IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL STEEL COMPANY
INDIANA HARBOR WORKS EAST

And Award No. 24

UNITED STEELWORKERS, USW
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case from the Indiana Harbor Works concerns the discharge of Grievant Jesselyn Grady. The case was tried in East Chicago, Indiana on February 5, 2008. Bill Carey represented Grievant and the Union, and Patrick Parker presented the Company's case. Grievant was present throughout the hearing and testified in her own behalf. The parties submitted the case on final argument.

Background

On August 18, 2006, 12" Mill Day Supervisor William Finlayson received a report that Grievant, a crane operator, had struck an employee with a crane block. As a result of the incident, Finlayson told Grievant he was going to send her for a fitness-to-work evaluation, and that she was to wait for security to escort her to the clinic. He said Grievant was agitated and rambling, and denied that she hit the employee. Grievant said she would not go for a fitness-to-work evaluation, and headed for the women's locker room. Jeff Hynes, a Plant Protection

Officer, arrived at about that time, and spoke briefly with Finlayson. Hynes said he followed Grievant toward the locker room and told her she had to go for an evaluation, and that Grievant refused, saying that nothing had happened. At that point, Hynes said he told Grievant she was being insubordinate and that she needed to accompany him to the clinic. Grievant refused and continued toward the locker room.

Hynes said he told Grievant three times not to enter the locker room. Grievant went inside, and Hynes said he called to her repeatedly to come out and warned her that she was being insubordinate. At some point, Grievant left the locker room and headed toward her car. Hynes then read Grievant a Company document that is used when employees refuse to submit to a fitness-to-work evaluation The document reads as follows:

> You are required to submit to an examination at the clinic to determine your fitness to work. If you fail to submit to this examination, you will be considered to be in violation of the plant rules regarding *being under the influence of alcohol or drugs, or both*. You will be immediately removed from the plant and you will later be subject to possible disciplinary action up to and including suspension preliminary to discharge. (*italics* in original)

Grievant got in her car and, Hynes said, left so swiftly that he had to jump back to avoid being hit. Hynes followed her and testified that she drove erratically. Hynes said he had advised the gate guard to stop Grievant, but Grievant drove by the gate at a high rate of speed without stopping. All of this occurred at about 6:20 p.m.

Hynes said he received a report at about 8:00 p.m. that Grievant had returned to the plant. Hynes found Grievant's car parked at Plant 4, and he located Grievant inside the plant, calling to the crane operator to bring her a purse she had left in the crane. Hynes said he immediately asked Grievant for her ID badge, but she said she did not have it. Hynes told Grievant he had to escort her out of the plant, and Grievant replied that she would not leave without her purse. She

also reiterated that she did not have her badge, although Hynes said she had shown it to the gate guard to enter the plant.

At that point, Robert Mazalan, Plant Protection Turn Commander, arrived on the scene. He, too, asked Grievant for her badge, and she repeated her claim that she didn't have it. Mazalan said he told Grievant she would need to submit to a fitness-to-work evaluation, and Grievant refused. Mazalan then read Grievant the statement reprinted above. On cross examination, Mazalan said Grievant tried to call her Union representative, and was frustrated when she was unable to reach him. Hynes said he followed Grievant when she left. She drove at twice the plant limit of 15 mph and ran through two stop signs without stopping, and she did not stop at the gate.

Grievant testified that she remembered being told to go for a fitness-to-work evaluation, but she was upset because Finlayson did not tell her why she was to be tested. She tried to reach her Union representative about whether the exam was justified, but he wasn't available. Grievant said she now realizes she was wrong to refuse the test. Grievant said she had developed an alcohol problem about 3 or 4 years prior to her discharge. She drank, she said, as a way of relaxing. After her discharge she entered a rehabilitation program that ran from 8 a.m. until 6 p.m. every day for thirty days. She was also required to attend AA meetings each evening. Grievant said it was hard in the beginning and that she resisted admitting she was an alcoholic. However, she finally was able to acknowledge her alcoholism, and to understand how alcohol affected her and what it had cost her. Grievant said she had worked a double shift the day before the August 18 incident and had been unable to sleep. If she had not been drinking, she said, she would have been able to rest before reporting on the 18th. Grievant said rehabilitation had

changed her life and that she now approaches things differently. Previously, she had no one to help her when she had problems, but she now has two sponsors and attends AA regularly.

On cross examination, Grievant said she had abused alcohol for most of her 44 months with the Company, and that she now realizes it was dangerous for her to operate a crane. She also agreed that she had a record review for another incident of being intoxicated on the job, and that she had been offered assistance under the EAP program at that time. However, she denied having a problem with alcohol, and she did not seek any help.

The Union also called Dave Lomellin, a Griever who also works in the rehabilitation program and monitors employees with drug and alcohol problems. He reviewed Grievant's history in rehabilitation, and said Grievant was compliant in everything the rehab facility and the committee asked her to do. She attended 6 or 7 AA meetings a week for the first 7 or 8 months of rehab. Lomellin said he told the grievance committee he believed Grievant was ready for her grievance to move forward, something he will not do when an employee isn't compliant. Darryl Reed, Chairman of the Grievance Committee, said historically the Company had been reluctant to give last chance agreements (LCA) to short service employees. However, it began offering LCAs to short term employees in 2006, and he identified a number of those agreements. Reed also said he does not approach the Company about an LCA until he believes the employee can be successful.

John Sadler, Area Manager in the 12" mill, described Grievant's discipline record prior to August 18:

10/28/04, 1 day suspension for being out of her work area

1/19/06, warning for using profanity on the radio

1/26/06, 3 day suspension for use of profane or abusive language to coworker

1/26/06, 3 day suspension for reporting under influence of alcohol and making contact with an employee's hard hat with the crane chain.

1/23/06, final warning for absenteeism

2/2/06, record review

Positions of the Parties

The Company notes Grievant's short service, her poor disciplinary record, and the severity of the offense, which included hitting an employee with the crane block. The Company does not deny that the cases cited by the Union gave employees second chances under an LCA. But those were all first offenses, the Company says, and Grievant received even more lenient treatment – she was simply suspended for three days for her first offense in February 2006. In addition, the Company says the Union did not present the disciplinary history of four of the five employees who received an LCA. The Company says Grievant had been warned of the severe consequences of a second offense only 7 months prior to the incident at issue. She had also been told she could take advantage of the EAP, but she failed to seek help. The Company also cites Inland Award 1027, which it says is quite similar to the present case.

The Union points out that nothing in the grievance procedure or the discipline notice mentioned that Grievant had hit an employee with the crane block. It was inappropriate, the Union argues, for the Company to rely on an argument it did not raise prior to the hearing. The Union agrees that Grievant was given a second chance following the February 2, 2006 incident. However, an LCA is more helpful, the Union argues, because it requires the employee to go through rehabilitation. Grievant was told about the EAP in her record review, but at that time she had not acknowledged her alcoholism, something that often takes a "shattering event." The Union acknowledges that Grievant has a disciplinary history, but it says she had only one

discipline – for being out of her work area – until March of 2005. Her record deteriorated after that, including January 2006, when she had four disciplinary actions in one week.

The Union points to changes in the collective bargaining agreement concerning the recognition of alcoholism as a treatable medical problem, and it submitted awards in which arbitrators had reinstated employees under a last chance agreement. In particular, the Union relies on the changes made to the 2005 contract, which recognizes that alcoholism is a treatable medical condition, and that an employee who has abused alcohol will be offered rehabilitation in lieu of discharge. The word "medical," the Union says, changes how the problem is to be viewed; it is not a social or personal problem, but is a medical problem that can be treated. Grievant has been to rehab and is continuing with those efforts. If an employee who has made such efforts cannot be reinstated, the language in the 2005 Agreement "means nothing," the Union claims. The Union also acknowledges that Article 3-G-5 says the Company can discharge an employee for working while knowingly impaired. But it says that language has to be viewed in connection with Grievant's rehabilitation, which is a substantial mitigating factor. Moreover, the Union cited USS-43,778 et. seq., in which the USS-USW Board of Arbitration said the use of alcohol is a mitigating factor in other offenses.

Findings and Discussion

Grievant's claim that she did not know why Finlayson wanted her to take a fitness to work evaluation was not credible. She clearly understood his concern and she knew the consequences of failing to submit to the test. Although she may have denied it at the time, I understood Grievant's testimony to acknowledge that she was under the influence of alcohol on

August 18, 2006[1], a status that would have applied in any event given her refusal to submit to the evaluation. The real issue in the case is whether working under the influence of alcohol and refusing to submit to a fitness-to-work evaluation constitute just cause for discharge or whether Grievant should have been afforded a last chance agreement that included a requirement to go through rehabilitation.

Both refusing to submit to a fitness-to-work evaluation and working under the influence of alcohol are serious offenses. A refusal to submit to an evaluation is particularly troublesome because it hinders the Company's ability to enforce the testing requirement in appropriate cases. Under the Inland agreement that expired in 2005, the Union often contended that the parties recognized that a first offense of being intoxicated at work was not just cause for discharge. This would have been consistent with the portion of the agreement that recognized alcoholism as a treatable condition, and which said the parties would cooperate in encouraging employees to undergo rehabilitation. The Union cites cases in which arbitrators were influenced by the language and reinstated employees under conditions that required proof of, or continued participation in, rehabilitation programs. There is no question that arbitrators, including me, were sometimes influenced by post-discharge rehabilitation efforts.

The difficulty in this case is that this was not Grievant's first offense. As was true in Inland Award 1027 – where Arbitrator Vonhof upheld the discharge of an employee with 40 months of service – Grievant was previously disciplined for being under the influence at work, and was offered an opportunity for rehabilitation at that time. She also had a record review which stressed the possible consequences of another offense. The principal difference in this case is, as the Union argues, the revised language in the 2005 Agreement. Article 3-G-5

[1] Grievant testified that she would have been able to sleep before reporting to work on August 18, had she not been drinking.

specifies that employees who abuse alcohol "will be offered rehabilitation in lieu of discipline," but it also recognizes that the Company retained the right to discipline an employee for working under the influence.

Here, Grievant operated dangerous equipment while under the influence of alcohol, and had apparently done so on several occasions in the past, including an incident in January 2006 when her crane chain came into contact with another employee. During her record review following that incident, Grievant was told she could see the Employee Assistance Coordinator, and she told the Company she would do so, but she did not. She did nothing, in fact, until she had another close call with the crane.[2]

In addition, I cannot ignore the fact that Article 3-G-5 says expressly that the Company retained the right to discipline employees who worked under the influence of alcohol. This language is much more specific than the language in the USS-USW contract, that reserves the Company's right to discipline employees "for other reasons." I offer no opinion about the scope or meaning of the USS-USW contract. My point is that the Union and ArcelorMittal were quite specific about the kinds of violations that would surmount the rehabilitation-in-lieu-of-discipline provisions of Article 3-G-5. I cannot ignore such plain language.[3] Nor can I find sufficient mitigating circumstances to modify the discipline. Grievant was a short service employee with a poor disciplinary record which, of significant importance, included a previous instance of being

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[2] The Union protests the Company's reliance on Grievant having hit an employee with the crane block. I agree that new arguments should not be raised for the first time in arbitration. But even though I will not consider it as an independent ground for discharge, that does not make the evidence irrelevant. Even if Grievant did not hit an employee, Finlayson seemingly believed in good faith that she did. Thus, the evidence was admissible as a justification for a fitness-to-work evaluation. In addition, even if Grievant did not hit an employee, the evidence indicates that she operated the crane in an area where there were numerous employees, some of whom were close enough to be hit by the crane. This is a dangerous area for a crane operator who is under the influence of alcohol.

[3] I disagree with the Union's argument that the 2005 rehabilitation language "means nothing" as a result of this decision. I did not ignore the language; however, this was the second time in 7 months that Grievant operated a crane around coworkers while she was intoxicated.

under the influence at work. Grievant is to be commended for her efforts at rehabilitation, but they are not sufficient to defeat the Company's right to discharge for just cause.

AWARD

The grievance is denied.

Terry A. Bethel
April 5, 2007