ARBITRATOR'S AWARD

In the Matter of the Arbitration
Between

ArcelorMittal, USA, Indiana Harbor West,
East Chicago, Illinois

and

United Steelworkers of America, Local Union 1011

Case No. BF-10-21

May 13, 2011

David A. Dilts
Arbitrator

APPEARANCES:

For the Union:

Bill Carey, Staff Representative
Timothy Krucina, Grievant

For the Company:

Philip Brzozowski, Advocate

Hearings in the above cited matter were conducted on April 13, 2011 at the offices of ArcelorMittal at 3210 Watling, East Chicago, Indiana. The parties stipulated that the present matter is properly before the Arbitrator pursuant to Article 5 I of their 2008 Collective Bargaining Agreement. The record in this matter was closed upon the conclusion of the arbitration hearing on April 13, 2011.

ISSUE

Was the Grievant (Timothy Krucina) properly discharged pursuant to the parties' 2008 Collective Bargaining Agreement? If not, what shall be the remedy?

BACKGROUND

Timothy Krucina (herein the Grievant) was a probationary employee who was discharged during his probationary period. Article 5 Section E.4.a states:

> New Employees hired after the Effective Date of this Agreement will serve a probationary period for the first 1,040 hours of actual work and will receive no Continuous Service credit during such period. Probationary Employees shall have access to the grievance procedure but may be laid off or discharged as exclusively determined by the Company; provided that such layoff or discharge may not violate Article Four, Section A (Non-Discrimination).

There is no dispute between the parties concerning the cause for the Grievant's discharge or that he was a probationary employee for purposes of the parties' Collective Bargaining Agreement. The dispute between the parties focuses narrowly on the application of Article 5, Section I.4.k of the Collective Bargaining Agreement which states:

> An Employee who is summoned to meet with a supervisor or any other representative of the Company for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by his/her Griever and if the Griever is not then available, the meeting shall be deferred.

There is no dispute that when the Grievant's deficiencies in his performance were discussed with him by the Company he had no Union representation. The dispute arises between these parties concerning whether the Company's discharge of this Grievant was defective because his Griever was not present when "possible disciplinary action" was discussed with the Grievant.

The parties stipulated that the present matter is properly before this Arbitrator pursuant to the requirements of Article 5, Section I of their 2008 Collective Bargaining Agreement. This case came for hearing on April 13, 2011 and the record of evidence was closed upon completion of that hearing.

UNION'S POSITION

The Union contends that there was a meeting on September 20, 2010 between the Grievant and the maintenance manager for the purpose of discussing possible disciplinary action. The Grievant was not accompanied by his Griever. It is the Union's position that this fact establishes that the Company violated Article 5.I.4.k of the Collective Bargaining Agreement.

This case, argues the Union, is not about *Weingarten rights*. The contractual provision at issue regarding union representation first appeared in the basic steel contract in 1965, ten years before the *Weingarten* decision. It is therefore a product of collective bargaining and not a right based on the shifting sands of NLRB decisions. Prior language in this provision had previously required that an employee make such a request, but that language was subsequently removed from the contract. Now, the right to have a Griever present is not dependent upon a request by an

employee but is an absolute – requested or not. Even under the old language arbitrators consistently ruled that Management was required to inform employees of this right to have their Griever present.

During the September 20 meeting the Manager of Maintenance explained to the Grievant that his poor work performance and absenteeism would need to improve if he was to remain employed with the Company. This was not an investigatory meeting, it was a "one way communication." The communication was basically what was expected and what the consequences would be if those expectations were not met. There is no dispute concerning the nature and content of that meeting.

The Union argues that discussing possible disciplinary action is a broad statement encompassing a wide range of types of meetings. One arbitrator said it should interpreted as broadly as the danger facing the employee. This case is about this Grievant. An employee who the Company does not need just cause to discharge, accused of poor work performance who may have limited understanding of their contractual rights. Can an employee be more at risk? A Union representative at such a meeting could help impress upon the employee the seriousness of his situation.

The Company has violated Article 5.I.4.k of the 2008 Collective Bargaining Agreement when Management did not inform the Grievant of his right to have Union representation present when possible discipline was discussed and denied the Griever the right to attend the meeting. The remedy requested is for the Grievant to be returned to employment and to be made whole for the violation of his rights.

COMPANY'S POSITION

The Grievant was a probationary employee who had several performance problems during his probationary period. He had been sleeping on the job, had attendance issues, and was not performing assigned duties. As the Collective Bargaining Agreement specifically permits, the Grievant was discharged "as exclusively determined by the Company."

It is the Company's position that the specific language of Article 5, Section I.4.k refers to "for the purpose of discussing possible disciplinary action" for the right to have a Griever present to be triggered. This language refers to investigative meetings with employees where the contents of the discussion may lead to discipline of that employee. This sounds a lot like the *Weingarten* requirements. The big difference, as the Union contends, is that the contract indicates that the employee shall be entitled to representation which essentially means the Company must make sure a representative is present at investigative meetings and the employee does not have to make the request. The purpose of the *Wiengarten* decision is the same as this contract language and that is to provide Union representation when evidence is being gathered and a case being built against the employee. Absent this type of investigation and evidence gathering, the rule is not triggered.

The meetings of September 20 and October 15 were not investigatory meetings. On September 20 the Grievant was summoned to meet with Mr. Enghofer for an employee evaluation where the Grievant was counseled regarding his work performance and the Company's expectations for future performance. The Grievant was also informed that these expectations would have to be met if he was to remain employed with the Company. This was a

one-way communication and not a discussion of possible discipline – no discipline was contemplated, nor was any subsequently issued. The Union also never filed a grievance over this meeting. Management does not believe that the language of Article 5, Section I.4.k. requires Union representation when meetings are held with employees to discuss their performance and the Company's expectations.

On October 15 the Grievant was again summoned to meet with Management. The purpose of the October 15 meeting was to inform the Grievant that his employment with the Company was being terminated. The Union was informed prior to October 15 that the Grievant's employment was being terminated. It is also the Company's position that the Article 5, Section I.4.k language does not apply to Management's notification to employees that the employment with the Company has been terminated.

It is Management's position that there has been no violation of the parties' Collective Bargaining Agreement and that this grievance should be denied in its entirety as being without merit.

ARBITRATOR'S OPINION

The case before this Arbitrator is a very narrow issue concerning whether a probationary employee is entitled to have a Griever present at meetings which may give rise to in which performance deficiencies are identified to a probationary employee which may result in the termination of that employee's employment. The facts in this case are not in substantial dispute. There were two meetings which occurred. The October 15, 2010 meeting was where the

Grievant was notified that his employment was terminated and is not substantially argued by the parties. The September 20, 2010 meeting was characterized by the parties as being a meeting where the Grievant's performance deficiencies were brought to his attention, as were the Company's expectations, including the consequences for not meeting those Company expectations.

While this matter is based in contract language it is not unlike the requirements of the NLRB's *Weingarten* decision, the contract language here places an affirmative burden to have a Griever present when "An Employee who is summoned to meet with a supervisor or any other representative of the Company for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by his/her Griever and if the Griever is not then available, the meeting shall be deferred." (Article 5, Section I.4.k). This language is generic in reference to "An Employee" and does not differentiate between probationary and seniority employees in plain language.

The language of the parties' contract also contains a provision which does differentiate between seniority and probationary employees: "Probationary Employees shall have access to the grievance procedure but may be laid off or discharged as exclusively determined by the Company; provided that such layoff or discharge may not violate Article Four, Section A (Non-Discrimination)." (Article 5, Section E.4.a). Clearly there is a tension between the requirements of these two contractual provisions.

The Union would have the Arbitrator interpret Article 5, Section I.4.k as meaning that the parties' mutual intent was for "An Employee" to mean any employee without differentiation between probationary employees and those who have earned seniority status. The Company

contends that to interpret Article 5, Section I.4.k in this fashion deprives them of the bargain reached in the language of Article 5, Section E.4.a which places with Management the right for probationary employees to be "laid off or discharged as exclusively determined by the Company." To include a procedural limitation on that exclusive right, argues the Company, makes the right less than exclusive – hence depriving the Company of their contractual bargain reached through negotiations.

Both positions have merit. The Union reads Article 5, I.4.k as dominate and that this language establishes the general rule which applies to all employees, including probationary employees. The Company would have the Arbitrator find that there is clear language which nullifies the Union's alleged clear rule, by placing exclusive determination concerning discharge of probationary employees in the hands of Management. This is the tension between these two provisions of the parties' Collective Bargaining Agreement.

Article 5, Section E.4.a specifies that Management shall have the right to "exclusive"[1] determination in discharge decisions concerning probationary employees. Given the plain meaning of the word "exclusive" it appears to this Arbitrator that Article 5, Section E.4.a is also properly read as an exception to the language of Article 5,Section I.4.k of the parties' Collective Bargaining Agreement. Which would eliminate the requirement to provide a Griever in cases involving probationary employees, in general. However, Management does concede that its practice is to interpret this language to require a Griever if the meeting is an investigation into the conduct of a probationary employee.

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[1] The *Concise Oxford English Dictionary, revised tenth edition,* provides a definition of the word exclusive (found in other major dictionaries) which defines the word as: 1 excluding or not admitting other things ▸ unable to exist or be true if something else exists or is true . . .

The Elkouris have provided some guidance with respect to probationary employee status, in general:

> Where an agreement provides that new employees are not to have seniority rights until completion of a probationary period, and is otherwise silent as to management right with respect to them, probationary employees may be discharged for any reason not otherwise unlawful. In one case, where the provisions of a collective bargaining agreement mentioned probationary employees but were unclear as to whether the employees were included under a just cause clause, the arbitrator held that "the weight of arbitral authority supports the proposition that Management has broad, if not almost unlimited, discretion where probationary employees are concerned. Some arbitrators, however, have set aside the discharge of a probationary employee if management's action was "arbitrary, capricious, or discriminatory"; thus, "the question in such a case goes to the good faith of the Company, not to the merits of its conclusion. . . .[2] [footnotes in original omitted]

In fact, this reasoning applies here, with the exception that probationary employees are specifically mentioned in the contract and their being laid off or discharged is an "exclusive" right given to Management by Article 5, Section E.4.a of the parties' 2008 Collective Bargaining Agreement. If the right is exclusive, then it is not subject to Union input as argued in the case of the September 20 meeting with the Grievant, hence Union representation is not obligatory as it is with seniority employees. However, there is an exception to this "exclusivity" as noted by the Elkouris. The weight of arbitral authority is that this exclusivity be exercised in manner with is in good-faith.

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[2]Frankand Edna Apser Elkouri, *How Arbitration Works, sixth edition,* Washington, D.C.: Bureau of National Affairs, Inc., 2003, p. 934.

Steel Cases Cited

Perhaps most convincing in this record is the weight of the cases cited , all by the Union. In case USS-8230, the Grievant was a seniority employee and the Union contentions here are perfectly consistent with that Arbitrator's finding – the problem is however, that decision was in the case of a seniority employee. In each of the remaining cases, save Grievance 1-45-98, the subject matter in all but one was corrective discipline. Corrective discipline and rights to Union representation, imply seniority employees and hence are not applicable under these facts and circumstances. However, these cases to point out a danger in the administration of discharge. The Union urges that a process which is open and observable to the Union will less likely result in error or caprice. In the later case, caprice or lack of good-faith is not contemplated in Management's "exclusivity" in determinating the propriety of discharge for probationary employees. Management must exercise care to assure that it exercises its exclusive determination in good-faith and without caprice.

Finally, the Union argues that grievance 1-45-98 involves a probationary employee and should carry weight in this decision. In a careful reading of Arbitrator Neumeier's decision, it is clear that the Grievant was reinstated because of the racially discriminatory conduct of his supervisor in that case. The cause for the Union's prevailing in that grievance was racial discrimination. However, non-discrimination is an exceptio, clearly stated in words, to Management's exclusivity in Article 5 Section E.4.a of the parties' 2008 Collective Bargaining Agreement.

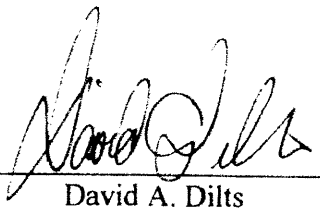
Conclusion

The simple preponderance of the evidence in this record persuades this Arbitrator that Management's exclusive determination, precludes a Griever being present in the types of meetings which were shown to have occurred in this case. The only exceptions being in cases involving discrimination, because of the clear language of Article 5 Section E.4.a, and Management being required to act at all times in good faith in the exercise of its exclusive prerogatives. Therefore, this Arbitrator is persuaded that this grievance is without merit and must be denied.

AWARD

For all of the reasons stated above, the grievance is denied.

At Fort Wayne, Indiana
May 13, 2011



David A. Dilts
Arbitrator