IN THE MATTER OF THE ARBITRATION )
)
Between )
)
**CLEVELAND-CLIFFS, INC.** )
**INDIANA HARBOR WORKS** )
)
and )
)
**UNITED STEELWORKERS,** )
**LOCAL 1010** )

OPINION AND AWARD

**RONALD F. TALARICO, ESQ.**
**ARBITRATOR**

Grievance No.: 28-BB-0024

Case 130

**GRIEVANT**

Bryan Orcutt

**ISSUE**

Discharge

**VIDEO HEARING**

November 3, 2022

**APPEARANCES**

**For the Employer**
Richard L. Samson, Esq.
OGLETREE DEAKINS

**For the Union**
Jacob Cole
UNITED STEELWORKERS

## ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esq., was mutually selected by the parties to hear and determine the issues herein. An evidentiary video hearing was held on November 3, 2022 at which time the parties were afforded a full and complete opportunity to introduce any evidence they deemed appropriate in support of their respective positions and in rebuttal to the position of the other, to examine and cross examine witnesses and to make such arguments that they so desired. The record was closed at the conclusion of the hearing. No jurisdictional issues were raised.

## PERTINENT CONTRACT PROVISIONS

### ARTICLE FIVE – WORKPLACE PROCEDURES

. . .

**Section I. Adjustment of Grievances**

. . .

**9. Suspension and Discharge Cases**

. . .

**b. Justice and Dignity**

**(1) In the event the Company imposes a suspension or discharge, and the Union files a grievance within five (5) days after notice of the discharge or suspension, the affected Employee shall remain on the job to which his/her seniority entitles him/her until there is a final determination on the merits of the case.**

**(2) This Paragraph will not apply to cases involving offenses which endanger the safety of employees or the plant and its equipment, including use and/or distribution on Company property of drugs,**

**narcotics and/or alcoholic beverages; possession of firearms or weapons on Company property; destruction of Company property; gross insubordination; threatening bodily harm to, and/or striking another employee; theft; or activities prohibited by Article Five, Section K (Prohibition on Strikes and Lockouts).**

. . .

**Section J. Management Rights**

**The management of the plants and the direction of the working forces, including the right to hire, transfer and suspend or discharge for proper cause, and the right to relieve employees from duty, is vested exclusively in the Company.**

**In the exercise of its prerogatives as set forth above, the Company shall not deprive an Employee of any rights under any agreement with the Union.**

. . .

* * * * * * *

**PERSONAL CONDUCT RULES**

**Personal Conduct Rules**

. . .

**2. The following offenses are among those which may be cause for discipline, up to, and including suspension preliminary to discharge.**

. . .

**J. Conduct which violates the common decency or morality of the community (including gambling games, bookmaking, pornographic material(s) including electronic media on Company property).**

. . .

* * * * * * *

## AGREEMENT, INVENTIONS, PATENT RIGHTS, AND CONFIDENTIAL INFORMATION

**In consideration of and as a condition of my employment by ArcelorMittal USA, I hereby agree as follows:**

1. **I will promptly disclose to the representatives of the company designated to receive such disclosure, any and all inventions made during the course of my employment, solely by me, or jointly with others, relating to the business of the company or its subsidiaries, and to the industries in which they operate, and I will not disclose any such inventions to any persons other than such designated representatives without the written consent of the company.**

2. **All such inventions shall be the property of the company and when any such invention appears of interest to the company, I will, upon request, assign and transfer all my right, title, and interest therein to the company without any right to compensation beyond my regular salary or wages except as the company in its sole discretion may determine.**

3. **If the company should desire to file an application for letters patent with respect thereto in the United States or in any foreign country or countries, I will, upon request, but without expense to me, fully cooperate with and assist the company in the preparation, prosecution, procurement and maintenance of patent applications and letters patent with respect to such inventions, and will do any and all lawful acts and execute any and all proper documents deemed necessary or desirable by the company to vest title thereto in the company.**

4. **I agree not to directly or indirectly disclose or use at any time either during or subsequent to my employment with the company any secret or confidential information, knowledge or data of the company (whether or not obtained, acquired or developed by me) unless the written consent of the company is first secured. Upon termination (of employment), I agree to turn over to the company all notes, memoranda, notebooks, drawings or other documents made, compiled by, or delivered to me concerning any product, apparatus or process manufactured, used or developed or investigated by the company during the period of my employment; it being agreed that the same and all information contained therein are at all times the property of the company.**

5. **With regard to any inventions made or conceived by me within one year following termination of my employment and relating to the industries in which the company or its subsidiaries operate, I agree that the company**

**shall receive, and hereby does receive, a royalty-free non-exclusive license, including the right to grant sub-licenses.**

. . .

## BACKGROUND

The Employer, Cleveland-Cliffs Indiana Harbor, is a fully-integrated steel making facility located in East Chicago, Indiana. The Union, United Steelworkers, Local 1010, is the exclusive collective bargaining representative for all production and maintenance employees at the plant. The Employer and Union have been parties to a series of collective bargaining agreements over the years the most recent of which is effective September 1, 2018.

The Grievant, Bryan Orcutt, was hired on October 13, 2014 and at all times pertinent to the within matter worked at the No. 3 Cold Strip Mill. At the new hire orientation conducted on October 6, 2014 the Grievant was provided with a copy of the Personal Conduct Rules and Plant Driving Regulations which were reviewed with him in detail at that time.

On July 28, 2022 a very serious and near fatal accident occurred in the 80" Hot Strip Mill around noon that day. Colin Elder, a bander/utilityman, had a 50,000 lb. steel coil partially tip over entrapping him for approximately 20 minutes between two of the coils. Kenneth Haluska, the Senior Division Manager of the Hot Strip Mill received a call informing him that there was a serious accident in the Hot Strip Mill involving Mr. Elder. When Haluska got to the area Elder was already in an ambulance on his way to the hospital.

The incident was captured on the plant video surveillance system and Haluska was able to immediately view the video. Mr. Haluska went to the hospital and spoke with the doctor caring for Elder and also spoke with Elder's father who also happens to work for the Company.

Haluska started an investigation into the accident. There are cameras throughout the plant and just about any computer terminal in the plant can access the video of the accident. The video was also shown during a safety "stand down" meeting that was called that day which is typical when a serious accident occurs. The video was also shown that day to the Union's Safety Committee and was also available for viewing on the Company's website.

Christine Forman from the PR Department received digital messages at approximately 2:09 p.m. that day from a forum indicating that there was a serious accident at the 80" Hot Strip Mill today and that someone had died. Foreman replied to the sender that the employee had not passed away but was in the hospital.

The Grievant testified that when he awoke on July 28, 2022 he received a message that someone was injured at the plant. The Grievant indicated that co-worker Nicholas Underwood sent him a Facebook message with an attached video of the accident which Underwood found on the Internet. Grievant testified that he was shocked about the accident and then later forwarded the video to a few people including his brother who works for a sign company, his neighbor who works for a coil management company, a friend who works for US Steel as a Millwright and Mr. Johnson who works with him in the Cold Strip Mill. It is not known who originally posted the video on the Internet and the Company did not investigate how the video came to be posted.

On or about August 5, 2022 Mr. Haluska received a call from Jasmine Forbes, the Safety Director of the Company's Riverdale plant informing him that the Grievant had emailed a snippet of the accident video to a contractor employee (M. Comforti) at Riverdale. Mr. Haluska then met with Grievant later that day at approximately 2:30 p.m. The meeting lasted about one hour. Grievant told Haluska that Nicholas Underwood sent the video to him via Facebook

messenger and admitted that he subsequently forwarded it to Mr. Johnson and several others via Snapchat.

Haluska testified that he met with Underwood on August 8, 2022 who told him that he saw the video on Facebook but does not know who originally posted it on that site. Mr. Underwood also indicated that he sent the video to Grievant unsolicited. On August 12, 2022 Haluska issued Underwood a written reprimand which provides as follows:

> **"Date: 7/28/2022**
>
> **On or about the above date, an investigation began that determined that you disclosed sensitive and confidential information to unauthorized Company personnel without the consent of the Company.**
>
> **As a conclusion to the investigation and based on information known at this time, it has been determined by the Company that your offense be treated as an honest, but serious, mistake resulting in an unintended violation of plant policy.**
>
> **This behavior also violates Plant Conduct Rule 2.J., which states:**
>
> > **The following offenses are among those which may be cause for discipline, up to, and including suspension preliminary to discharge:**
> >
> > **2.J. Conduct which violates the common decency or morality of the community (including gambling games, bookmaking, pornographic material(s) including electronic media on Company property)."**
>
> . . .
>
> **You are hereby warned that any repetition of the behavior that led to this discipline or violation of any other plant rules may be cause for additional discipline up to and including suspension preliminary to discharge."**

The Company indicates that on March 24, 2022 a Notice To All Craftmen had been disseminated which provided as follows:

**"A reminder, you are not allowed to take pictures or video and post on any social media platforms. Any questions, see me.**
**Kevin Hayes."**

On August 12, 2022 Grievant was notified that he was being suspended for five (5) days, subject to discharge:

**"Dear Mr. Orcutt:**

**You are hereby notified that you are suspended for five (5) days, effective the date of this letter, and at the end of that period, you are subject to discharge.**

**This action is being taken as a result of your violation on or about July 28, 2022, and in the subsequent days, of Personal Conduct Rule 2.J., which states:**

**2. The following offenses are among those which may be cause for discipline, up to, and including suspension preliminary to discharge:**

**J. Conduct which violates the common decency or morality of the community (including gambling games, bookmaking, pornographic material(s) including electronic media on Company property.)**

**In addition, you disclosed sensitive and confidential information to multiple unauthorized persons, including Company personnel and persons outside of the Company without the consent of the Company.**

**Either of the above violations, standing alone, is grounds for suspension pending discharge.**

**Under the provisions of Article 5, Section I of the current collective bargaining agreement, you may request and be granted, during this five (5) day period, a hearing before the Division Manager, and, at such hearing, you are entitled to Union representation. Pursuant to Article Five you are not entitled to Justice and Dignity for this offense."**

On August 22, 2022 Grievant was informed that his five (5) day suspension preliminary to discharge was converted to discharge effective August 22, 2022. Grievant was denied the benefit of Justice and Dignity as set forth in Article Five, Section I. 9. b.

A timely grievance was filed on August 12, 2022 protesting Grievant's "suspension including discharge".

## POSITION OF THE EMPLOYER

We believe the facts of this case will trouble you and we believe the evidence presented here today underscores that observation. Like most collective bargaining agreements, the parties' collective bargaining agreement states that the Company will act with "proper cause" in disciplining employees. When an employer discharges an employee for work rule violations, the employer must prove its case by a preponderance of the evidence. The Employer bears the burden of proof by a preponderance of the evidence to prove that there is just cause to terminate the Grievant. The evidence herein demonstrates that the Company has met its burden.

First, let me emphasize that the evidence presented here today demonstrates quite convincingly that the Grievant did what the Company says he did. He sent the video in question to all those individuals the testimony described – some of whom were with the Company, some of whom worked for a competitor and some of whom did not work for the Company or were not even affiliated in any way with the steel industry. We can only speculate the reasons for doing so but the Grievant offered no excuse. We can only believe therefore that he did it for the thrill or fun of doing so. The Grievant is now offering that he distributed the video for safety purposes. He did not say that during the investigation and is now claiming he was "ambushed" at the investigation. However, to not assert safety purposes during the investigation, if that is why it was truly done, doesn't add up. He readily admitted that he sent the video to people not in steel, as well as his brother who works at a sign company. He also admitted to sending the video to David Johnson-- because his wife asked for it and the Grievant doesn't know what his wife does

for a living. The Grievant also did not raise safety as a reason for sending the video at the Step 2 hearing either and that was held two weeks later, so he clearly wasn't "ambushed" then. Jt. Exhibit 5—the Step 2 Minutes says nothing about the Grievant saying he sent the video for safety purposes.

That was a violation of the Company's policies, policies which the Grievant was aware of. In fact he admitted that he was aware of them.

Let's start with Rule 2J - Common Decency: The conduct rules make it clear the Company can terminate an employee on a first offense for a violation of this rule. Sending the video for no other reason than to engage in tawdry gossip while a fellow employee has suffered life threatening injuries and is in a hospital emergency room is not decent. In fact, it is downright awful. It had the potential to significantly harm Mr. Elder's mental health had word got out that the Grievant was essentially poking fun at what happened.

Moving on to the Confidentiality Policy – Was this confidential information? How else could one describe it? The video of the event was captured by a Company camera, of the interior of the Company's plant and of an accident involving a Company employee that occurred on Company property. How much more confidential could that be? It is so obvious that even the Grievant admitted during the investigatory interview that he knew he was not supposed to share the video.

Can we seriously question the possibility of harm coming from the fact that he shared this confidential information? As Mr. Haluska testified, there was possible harm to the accident investigation; there was potential harm to Mr. Elder himself; and there was obvious harm to the Company's standing in the community and its ability to recruit employees since the release of the video had the unquestioned possibility of tarnishing the Company's reputation for safety, no

matter how much effort it puts into making its workplace as safe as possible. Simply put, the 20 second video created a false narrative of those robust safety efforts and created a fever swamp for those Facebook users and video recipients inclined to draw quick conclusions over who was to blame for the accident thereby tarnishing the Company's reputation.

The disclosure of confidential information is a serious matter, one which arbitrators have said is deserving of the highest form of punishment – discharge from employment. I note the following example that we will send to you after today's hearing:

- Labor Arbitration Decision, IN THE MATTER OF THE ARBITRATION BETWEEN: Borgess Medical Center, 2007 BNA LA Supp. 119141 **(Arbitrator William P. Daniel)**

  This case involved a hospital nurse who disclosed to a fellow employee confidential information concerning a recently admitted teenage patient who had been in a tragic automobile accident. Even the employee's claim that she was showing this highly confidential information as a teaching moment for the other employee did not convince the arbitrator - who compared the employee's conduct to gossiping about a patient - to lessen the penalty of discharge.

Now, we expect the Union to argue that Mr. Orcutt was the subject of disparate treatment since Mr. Underwood only received a written reprimand as opposed to some other heightened form of discipline. But as our testimony revealed, the Company did not have proof that Mr. Underwood violated the Company's policies, and while the Company had its suspicions, as you well know, proof is just about everything in establishing just cause for discipline. The fact that the Company did not have such proof against Underwood should not mitigate the penalty or the fact that the proof of the Grievant's misconduct was overwhelming.

To address the Union's other arguments:

1) The Union alleged that Snapchat is not social media. Snapchat is an avenue for interaction to create and share ideas. Social media is exactly what Snapchat does

2) The Union alleged that the video is not "information" as referred to in the context of the confidentiality agreement. How can a video not be considered information? Of course, it is. Look at the policy, Company Exhibit 2—The Confidentiality provision is specifically identified in the header of the document. In addition, the confidential information provision is described in its own separate paragraph. Clearly the video was confidential information covered by the policy.

3) The FaceBook page – Steel Mill Pictorial Union Exhibits 4 & 5. You heard evidence from Sr. Division Manager Haluska that he warned the Supervisor in Union Exhibit 4 that if he did it again he would be fired and that he was unaware of what the Union offered at the hearing for the first time as Union Exhibit 5.

4) The postings in Union Exhibits 4 & 5 are not at all comparable to the video that the Grievant distributed to multiple people without authorization. The pictures in those postings were exterior building photos, not a video of the interior of a building that depicts a gruesome injury that was sustained by a Company employee.

5) The Union also attempts to paint the Grievant as "honest." The evidence offered today shows that he wasn't. Sr. Division Manager Haluska described the investigation and was very detailed and precise in his testimony. The Grievant was not, and he admitted that he had to be convinced two times by his Union representatives to be forthcoming. The Company had to labor in its efforts to get him to come clean.

In sum, here is what the evidence has shown:

- The Company has rules against disclosing confidential information and a rule against conduct that violates common decency and morality.

- These rules unquestionably promote legitimate employer interests. Nor have they ever been contested by the Union as unreasonable in any way.

- Mr. Orcutt was aware of these rules.

- He was aware that he was violating these rules when he sent the video by email and social media.

- The Company did a thorough investigation of the incident and proved that Mr. Orcutt engaged in the conduct he was charged with – in fact, he readily admitted it.

- Mr. Orcutt had no legitimate basis for sending the video to its recipients one of whom worked for a competitor.

- He caused significant harm both to Mr. Elder and to the Company by sending the email, text, and airdrop.
- There was no disparate treatment.
- His penalty was proportionate to the harm he caused.

On the subject of Justice & Dignity, we also ask that you find that the Company was within its contractual right to deny it. The evidence showed that since Mr. Orcutt was clearly aware of the mandates to not share the video and that he deliberately violated those rules that he was grossly insubordinate; but for the reasons we have identified he endangered the safety of Mr. Elder who was in dire shape when the video was shared and was, therefore, subject to further trauma by the dissemination of the video.

For all of these reasons, we ask that you find that the discharge of the Grievant was for just or proper cause, that Mr. Orcutt was properly denied J&D and that you therefore deny the grievance in its entirety.

## POSITION OF THE UNION

It is truly unfortunate that there was an accident that occurred on July 28, 2022. And what is equally as unfortunate is that there was an unnamed individual that recorded the event. That individual would most likely have been disciplined as severe as todays grievant. But Brian Orcutt cannot be the scapegoat for the company because they did not produce the recorder of the video. He has simply not violated any rule or policy.

If there is truly a desire of this long standing billion-dollar sophisticated company to keep information off the internet and out of employee's hand for distribution they would not allow the videos and recordings to be so freely accessible. They would not just casually toss a "Notice to

all craftsman" paper on the shanty table or put on the bulletin board without absolutely verifying all the affected employees with a one on one, ensuring they have been contacted. There would be a clear and unambiguous policy covering all employees and management because clearly they are unaware of any policy as stated by Ken Haluska. Along with this there would not be a confidentiality agreement sandwiched between patents, ideas and licensing almost seemingly awry from its original intent. Again it would absolutely detail what is expected of employees. No sharing videos, pictures, steelmaking processes, and trade secrets.

There is an attempt by the company to use an inventions and patent rights confidentiality agreement to severely punish the grievant. There can be no doubt that the intended acknowledgement of the signee is for exclusive rights of the employer to all ideas, inventions and patents generated during the employee's tenure with the company. Even mentioning that it will all be turned over at the end of employment.

The company's personal conduct handbook is last revised in 2008- and I kid you not I had to google what bookmaking was. As mentioned in my opening Personal Conduct Rule 2j states "conduct which violates the common decency or morality of the community (including gambling games, bookmaking, pornographic materials including electronic media on company property). Grievant Brian Orcutt sent a video which has nothing to do with gambling, bookmaking or pornography. The principle of Ejusdem Generis most certainly applies here. This principle can be found in Elkouri and Elkouri How arbitration works 6th edition Ch. 9.3.A.xii.

Grievant openly admits to having multiple social media accounts and wisely elected not to send the video out to the masses even though as characterized by the company it would have received a great Thrill. The company is desiring you to buy into that thesis is far from the truth.

Brian Orcutt should not be terminated plain and simple. He has been forthcoming and honest throughout the entire investigation. There is no clear and unambiguous rule that prohibits the actions of Mr. Orcutt.

The Company failed to meet their burden of proof. There cannot be a determination that the grievant was terminated for just cause. Fellow employee Nicholas Underwood used a clearly defined social media platform, facebook messenger to send the video to Mr. Orcutt. Underwood received far less discipline and the company characterized this as an honest, but serious, mistake. How is this fair and just? Simply put it is not. As illustrated by the Union in Ex 4 &5 management posted on social media accounts and clearly was not terminated as they are still with the company. The Company has provided no citable discipline for the grievant and as I mentioned had a good record at the time of the termination

There is one arbitration that sticks out and while not exactly situated they are somewhat similar in which the grievant had a good record, it deals with confidentiality and the company failed to meet their burden of proof. It is between Appalachian Regional Healthcare and the USW. I will send it over along with this closing at conclusion of the hearing.

The union respectfully requests you to consider all evidence, testimony, and facts and grant the grievance or fashion an appropriate remedy.

## FINDINGS AND DISCUSSION

Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority, other contractual benefits and reputation are at stake. Because of the seriousness of this penalty, the burden is on the Employer to prove guilt of wrongdoing. Quantum of proof is essentially the quantity of proof required to convince a trier of fact to resolve or adopt a specific

fact or issue in favor of one of the advocates. Arbitrators have, over the years, developed tendencies to apply varying standards of proof according to the particular issue disputed. In the words of Arbitrator Benjamin Aaron, on some occasion in the faraway past, an arbitrator referred to the discharge of an employee as "economic capital punishment". Unfortunately, that phrase stuck and is now one of the most time honored entries in the "Arbitrator's Handy Compendium of Cliches". However, the criminal law analogy is of dubious applicability, and those who are prone to indiscriminately apply it in the arbitration of discharge cases overlook the fact that the employer and employee do not stand in the relationship of prosecutor and defendant. The basic dispute is still between the two principals to the collective bargaining agreement. In general, arbitrators use the "preponderance of the evidence" rule or some similar standard in deciding fact issues before them, including issues presented by ordinary discipline and discharge cases such as within.

The Grievant was terminated on August 12, 2022 based upon two separate and distinct alleged Rule violations: (1) Personal Conduct Rule 2.J. pertaining to conduct which violates the common decency or morality of the community; and (2) the disclosure of sensitive and confidential information to multiple unauthorized persons without the consent of the Company. The Company asserts that either violation standing alone is sufficient grounds for suspension pending discharge.

The genesis of this matter involved a very serious and near fatal accident on July 28, 2022 in the 80" Hot Strip Mill. At that time Colin Elder, a bander/utilityman, was accidentally trapped between two 50,000 lb. steel coils. Fortunately for Mr. Elder, while he sustained serious injuries, he survived the accident but still suffers physical consequences to date.

The Company has an extensive video surveillance system throughout the plant which was able to capture the accident. As is common throughout this plant and many other companies, a "safety stand down meeting" was called soon after the accident and the video was viewed by numerous employees as a safety review. The video was also shown that day to the Union's Safety Committee. More importantly, the video of the accident was also available for viewing on most, if not all, computer terminals throughout the plant to anyone who was either simply curious about the accident or had a legitimate interest in viewing the video. It is not known how many employees actually did view the video. However, one could reasonably conclude that the video was widely viewed and known throughout the workforce.

Sometime mid-day on July 28, 2022 the Grievant was at home. He received a Facebook message from one of his co-workers, Nicholas Underwood, with the video of the accident attached. Mr. Underwood, who later received a written reprimand for disseminating that video, indicated that he discovered the video on the Internet. Later that day Grievant shared the video directly with a few people including his brother who works for a sign company, his neighbor who works for a coil management company, a friend who works for US Steel and a co-worker in the Cold Strip Mill. It is important to note at this juncture that Grievant did not disseminate the video via Facebook or any other social media platform which could be viewed by the public at large. Rather, he sent it individually to a few of his acquaintances.

When word of the near fatal accident began to circulate the Company started an investigation into what it believed was the improper release of Company information, i.e. the video. Grievant was called into a meeting with Mr. Haluska on August 5, 2022 and while he eventually admitted that he shared the video with several individuals he was reluctant, at first, to admit to that fact which, I presume, was out of concern to not implicate other individuals to

whom he sent the video of his own accord. The Grievant also attempted to characterize his dissemination of the video to others as having been grounded in "safety" concerns both at the Indiana Harbor Plant as well as at other companies. While that would certainly be an admirable motivation on the part of the Grievant I do not place much stock in his explanation. I believe the Grievant made the disseminations for what are very normal and human reasons, i.e., gossip and/or voyeurism.

With respect to the alleged misconduct regarding the disclosure of sensitive and confidential information with Company permission the Company introduced a document signed by all employees, including the Grievant, entitled Agreement, Inventions, Patent Rights, and Confidential Information. The Company argues that Grievant violated this Agreement which is supportive of his termination. I strongly disagree. This Agreement is typically utilized by many companies to protect its "work product" such as inventions, patents, proprietary information, etc., which an employee either creates and/or utilizes during the course of their employment.

The Employer specifically cites to Paragraph 4 of the Agreement which prohibits an employee from disclosing or using any "secret or confidential information, knowledge or data of the Company" without the Company's written consent. The Company asserts that the video of the accident falls within this prohibition and the Grievant's dissemination of the same violated that provision. However, I find it to be quite a stretch to characterize the video of this accident as being some type of "secret or confidential information, knowledge or data of the Company". Admittedly, the video is information or data belonging to the Company. But, clearly the video cannot be considered "secret or confidential" information, knowledge or data. As indicated earlier in this decision, the video was initially shared with any number of employees during the Safety stand down meeting, the meeting with the Union Safety Committee, etc. More

importantly, it was readily available at every computer terminal in the plant to be viewed by any employee at any time for several days whether for legitimate employment purposes or mere gossip/voyeurism. Moreover, the video had already been posted to the internet which is where Mr. Underwood claims he found it.

While some, including this Arbitrator, would find gossiping and/or voyeurism over this near fatal accident to be distasteful and unseemly, it certainly cannot be considered violative of the Company's Agreement regarding "secret and/or proprietary information". I understand the Company's concern that the video could cast it in an unfavorable light especially with regard to the importance of its safety record, but that is not the same as disclosing secret or confidential information as contemplated by the Agreement. I therefore find that Grievant's actions in disseminating the video do not constitute a violation of the Agreement.

The Grievant is also alleged to have violated Plant Conduct Rule 2.J. which proscribes conduct that violates the common decency or morality of the community. Rule 2.J. includes examples of what the authors of the Rule considered to be violations, i.e., gambling games, bookmaking, pornographic materials on Company property, etc. The Grievant's actions in disseminating the video clearly do not fall within any of the enumerated examples set forth in the Rule. However, those examples are not to be considered the only potential violations of this Rule, but are merely illustrative of the general types of conduct being proscribed.

After careful thought and consideration I believe the indiscriminate dissemination of the video of a near fatal accident can be considered as offending the common decency or morality of the community especially while the injured employee was still in the hospital with life threatening injuries and the Grievant is engaging in tawdry gossip which has the potential; to

harm the mental health of Elder and his family. I therefore find the Grievant's conduct to be violative of this Rule.

The only remaining issue at this juncture is the appropriateness of the penalty of discharge for the offense committed within. As a general rule, arbitrators should not interfere with the penalty imposed by an Employer if the collective bargaining agreement permits management to exercise discretion and the reasonableness of the penalty is not seriously called into question. However, even when their power to mitigate a penalty is unencumbered arbitrators should be loathe to substitute their judgment for that of management unless the degree of mitigation is a major and consequential change. There is no contractual prohibition against an Arbitrator reviewing the penalty imposed by the Employer within. However, after careful consideration of all of the evidence presented I find the existence of several factors that do cast doubt upon the appropriateness of the imposition of the penalty of discharge for the within offenses.

First, I find it difficult to reconcile the discipline accorded Mr. Underwood who disseminated the video to Grievant for no apparent reason other than "gossip/voyeurism", yet the Company characterized his actions as an "honest, but serious mistake". Mr. Underwood received only a written reprimand. In this same vein I do not believe Grievant was acting maliciously or with any intent to cause harm to either Mr. Elder or the Company and I believe he should have been given some of the same benefit of the doubt.

I also cannot reconcile the Company's treatment of the various photos of the plant's buildings, grounds, etc., that were posted on the website "Steel Mill Pictorial" by Supervisors Plankey and McKinney. Those photos clearly have more potential to do harm to the Company than the subject video. In fact, Mr. Haluska admitted that he considered these photos to have

violated Company policy (Company Ex. 4.) yet no formal action was taken against these Supervisors. They were only orally admonished. The Notice to All Crafters (Company Ex. 4.) clearly prohibits posting videos or pictures on any social medial platforms.

I also place substantial weight on the fact that Grievant has eight years of service and a clean disciplinary record.

Any reliance by the Company on the arbitration decision in Borgess medical Center and Michigan Nurses Association, (Arb. Wm. Daniel 2007) I find to be misplaced. That case involved the release of highly sensitive information of a dying patient which was not previously widely viewed and disseminated among other employees as is the situation existing within. Moreover, medical records also enjoy strict and special protections not normally given to other types of company records.

Finally, I would note that on the basis of the findings in this decision that the Grievant should not have been granted Justice and Dignity under Article Five. Section I, 9. b. of the collective bargaining agreement. The Grievant admitted that he was aware of the Company mandates not to share the video but he went ahead and deliberately did so which can be considered gross insubordination. In fact, as cited in the Second Step Hearing Meeting Minutes of August 18, 2022 "Grievant apologized for his actions; he knows he messed up, and regrets it".

For all of the above reasons, the following Award is hereby entered.

## AWARD

The grievance is sustained in part. The Grievant shall immediately be reinstated to his former position with full seniority but without the payment of any lost wages and/or benefits.

Jurisdiction shall be retained in order to ensure compliance with this Award.

Date: Dec. 19, 2022
Pittsburgh, PA

Ronald F. Talarico, Esq.
Arbitrator