IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL STEEL COMPANY
CONSHOHOCKEN PLANT

And Mittal Award No. 27

UNITED STEELWORKERS, USW
LOCAL UNION 9462

OPINION AND AWARD

Introduction

This case involves the Union's claim that the Company did not have just cause to discharge Grievant Brian Johnson. The case was tried in Conshohocken, Pennsylvania on October 29, 2008. Robert Cayia represented the Company and Lew Dopson presented the case for the Union. Grievant was present throughout the hearing and testified in his own behalf. There are no procedural arbitrability issues, and the parties agreed that the issue on the merits is whether there was just cause for discharge and, if not, what the remedy should be. The parties submitted the case on closing argument.

Background

The events leading to discharge occurred on June 19, 2008. Grievant was employed as a Senior Operating Technician (SOT) on the shear line. Part of his responsibility was to blow the whistle that signals the beginning and end of breaks. On June 19, Grievant was working a 2:00 p.m. to 10:00 p.m. shift. One of the regular breaks runs from 4:00 p.m. to 4:10 p.m. One of the

employees on the crew was Rick Vawter, who was assigned as a floor person to stamp and stencil ladles. Unlike Grievant, Vawter was working a 6:00 a.m. to 6:00 p.m. shift.

According to one employee who witnessed the events at issue, Grievant blew the end-of-break whistle a little early, and Vawter said in the break room that he was going to ask Grievant about it. Grievant said Vawter approached him on the line and asked why Grievant was in such a hurry, pointing out that there were only 2 plates on the hotbed. Grievant responded that the break ended at 4:10, which is when he had blown the whistle. Grievant testified that Vawter looked tired and that Grievant told him he would do Vawter's job. Grievant said Vawter became angry over this comment, which led to an altercation between the two employees. There is no question that during the altercation, Grievant hit Vawter in the face twice. It was this conduct that led to Grievant's discharge.

Mike Brinton, Shift Manager, said that Grievant called him on the radio and asked him to come to the shear line. As Brinton rounded a corner on his way to the line, he saw Vawter on a catwalk yelling at Grievant that he would be fired because Grievant punched him and that Vawter had Grievant right where he wanted him. When Brinton arrived, he put Grievant and Vawter in different locations and then spoke to each one separately. Brinton said he spoke with Grievant who told him that the two men had argued over the length of the break, and that the discussion became heated. According to Brinton, Grievant told him that the two men argued and poked each other in the stomach. Vawter also broke Grievant's marking stick. There were more words and then, Brinton said, Grievant told him he had hit Vawter twice on the side of his face. Vawter told Brinton that he and Grievant were arguing and poking each other in the stomach and calling each other fat slobs. He admitted breaking Grievant's marking stick. Vawter denied hitting Grievant, other than the pokes in the stomach.

Brinton also spoke with another employee who had separated the two men, although that employee said he had not seen the confrontation. After speaking with the employees, Brinton called Robert Damron, Manager of Finishing Operations, and described the situation. They agreed that both Grievant and Vawter would finish their shifts. By this time it was after 5:00 and Vawter had only about a half hour remaining. Brinton said it would have affected operations if he had sent Grievant home because he had no one to replace him. The two men ordinarily worked within a few feet of each other in a cramped area. However, Brinton sent Grievant to his regular workstation, and assigned Vawter to "throw sticks," which is done in connection with stacking sheets on top of each other. This put him about 300 to 500 feet away from Grievant. Brinton said he told the two men to stay away from each other.

On cross examination, Brinton said he had known Grievant for 20 years, that he had never had any problems with his performance, and that he knew of no previous altercations or discipline. He also said Grievant called him immediately after the incident and made no effort to cover up what had happened or to impede the investigation. Brinton acknowledged that the e-mail he sent to Damon and other managers about his investigation did not mention Grievant having said he poked Vawter in the stomach. Brinton also identified another e-mail he had sent to his superiors regarding a discussion with Dean Jones, a crane operator who said he witnessed the incident. According to the e-mail, Jones said he looked down from the crane and saw the two men arguing. He said Vawter broke Grievant's stick and that Vawter "lunged at" Grievant, and then the two men began "throwing fists at each other."

Jones testified that he did not use the word "lunge," and that it was probably Brinton's interpretation of what Jones had said. He said he saw Grievant was partially turned away from Vawter, and Vawter took Grievant's stick and broke it on the rail. Vawter then "moved at

Grievant" and Grievant "pulled back." Jones said Vawter was much larger than Grievant. Jones said he did not see any stomach poking, but that he saw Vawter screaming at Grievant and that he thought Vawter was the aggressor.

Damron said when Brinton called him at home, Brinton said Grievant had calmed down and that Vawter was going home shortly. Damron said he agreed with Brinton's decision to keep Grievant at work. Damron was part of the investigation into the incident on the next day. He said Grievant told him Vawter had made a comment asking how Grievant's wife could put up with him because he was so fat. Grievant also said Vawter broke his stick and hit him in the stomach three times, and then he hit Vawter in the mouth. Damron testified that Grievant did not say anything about Vawter having lunged at him. The Company also introduced a statement that included notes from a conversation with Vawter the day after the incident. Vawter acknowledged complaining to Grievant about the short break, and he said he had broken Grievant's stick. Vawter also said he had poked Grievant in the stomach 3 times, and had said he felt sorry for Grievant's wife because Grievant was fat. Vawter said Grievant also called Vawter fat and poked him in the stomach. On cross examination, Damron said he had received a copy of Brinton's e-mail that said Jones told Brinton that Vawter had lunged at Grievant, but he did not talk to Jones about it, although he thought Brinton did. Damron also said the stick Vawter broke was Company property.

Plant Manager Gary Sarpen cited the rules the Company invoked when it decided to discharge Grievant. The principal rule says, "Any employee who engages in a fight or physical altercation will be subject to immediate suspension with intent to discharge." Sarpen said he was also influenced by a rule that said, "Employees, who are incompetent or fail to meet reasonable standards of proficiency, including gross neglect of duty will be subject to progressive discipline

up to and including discharge." The second rule applies, Sarpen said, because SOTs have the responsibility to direct others, and are expected to use good judgment to resolve problems. Grievant failed in those responsibilities in this case, Sarpen said. He added that fighting is very serious, especially in a mill environment which presents multiple hazards. The two men shared a work area near the hotbed which can – but at the time of the incident did not – hold slabs as hot as 500 degrees. In addition, there is an open pit in the area, although apparently it was covered by a steel plate on the day in question. Sarpen agreed that Vawter's conduct was serious, but he said Grievant's behavior was worse, noting that Grievant hit Vawter in the face twice.

Vawter was suspended for 10 days and put on a 3 year last chance agreement. Sarpen said he had never before suspended an employee for as long as ten days. At various times on direct and cross examination, Sarpen characterized Vawter's conduct as both deplorable and reprehensible. He also said he thought Vawter was the instigator and that he "escalated the disagreement."

Grievant denied poking Vawter, and he said he did not tell Brinton that he had. Grievant said after Vawter broke his stick over the rail, Vawter moved toward him and started pushing him. He said Vawter swung at him and grazed his stomach. Grievant said they "locked up" and he hit Vawter twice. Vawter was "winning the push," Grievant said, and he hit Vawter to put some space between them. Grievant said he could not run away from Vawter because Vawter was holding him. On cross examination, Grievant said he was trying to do his job, but Vawter escalated the argument when he broke the stick. The Company representative pointed out that Grievant's statement said nothing about Vawter grabbing Grievant. In addition, there was no mention that Vawter had swung at him and grazed his stomach. Grievant said he forgot to mention those details. However, Grievant said he told Brinton that he acted in self defense.

Positions of the Parties

Although the Company's opening statement asserted that there were no credibility issues in the case, it says details Grievant added for the first time in arbitration make it necessary to weigh the truthfulness of witnesses. No one other than Grievant and Vawter saw the entire incident. Jones testified that he saw fists flying, but he did not see either man poke the other and his account does not include Grievant's assertion in his testimony that they grabbed each other. Nor could Jones hear what Grievant and Vawter said to each other.

The Company argues that the events are fairly easy to reconstruct. Vawter was unhappy with what he thought was a short break, but Grievant told him it had been 10 minutes. The discussion continued and Vawter made "offensive and insulting" comments, including a reference to Grievant's wife. Vawter made the first contact, the Company says, by poking Grievant in the stomach. And, despite his denial at the hearing, Grievant had previously admitted that he poked Vawter. Grievant then dropped his stick, and Vawter broke it. At that point, the Company says, Grievant hit Vawter in the mouth twice. At the hearing, Grievant claimed he acted in self defense and that Vawter had grabbed him and was pushing him backwards. But he had never said that before the arbitration hearing, the Company argues, and when asked why, Grievant said he must have forgotten. This is not a reasonable explanation, the Company says; the better explanation is that Grievant did not mention Vawter moving at him and grabbing him because it did not happen.

The Company says as time has passed, Grievant has reconstructed the events to shift the blame to someone else. It is human nature to do so, the Company says, but it does not excuse what happened on June 19, 2008. The Company says it does not condone Vawter's behavior.

He was guilty of goading and baiting and his actions were reprehensible and provocative. Vawter was the aggressor, the Company says. Initially, Vawter was suspended with intent to discharge, but the Company decided Grievant's actions were more severe. Grievant not only hit Vawter twice, but he struck him in the face, where he could do the most damage. This escalated the situation beyond a verbal and low-level physical altercation. The Company says there was some premeditation and that Grievant's conduct was intentional. The Company argues that fighting cannot be tolerated, no matter how extreme the provocation. It has a zero tolerance policy, which both the Union and the employees understand. Reinstating Grievant would detract from the deterrent effect of the policy, the Company says.

The Union says it has never argued that an employee can retaliate simply because he is provoked. It would have been inappropriate here, the Union says, for Grievant to strike out at Vawter because of words or a broken work tool. Fighting, the Union says, has no place in the workplace. But from the beginning, the Union says Grievant has claimed he acted in self-defense and that the Company would have realized he was telling the truth if it had properly investigated the case. Jones told Brinton that Vawter moved toward Grievant before Grievant struck him, but no one followed up on these statements. In particular, no one spoke with Jones after Brinton spoke with him on the day of the incident. The Union also notes that Jones was a credible witness who nothing to gain by lying.

The Union also points out that unlike many such instances, Grievant did not try to hide his actions; instead, he immediately called his supervisor to tell him what happened. In addition, Grievant had been a good employee and had a good disciplinary record. The Union says that as an SOT, Grievant had lots of disputes with other bargaining unit employees about work directions, but he resolved them on his own, without resort to violence. What happened on June

19 was an aberration, the Union says. The Union also questions the Company's claim that it has a zero tolerance policy. Vawter, it points out, was involved in a fight but he wasn't discharged. The Union says it is not trying to change the culture of the plant, as the Company claims. However, it says the Company cannot simply impose discipline without considering the facts of each case. Grievant's discipline, the Union argues, must be appropriate to the degree of discipline given to the other participant in the fight.

Findings and Discussion

Neither the Company's rules nor its actions demonstrate that it has a zero tolerance policy. The rules say employees who fight on Company property will be subject to discipline up to and including discharge, but they do not mandate discharge for a first offense. Obviously, the Company evaluates the facts before it decides whether discharge is warranted. This is what the Company did for Vawter; initially he was suspended subject to discharge, but Sarpen said his analysis convinced him that Grievant's actions were more serious than Vawter's. But there cannot be any doubt that Vawter *was* involved in a physical altercation. He admitted to poking Grievant in the stomach multiple times and he acknowledged making a comment about Grievant's wife. Indeed, in its closing argument the Company said Vawter was the aggressor, which Sarpen also acknowledged in his testimony. The Company's decision to retain Vawter – which is not questioned here – indicates that there are degrees of fault and that discharge for fighting is not automatic. The question in this case, then, is whether the facts surrounding Grievant's conduct warranted discharge.

No one condones either Grievant's or Vawter's conduct on June 19, 2008. Moreover, it is fair to say, as the Company does, that fighting cannot be justified merely by provocative words

or gestures. But there was more than that in this case. I have some question about Grievant's account of the incident which, as the Company asserts, he probably embellished over the ensuing months to shift blame away from himself. I think it is unlikely that Vawter grabbed Grievant and pushed him backward with force, or that he swung at Grievant and grazed his stomach. However, it is not hard to conclude that Grievant felt threatened. Vawter became angry when Grievant said he would do Vawter's job, and he poked Grievant in the stomach. The two men poked each other, and then Vawter escalated the encounter when he took Grievant's marking stick and broke it against the rail. This was the same point, Jones testified, when Vawter moved toward Grievant. Nothing in the record suggests that Jones had any reason to lie about what he saw. Unlike Grievant, who added new details in his arbitration testimony, Jones told Brinton on the day of the incident that Vawter moved toward Grievant during the confrontation. And his description of what he saw was apparently sufficiently graphic for Brinton to have interpreted Vawter's conduct as a "lunge."

I agree with the Company's opinion that Vawter was the aggressor and that his actions were "reprehensible." I also agree that Grievant's response was more serious than the contact that preceded it. Nothing in this opinion suggests that Grievant was justified in hitting Vawter. But the entire episode happened in a matter of seconds and Vawter was the one who initiated physical contact. At the same time that he poked Grievant, Vawter made comments about Grievant and his wife, which were obviously intended to provoke a reaction of some kind. I disagree with the Company's argument that Grievant's response was pre-meditated. Rather, it seems likely that when Vawter broke the stick and moved in Grievant's direction, Grievant overreacted to Vawter's provocation. But this was an emotional reaction to a charged atmosphere initiated by Vawter. Grievant's actions were more serious than Vawter's, but in

assessing the appropriate discipline for Grievant's conduct, Vawter's physical provocation cannot be ignored. It is also worth noting that once he hit Vawter and was able to get out of the area, Grievant immediately called Brinton and reported the incident and, at least on that day, he did not try to minimize what he had done.

I understand the Company's argument that reducing the degree of discipline would undermine the deterrent effect of its rule against fighting. But, as the USS-USW Board of Arbitration noted in USS-44,279, the issue in the case is whether there was just cause for discharge, and a deterrent effect is not enough to establish a reasonable relationship between the act and the discipline imposed. If that argument sufficed, then it seemingly would justify discharge for any rule infraction. However, proportionality between offense and discipline is part of the just cause formulation. Also relevant are Grievant's good disciplinary record and his 20+ years of service at the Conshohocken facility.

I find that in the circumstances of this case – including the fact that Vawter was retained with a suspension and a last chance agreement – the Company did not have just cause to discharge Grievant. Nevertheless, Grievant is not free from blame in the incident, and disciplinary action short of discharge is appropriate. As the Company noted at the hearing, Grievant hit Vawter in the mouth twice, which was more serious than Vawter's conduct. I find, then, that Grievant is to be reinstated but without back pay. In addition, the Company can impose the same last chance agreement given to Vawter, except for paragraph 3, which deals with breaking Company equipment.

AWARD

The grievance is sustained, in part. Grievant is to be reinstated without back pay. The Company may also impose a last chance agreement, as explained in the last paragraph of the Findings.

Terry A. Bethel
November 26, 2008