ARBITRATOR'S AWARD

In the Matter of the Arbitration
Between

Mittal Steel USA
Indiana Harbor
East Chicago, Indiana

and

Larry Jones, represented by
United Steelworkers of America, AFL-CIO-CLC
and its Local Union 1011

Mittal Steel Award # 5
Grievance No. SP-05-008

David A. Dilts
Arbitrator

June 8, 2006

APPEARANCES:

For the Company:

Patrick David Parker, Manager of Labor Relations

For the Union:

Rick Bucher, Staff Representative

Hearings in the above cited matter were conducted on June 5, 2006 at the offices of Mittal Steel Company, 3210 Watling Street, East Chicago, Indiana. The parties stipulated that the present matter is properly before this Arbitrator pursuant to the requirements of Article Five, Section I of their 2002 Collective Bargaining Agreement. The record in this matter was closed upon completion of the hearing on June 5, 2006.

ISSUE

Was Larry Jones (herein the grievant) discharged for just cause? If not, what shall be the remedy? Did the Company properly deny the grievant the application of the Dignity and Justice provisions of Article Five, Section I, 9 b. of the 2002 Labor Agreement? If so, what shall be the remedy?

BACKGROUND

The grievant is an operating technician in the Steel Producing Division of the Company's Indiana Harbor Works. The grievant has a seniority date of July 22, 2002.

The grievant reported off work indefinitely for a serious health condition. The record shows that the grievant saw a physician on June 28, 2005 who released him to return to work on July 3, 2005. On July 3, 2005 the grievant reported for work, without a return to work physical, and then reported off work for the next two turns. On July 7, 2005 the grievant submitted a claim for sickness and accident benefits. On July 11, 2005 the grievant appeared for a return to work physical and was returned to work on July 12, 2005. On August 12, 2005 the grievant was suspended preliminary to discharge for unauthorized absence. On August 19, 2005 the grievant submitted a claim for sickness and accident benefits for the period June 5, 2005 through July 5, 2005. The Company rejected that claim for benefits.

The grievant was issued a notice of pre-discharge suspension dated August 12, 2005 for "Being Absent without Authorization." The pre-discharge suspension was converted to

discharge on August 19, 2005. The matter of this discharge was resolved in an arbitration award dated March 24, 2006.

Subsequent to the discharge of August 19, 2005, the grievant received a second discharge notice for "submitting falsified documentation to obtain authorization for a leave of absence." The grievant was suspended from August 31, 2005 through September 4, 2005 and the grievant was subsequently discharged on September 5, 2005. There is no dispute that the grievant falsified and caused to be falsified medical documentation as alleged by the Company.

Further, there is no dispute that the grievant was notified that he was no longer eligible to continue working under the Justice and Dignity provisions of the Labor Agreement "because it is your second dischargeable offense (while already working pursuant to the Justice and Dignity provision.) There are no factual disputes concerning this issue.

COMPANY'S POSITION

It is the Company's position that there is just cause to discharge this grievant. Clearly there is no dispute that the grievant was off work for the periods of time charged by the Company and that the grievant caused employees in a physicians office to falsify medical documentation alleging that he was seen in the physician's office, when in fact, he was not. Further, it is clear that the grievant turned-in this documentation in an attempt to defraud the Company of Sickness and Accident benefits, totally $1,142.80. The actions by the grievant are theft, and matters involving theft are subject to immediate discharge, and are not eligible for consideration under the Justice and Dignity provisions of the Labor Agreement (Article Five,

Section I 9 b. (2)).

The grievant has an extensive record of discipline for attendance problems. The grievant compounded this poor record by attempting to defraud the Company, and engaging in behavior that can be described no better than to call it what it was, THEFT!

The grievant placed himself at jeopardy of losing his job by transmitting to the Company documents in support of a claim for Sickness and Accident benefits that he knew had been fraudulently amended by a receptionist in the physician's office, or possibly by his own hand. There is no greater breach of trust an employee may commit than to steal from his employer, and that is precisely what this grievant did.

The Company, in support of its position, has entered into the record two arbitration decisions which are on point and should provide guidance in this matter. The matter of this grievant's discharge is straightforward, simple, and abundantly clear. There was just cause for this grievant's discharge, and for denial of the Justice and Dignity provisions of the Labor Agreement. Therefore the Company respectfully requests that the Arbitrator deny this grievance in its entirety as being utterly without merit.

UNION'S POSITION

The Union does not dispute the fact that the grievant turned into the Company medical documentation that was not accurate. It is a fact that the grievant did obtain falsified medical documentation and turn it into the Company. The Union denies none of this. What the Union does contend is basically two things. First, the grievant did not receive one penny from the

Company, nor was it his intention to obtain benefits. Second, the Company misreads Article Five, Section I 9 b. (2) of the parties' Labor Agreement, and the grievant is entitled to Justice and Dignity benefits from March 24, 2006 until the completion of this case. Each of these matters will be addressed in turn.

While the Union does not deny that the grievant did what he did, the Union denies that there was any intent to defraud the Company. What faced the grievant at the time of his actions was that the Company was misreading and misapplying the absence control policy. For the grievant's absences to be excused for purposes of the attendance control policy, the grievant had to be eligible for Sickness and Accident benefits pursuant to the Company's interpretation of the Contract's Appendix, Section K. Therefore, it was not an attempt to defraud the Company, what the grievant did was to panic and in an attempt to preserve his job file documents he knew were false.

It is the Union's position that only the grievant knows what his intent was, and he testified credibly concerning that intent. Further, the Union asks the Arbitrator to weigh the credibility for himself. The grievant would have received just over $1100 if his application for benefits was granted, this paltry sum compared to the loss of earnings from being discharged is trivial. What is clear from the this record, is that the greater motivation was the preservation of the grievant's job – JUST AS HE TESTIFIED. There is nobody else present at the hearing who could hazard anything but a guess as to what the grievant's motivations were.

The grievant is not without culpability in this matter. This the Union and the grievant admits. However, it is clear that the grievant received nothing from the falsified documents, and that he readily admits what he has done, and is remorseful. However, the Company's action and

overreaching with respect to the first discharge was the grievant's motivation, and not any attempt to convert anything due the Company. The Union believes that this record merits discipline far less than discharge, and prays that the Arbitrator will provide relief from this punitive, and wrongfully harsh disciplinary penalty.

The Union asks that the Arbitrator pay close attention to the language of Article Five, Section I 9 b. (2). There is no exception in this language for what the grievant is accused of having done, or what he has done. The Company now urges the Arbitrator to find that the grievant is guilty of theft, and there is no such evidence in this record. What is accurate is the exception in Article Five, Section I 9 b. (4). The grievant on or about September 5, 2005 was discharged for a second time, and for that reason would have been properly denied the application of the Justice and Dignity provisions of the Labor Agreement. However, once the Arbitrator's award of March 24, 2006 was issued, the grievant was no longer "twice" discharged, and was again entitled to the benefits provided for under Article Five, Section I 9 b.

The Union respectfully requests that the Arbitrator sustain this grievance in its entirety. The Union asks as remedy that the Arbitrator fashion an award which reduces the penalty assessed this grievant to something short of discharge, and which is reasonable and just. Further, the Union requests that the Arbitrator order the Company to properly apply Article Five, Section I 9 b. of the Labor Agreement and restore to this grievant his right to the Justice and Dignity benefits specified in Article Five, Section I 9 b. of the parties' Labor Agreement from March 24, 2006 to such time as this case is resolved or he returns to work, or any other remedy as the Arbitrator may deem appropriate within the meaning of the parties' Labor Agreement.

ARBITRATOR'S OPINION

This case is, as both the Company and Union assert, simple and straightforward in many respects. The Company's assertion that the grievant committed theft is at odds with the facts as established by a preponderance of the credible evidence in this case. Theft is a word upon which most of the major dictionaries agree concerning its meaning. Webster's defines theft as:

> the act of an instance of stealing; larceny SYN. –theft is the general term and **larceny** the legal term for the unlawful or felonious taking away of another's property without his or her consent and with the intention of depriving the person or it; . . .

What this grievant did and what the written notice accuses him of is, in this Arbitrator's considered opinion consistent, (Joint exhibit 2, first page) in pertinent part:

> You are hereby suspended 5 calendar days, effective 08/31/05 through 09/04/05 for "Submitting falsified documentation to obtain authorization for a leave of absence."
>
> You are entitled to a hearing within this 5-day period. If, after the hearing, the suspension is converted to discharge, you will no longer be eligible to continue working under the Justice and Dignity provision of the Labor Agreement because it is your second dischargeable offense (while already working pursuant to the Justice & Dignity provision.)

What the Company alleges in this document is that the grievant falsified documents to obtain a leave of absence. This is not theft as stated. There is no conversion of property – theft requires conversion (the taking away of another's property). The charge is clear and in quotation marks "Submitting falsified documentation to obtain authorization for a leave of absence." No

mention of money or theft is to be found in this document.

The question now arises as to whether the grievant's falsification of medical documentation is serious enough to warrant discharge. The Union also raises an affirmative defense of the Company's misapplication of the language of Section K of the Labor Agreement's Appendix as at least partly motivating the grievant's misconduct.

The falsification of Company documents has normally not been looked upon favorably by managements in any organization, and has often resulted in the promulgation of rules against such conduct. However, falsification of medical documentation to obtain benefits is clearly and unambiguously fraudulent behavior. Webster's defines the term as "intentional deception to cause a person to give up property or some lawful right." What the grievant has done, and admits to having done is fraud. Whether he received property, in this case money, from his deceit is not relevant to a finding of culpability in this matter. The grievant is culpable, and even without a written rule, knew or should have known, that an offense of this nature and magnitude could be reasonably expected to subject him to severe discipline, perhaps even discharge.

For the Company to argue at hearing that the grievant's conduct amounts to theft is overreaching what the credible facts demonstrate. What is also evident, is that the Company was influenced by a document transmitted by a "Josh" at the grievant's healthcare provider which is inflammatory and hearsay which cannot be credited here. This document alleges the grievant is a manipulator of the system, and with that preface, continues to deny the grievant was seen in the office on two of the dates memorialized in the documentation. The inflammatory preface of this document may have clouded the judgement of management with respect to characterizing the grievant's conduct as theft.

Further, the Union argues that the grievant's judgement was clouded by the Company's interpretation and application of standards concerning its attendance control procedures. The Union argues that because the Company was unduly harsh in its interpretation requiring that for the grievant's absences to be exempted as cause for further discipline he must qualify for Sickness and Accident benefits that the grievant panicked and falsified his medical claim. Perhaps, this is something that contributed to the grievant's conduct. However, it is clear that the grievant had then the alternative of filing a grievance and pursuing that grievance through the proper channels without resort to deception. The grievant had union representation available, and was an employee of this Company and its predecessors for nearly three decades, and knew or should have known that if his view of the contract and its requirements had validity his relief was through the grievance procedure, and not through deceit. While this line of reasoning cannot serve to excuse the grievant's behavior, it may well have clouded his better judgment.

While the Union's contention is correct, in that the grievant did not steal, and was not guilty of theft, the Union's position that the culpability is less and should be dealt with by something less than discharge is an affirmative defense which the Union must prove. This Arbitrator agrees, that there is a shade of difference between falsification and theft, but the question is whether that shade of difference is sufficient to warrant a finding that discharge is unreasonably harsh.

Clearly, this grievant is no stranger to the disciplinary process. While it is true he is a long service employee, he is one whose record cannot be characterized as meriting mitigation due to long and faithful service – nor does the Union seriously argue this position. What the Union would have this Arbitrator find, is that deceit is a sufficiently lesser offense that

something less than discharge should be ordered. In fact, these matters are never easy because they are judgment calls. Judgment calls, complicated by management's universal appeal that Arbitrators ought not substitute their judgment for that of management. However, when discharge is subject to the arbitration provisions of the Labor Agreement it is precisely the Arbitrator's judgment, rather than management's, to which the parties mutually subscribe.

The effects of the grievant's deceit could have been worse, he could have collected $1,142.80 in benefits to which he was not entitled. As the Union skillfully asserted, if such was the case, this case would not have found its way to the Arbitrator – and if it had, the decision would be easy and the grievant's discharge sustained. The fact is that the grievant knew he was wrong, and that he knew what he did would not be well-received by the Company. This fact alone makes it difficult to see much light between the deceit committed and admitted-to in this case, and theft. On the other hand, the grievant had been discharged in the prior case, wrongfully, because the Company's narrow interpretation of what Sickness and Accident eligibility is with respect to the written requirements of their Labor Agreement. Such a harsh view undoubtedly contributed to the grievant's panic.

Without the Company's very limited culpability in this matter, the reliance on hearsay for this "Josh" in the physician's office, and the fact that the grievant collected no money whatsoever from this misconduct, the Arbitrator would have denied this grievance without serious consideration of an alternative penalty. In other words, this grievant's conduct is worthy of the severe discipline.

However, in the final analysis, the grievant's panic and the lack of financial benefit must be given consideration as mitigation of an otherwise deserved discharge.

Justice and Dignity

There is no evidence of theft in this case. The language of Article Five, Section I 9 b. is clear and unambiguous and must therefore be applied as such. Management's contention that Article Five, Section I 9 b. (2) applies in this matter is without merit, in this Arbitrator's considered opinion. The Arbitrator is convinced that the Union's contention that Article Five, Section I 9 b. (4) applies in this set of facts and circumstances is correct, and is consistent with the writings found in Joint exhibit 2. At the point where the grievant was no longer subject to a second discharge, is that point at which the Justice and Dignity provisions should have been applied by management and he should been reinstated to his former position pursuant to the Labor Agreement's requirements.

Conclusions and Remedy

It is this Arbitrator's considered opinion that the grievant's conduct is worthy of harsh disciplinary action. It is only the fact that the Company did not pay out benefits and the grievant's claim that he did this only from a sense of panic and without a view to financially benefit that his remorse is taken into consideration here.

It is the judgment of this Arbitrator that the grievant shall be reinstated to his former position, but only as a matter of a last chance. Any falsification of documents of any kind, shall be just cause for the grievant's discharge.

The grievant is, as the Union contends, entitled to benefits under the Justice and Dignity provisions of the Labor Agreement. However, it is this Arbitrator's considered opinion, that these benefits are forfeit due the mitigation of the penalty in this matter. The misconduct of which the grievant is proven culpable is serious and discharge may well have been appropriate save the issues examined here. It would be a *pyrrhic* victory for the Union and this grievant to receive two months and two weeks pay, yet lose the job that he was willing to go to such extremes to preserve.

It is just in this Arbitrator's considered opinion to give this grievant one last chance to preserve his career, but to impress upon him the need to be regular in attendance and honest in his dealings with his employer. Therefore, the grievant's reinstatement is without back pay or benefits. This award will remain a part of the grievant's personnel records for a period of one calendar year from the date of the award, and he will be discharged for a failure to be honest with his employer during this period of time. This Arbitrator retains jurisdiction over this matter to resolve any conflict which may arise in that period concerning the implementation of this award.

AWARD

Management acted properly in disciplining this grievant. The grievant's conduct is worthy of harsh discipline, but the penalty of discharge, under these facts and circumstances, is unduly harsh. Therefore, the grievant is ordered reinstated to his former position, on a last chance basis for one year, and without back pay or benefits.

Management wrongfully applied Article Five, Section I 9 b. (2) of the contract. The proper provision for Justice and Dignity benefits was Article Five, Section I 9 b. (4), however, in recognition of the gravity of the grievant's misconduct, the benefits to which he was entitled under this provision are forfeit as part of the mitigation of this penalty.

At Fort Wayne, Indiana
June 8, 2006

David A. Dilts
Arbitrator