure in the steel industry, where the understanding is that the employer will not make the final disciplinary decision until after the hearing. On the same day, December 7, Grievant also received a different form headed "Warning or Suspension Notice," which relates the facts of the case as seen by the Company and then says in a separate paragraph, "Mr. Jennings is given a **five day Suspension** with the understanding that any future infractions will subject him to progressive discipline up to and including discharge from the Company." (emphasis in original). It is not clear from the record whether Grievant received both documents at the same time.

As the Union argues, the Warning or Suspension looks like a disciplinary decision, especially given the reference to progressive discipline, which is clearly aimed at future infractions. The confusion stems from the fact that the parties scheduled the disciplinary hearing for December 11. There would have been no need for a hearing if the Company had already made the disciplinary decision. This suggests that the Company had not yet decided on the appropriate discipline as of December 7, and that the Warning or Suspension Notice was considered to be part of the suspension subject to discharge. In addition, the Union participated

in the disciplinary hearing and there is no evidence in the record that it argued the matter was already resolved by the Warning or Suspension Notice. Although the Company's procedure created ambiguity, given the circumstances, particularly the subsequent disciplinary hearing, I will not read the Warning or Suspension Notice to be the final disciplinary decision.

In these circumstances, I am not persuaded that the Company had just cause for discharge. But it did have just cause to impose substantial discipline. As the Company points out, the Union pressed the Company to transfer more work to the bargaining unit. The transfer of some supervisory duties does not mean employees are free to ignore a direction from the SOT. I order the Company to reinstate Grievant with a last chance agreement and a 30 day unpaid suspension. Grievant is to be made whole for all losses in excess of 30 days. Given this decision, I need not consider the Union's Justice and Dignity claim.

AWARD

The grievance is sustained in part. The Company is ordered to reinstate Grievant with a last chance agreement and a 30 day disciplinary suspension. Grievant is to be made whole for all losses in excess of 30 days.

Terry A. Bethel
May 22, 2007