# ARBITRATOR'S AWARD

Case #83

In the Matter of the Arbitration
Between

ArcelorMittal USA,
Indiana Harbor West,
East Chicago, Indiana

and

James Rukas, represented by
United Steelworkers of America,
and its Local Union # 1011

David A. Dilts
Arbitrator

Grievance SP-2016-022

June 16, 2017

APPEARANCES:

For the Company:

Aldo Nardiello, Labor Relations Representative

For the Union:

Alexander Jacque, USWA Sub-District Director

Hearings in the above cited matter were conducted on Wednesday, June 14, 2017 at the offices of ArcelorMittal Steel Company at 3210 Watling Street, East Chicago, Indiana. The parties stipulated that this matter is properly before the Arbitrator pursuant to Article Five, Section I of their 2015 Basic Labor Agreement. The record in this matter was closed upon completion of the hearing on June 14, 2017.

## ISSUE

Was the Grievant (James Rukas) discharged for proper cause? If not, what shall be the remedy?

## BACKGROUND

The Grievant has eight years service with this Company. During his tenure the Grievant had prior disciplinary actions, the latest resulting in a Last Chance Agreement signed in December of 2013 (Company exhibit 15). The cause of this Last Chance Agreement is: *"On August 22, 2013 [the Grievant] was properly suspended and subsequently discharged for violation of Personal Conduct Rule 2 A. Fighting with, or attempting bodily injury to another employee or non-employee on Company property."*

The parties' statement of the background and facts in this case are contained in their Third Step Hearing Minutes of this grievance (Joint exhibit 3, p. 2):

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> On July 13th, 2016, at exactly 5:47 p.m., the #1 CCM Cast State (also know as the caster) was reset. Besides causing signification production delay and the loss of slab tracking/identification in the caster, the reset represented a potential safety risk to 3 SP Employees working at that time.
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> When the caster's speed is less than 1 inch per minute ("in/min"), it is possible to reset the caster from Observer during this momentary pause. Observer is a

program used by operators to, among other things, monitor caster speeds, track the metal, and see the weight of the content in ladles. Some of the screens in Observer, such as the screen used to reset the caster, require a password to access. On the night of the reset, there were four individuals scheduled to work in the LMF pulpit from 3:00 p.m. to 11:00 p.m. The individuals were: Scott Laughlin, Mike Kolesiak, Vic Long, and James Rukas.

On August 12, 2016, the Company suspended Mr. Rukas for five (5) days preliminary to discharge. On August 18th, 2016 a Step Two Hearing was held. On September 20th, 2016, Mr. Rukas was mailed a letter informing him that his suspension has been converted to discharge, effective August 30th, 2016. However, the Company verbally told the Union that Mr. Rukas' suspension had been converted to discharge on August 23rd, 2016.

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These facts and circumstances are not at controversy between the parties. The Company further contends that it was able to identify the computer from which reset command was sent to the caster and that the Grievant was observed in computer screen which were not the norm for his duties, and were screens from which a reset command could have been issued. Further, the Company contends that the Grievant was one of a very persons who had the knowledge of the Observer program necessary to reset the caster. The record also shows that the slab was salvaged, but engineers worked for several hours to recover the tracking information because of the reset.

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closed upon completion of the hearing on June 14, 2017.

## COMPANY'S POSITION

It is the Company's position that it had proper cause to terminate the employment of this Grievant for resetting a caster (#1CCM Cast State) without proper authorization. This is a serious matter which creates the potential for serious injury to co-workers and customers. This also resulted in significant production down-time (at least ninety minutes) costing up to $250,000 per hour. In this case, two engineers spent several hours identifying the steel in the caster so that it could be sold with the appropriate tracking.

Prior to July 13 there was abnormal computer activity coming out of the computer identified as 3spccmspare. As a result the Company installed a program (Accounting Capability) to determine what was happening. Company exhibit 6 shows that this computer was the one from which the reset command came. (Company exhibits 5, 6, 12, and 13 and the testimony of Mr. Eng).

This computer is in the pulpit in #2 LMF; a position to which the Grievant was assigned on July 13, 2016. The Grievant's turn was from 3:00 p.m. to 11:00 p.m. on July 13 (Company exhibit 11). Alan Sutliff, LMF Process Manager, testified concerning his involvement in the investigation concerning this matter. His testimony was that the Grievant's three co-workers observed the Grievant in a computer screen which he normally did not operate at about the time the caster was reset. Further, it was possible to identify the precise time that the caster was reset as 17:47.15 and that it was done through the Accounting Capability program. (Company exhibit

12).

The evidence places the Grievant at work at the time of the caster reset, he was assigned to the area that the subject computer was, and co-workers saw him in computer screens that were not normal. The record also shows that the Grievant had the knowledge to reset the caster on the turn of July 13, 2016 which most employees do not have (Company exhibit 7). In fact, the Grievant subsequently showed another employee how to reset the caster using Observer. The Grievant also admits that he knew the password for the computer from which the reset command was given. Further, the Grievant's work history shows a disregard for safety issues and actions that resulted in his receiving a Last Chance Agreement.

The clear preponderance of the credible evidence shows that the Grievant reset the caster, and that alone is proper cause for his discharge. Aggravating this matter is the fact that the Grievant was on a Last Chance Agreement for endangering fellow employees and he violated that Last Chance Agreement earning a second proper cause for discharge. Management respectfully urges the Arbitrator to deny this grievance in its entirety as being without merit.

## UNION'S POSITION

The Company bears the burden of proof in this case, and it has failed to shoulder that burden of proof. The Company urges that the facts that the Grievant was at work at the time of reset, had access to the computer from which reset command came, knew the password for that computer, and knew how reset the caster is proof that he was culpable. These "facts" are not proof of anything.

The password for the subject computer is on a sticky note immediately above it and everyone knows it, including the Grievant and his co-workers. There were four employees assigned to that same work area, and the Grievant is only one of them. From the evidence presented by the Company it is clear that the caster is reset by responding to queries posed by the program (Company exhibit 8) – this requires only that one know how to operate a keyboard and answer queries. If one views only the facts presented at hearing there is precious little evidence to support the Company's allegations.

The Company contends that the Grievant's co-workers claim that the Grievant was in a computer screen that was not appropriate to his work assignment, and none of these were called to testify – nor was there written statements from these employees. All we have is the word of a management official who allegedly discussed this issue with them – this is not credible evidence, its only an allegation. Further, an intern wrote a statement which refutes the claim that management made concerning the computer screen the Grievant was alleged to have been in at the time of the reset.

Worse still, the Company alleges the Grievant violated his Last Chance Agreement (Company exhibit 2). Paragraph I of the Last Chance Agreement requires that for the Agreement to convert to discharge there must be *"failure to meet any of the conditions set forth above or any repetition of the conduct which led to the suspension/discharge action . . .* " The conduct that led to the Last Chance Agreement was violation of Personal Conduct Rule 2. A. Rule 2. A. proscribes: "*Fighting with, or attempting bodily injury to another employee or non-employee on Company property.*" No such allegation was leveled against this Grievant in this matter – therefore there is no repetition of the fighting violation and hence no violation of the Last Chance

Agreement.

The Union also argues that the aggrieved discipline was untimely. The event that gave rise to the Grievant's suspension occurred on July 13 and the Grievant did not receive notice of the conversion of his suspension to discharge until September 20, 2016. This two month delay is not consistent with the notice of suspension statement of five days for conversion and is simply improper. Justice delayed, particularly under these facts and circumstances is clearly wrong and cannot be allowed to stand.

Simply put, the Company has shown no proper cause for this suspension and subsequent discharge. Clearly, the record shows no repetition of fighting or attempting bodily injury on another hence a violation of the Last Chance Agreement. The Union respectfully requests that this grievance be sustained and that the aggrieved suspension and discharge be ordered expunged. Further, the Union asks that the Grievant be made whole in all respects for this wrongful disciplinary action.

## ARBITRATOR'S OPINION

There are two issues before this Arbitrator which could result in the Grievant's discharge. The Grievant is alleged to have reset the subject caster without authorization thereby delaying production and creating a potential safety hazard (among other things). The Company claims that such an action is serious misconduct and warrants discharge on its face. Further, the Company contends that the Grievant's misconduct on July 13, 2016 also violates his Last Chance

Agreement and as such also warrants discharge.[1] The Union raises a defense beyond the veracity of the allegations made against this Grievant and that defense is that the discipline was untimely. Each of these matters will be examined, in turn, in the following paragraphs of this opinion.

**Does the Record Show the Grievant Reset the Caster on July 13, 2016?**

The Company proffered a quantum of circumstantial evidence upon which it bases its conclusion that the Grievant was culpable. In summary, the Arbitrator was shown that the Grievant was at work on his scheduled turn from 3:00 p.m. to 11:00 p.m. on July 13, 2016 (this the Union does not dispute). The Company has also persuaded the Arbitrator that the command to reset the subject caster came from the computer identified as ***"3spccmspare"*** – this computer is in the Grievant's assigned work area, (Company exhibits 5, 6, 12, and 13 and the testimony of Mr. Eng). While the Union was skeptical of this testimony and supporting documents, this Arbitrator is persuaded that the Accounting Capabilities program is capable of tracing a command's origin and that this evidence is credible and should be given full weight. Equally, Company exhibit 12 and the testimony of each of the Company's witness is persuasive that the reset occurred precisely at 17:47.15 during the July 13, 2016 turn. These are facts which are left without serious dispute by the Union.

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[1] Company exhibit 1, notice of suspension for the Grievant dated August 12, 2016 lists two specific reasons, "either of which would be cause for suspension preliminary to discharge" for the discipline: (1) Your involvement in the #1CCM Cast State being reset which caused a significant production delay, the loss of slab tracking and identification in the caster, and the potential safety impact to 3SP employees and (2) You are currently under a Last Chance Agreement dates December 11, 2013 and your actions as stated above would find you in violation of that agreement.

Two other significant issues are left in controversy. Management claims that the Grievant's co-workers claim that they saw the Grievant in a computer screen that was inappropriate to his duties at the time of the reset. In fact, there is substantial controversy over the claims that the Grievant's co-workers corroborate the Company's conclusion that the Grievant was on a screen from which he could reset the caster. The Third Step Hearing Minutes state, in pertinent part (Joint exhibit 3, p. 4):

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> As part of the investigation into the caster being reset, the Company interviewed Mr. Laughlin, Mr. Kolesiak, Mr. Long, and Mr. Rukas on August 5th, 2016. All four of these individuals were scheduled to work in the LMF during the time of the caster reset. From these interviews, the Company learned a number of things. First, Mr. Rukas was the only individual who used the #2 Heating Station Computer during the turn. Second, around the time of the reset, Mr. Rukas was not on the Observer screen that is normally used by the operators in the LMF pulpit. Additionally, LMF operators rarely have a reason to log out of Observer. Thirdly, Mr. Rukas was the only individual in the LMF pulpit that night who was trained in Observer. Mr. Rukas knew the passwords for the password-protected Observer screens and stated that he "know [Observer] better than most people." Lastly, after the reset, Mr. Rukas showed someone how one could rest the caster using Observer.
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> In response to Mr. Rukas' testimony during the Step Two Hearing, the Company conducted additional interviews with Mr. Laughlin, Mr. Kolesiak, and Mr. Long on August 22nd, 2016. During the Step Two Hearing, Mr. Rukas stated that he may have been away from the #2 Heating Station Computer or asleep at the time of the reset. From these interviews, the Company learned that Mr. Rukas was the only person who sat at the #2 Heating Station Computer during their turn. Moreover, on the night of the reset, no one was asleep while in the LMF pulpit. The Company also reconfirmed that Mr. Rukas was at the #2 Heating Station Computer around the time of the reset.
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> In addition to the statements made by Mr. Laughlin, Mr. Kolesiak, and Mr. Long during the August 5th and August 22nd interviews, the Company also obtained a

> signed statement from Skeeter Judd. Mr. Judd was a Metallurgical Engineering Intern during the summer of 2016 and was in the LMF pulpit at the time of the caster reset. . . .

It is interesting to note that the Step Two Minutes (Joint exhibit 2) dated August 18, 2016 makes no mention of the August 5, 2016 interviews with Mr. Laughlin, Mr. Kolesiak, and Mr. Long. The writing cited above claims that the Company learned only two things from the interviews with the other employees in the LMF pulpit. What is contained here is nothing more than conclusions reached by Management and is not the evidence upon which those conclusion were drawn. The statements provided by these alleged witnesses were not provided so the accuracy of the Management conclusions could be determined by this Arbitrator. Conclusions of this nature are not evidence, they are little more than accusations. Yet, there is more, . Judd (Company exhibit 10, Union exhibit 2) states in pertinent part:

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> Scott, Vic, and Myself were waiting for Mike to finish the heat at the VCP. Jim was using the computer at Heating Station 2. The computer Jim was using is the computer that has two duplicate monitors; one monitor facing the operator at Heating Station 2 and the other monitor facing the operator at the VCP, both displaying the same image. Mike wanted to check how much time he had left to make the connection with the caster, so he looked to the monitor that faces the VCP. Usually that monitor has the screen that shows the cast speed and weight remaining in the ladle with the observer computer screens used in the shop and I wasn't paying attention to what Jim was doing; I don't know what he was using the computer for or what he was looking at.
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> Mike saw that the screen wasn't what he needed and asked Jim to change the screen back so that he could check the amount of time he had left to make the connection. Jim obliged and navigated back to the screen Mike wanted to see. Shortly after that a decision was made that the shop had to cap off due to an issue

> with slab tracking. When the announcement to cap off was made Mike blurted out a comment blaming Jim for the turnaround – at the time I thought is was joke. Jim replied to the comment by saying it wasn't possible to mess with slab tracking from whatever screen he had been looking at. After that I took the samples I had collected to my office before changing out of my greens and going home for the night.

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Mr. Judd's statement provides no specific times so that an independent judgment could be made concerning the timing of the events, however, Mr. Judd describes the change in computer programs to have occurred prior to announcement to cap off – but again, no time is provided – only "shortly after" to describe how long from the time the Grievant changed screens to the announcement to cap off. It is also clear from Mr. Judd's writing that he did not think it credible (thought it was a joke) that Mike blamed the Grievant for the turnaround.

No writing or corroborating evidence of any kind is to be found in this record concerning the conclusion reached by the Company concerning the alleged statements of the Grievant's co-workers concerning any of the matters argued by the Company. Testimony and writings concerning the conclusion drawn by Management is not evidence upon which the Arbitrator can pass judgment.

Lacking direct evidence, what Management asks the Arbitrator to judge is circumstantial evidence alone. The Union contends that the circumstantial evidence falls far short of being persuasive of the Grievant's culpability. Circumstantial evidence is frequently the basis of arbitral decision-making, as the Elkouris observe:[2]

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[2] Kenneth May, ed. Frank and Edna Elkouri, *How Arbitration Works, seveth edition,* Arlington, Virginia: Bloomberg BNA, 2012, p. 8-54. [footnotes deleted]

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> The question, therefore, is not whether circumstantial evidence is valid, but what reasonable inferences may be drawn from the circumstances presented. It is not sufficient that the circumstances give rise to mere suspicion or speculation; the circumstances must lead to inferences and factual conclusions based on a reasonable probability. "If the evidence producing the chain of circumstances is weak and inconclusive, no probability of fact may be inferred from the combined circumstances." [*South Penn Oil Company*, 29 LA 718, 721 (Duff, 1957)] The facts offered as circumstantial evidence must afford a basis for a reasonable inference of the existence or nonexistence of the fact sought to be proved. The reasonable inference sought to be reached must be more probable and natural than any other explanation, although it is not necessary to be adequate that circumstantial evidence exclude every reasonable theory except guilt. As a basic safeguard, one arbitrator has emphasized that an arbitrator in using circumstantial evidence "must exercise extreme care so that by due deliberation and careful judgment, he may avoid making hasty or false deductions" [*Ibid.*, Duff, 1957].

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The Arbitrator is persuaded that it is factual that the Grievant was on duty at the time of the caster reset, the Arbitrator is also persuaded that the Grievant knew how to reset the caster using Observer and that the reset command came from the computer he normally used. The Arbitrator is not persuaded that the alleged statements of the Grievant's co-workers can be given weight.[3] Therefore, only the written statement of Mr. Judd is available concerning the events of July 13 which were subject to witness observation (direct evidence). Mr. Judd concluded that the one co-worker's allegation that the Grievant reset the caster was a "joke," but placed the Grievant

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[3] Article 5, Section I.8.c proscribes management from calling bargaining unit witnesses which is a contractual limitation on presenting evidence obtaining through the discovery of the grievance procedure. Such limitation is the mutual will of the parties and is binding on this Arbitrator.

at the computer from which the command came "shortly before" the cap off announcement (circumstantial).

The Grievant was at work, assigned to the pulpit, Mr Judd places him at the subject computer at the time of reset and the reset command came from the computer the Grievant was using. These circumstances are reasonably inferred to be the likely facts of this case. These inferences are clearly consistent with the Grievant's culpability in this case, albeit other theories of the case are possible -- but this Arbitrator is persuaded not as likely. This body of evidence is akin to "standing over the body with a smoking gun" and therefore is persuasive of the Grievant's culpability. Therefore this Arbitrator has little alternative save to find that the Grievant committed the offense of which he stands accused.

Management nearly sunk its own case through over-reach by attempting to persuade the Arbitrator of other circumstances that were of little or no importance in this case. The Grievant is alleged to have had a password that was likely posted above the computer for all to see. Further, Management argued that only this Grievant could have operated Observer to issue the reset command on July 13, and then presented a menu driven computer screen that lacked complication or specialized any specialized knowledge requirement (Company exhibit 8). These circumstances are not reasonably inferred to be fact.

**Last Chance Agreement**

Management contends that the Grievant violated his Last Chance Agreement through the events of July 13, 2016. The Last Chance Agreement has two paragraphs applicable to these

facts and circumstances, Paragraph H and Paragraph I, to wit: (Company exhibit 15):

H. Mr. Rukas will waive any right to the special Justice and Dignity Procedure outlined in the Collective Bargaining Agreement in the event of any subsequent suspension/discharge action taken against him within a period of two (2) years from the date of this Agreement and for five (5) years in the event of any subsequent suspension/discharge action taken against him for any repetition of the conduct which led to this suspension/discharge action.

I. This Last Chance Agreement represents a **final chance at employment** for Mr. Rukas and is being made in full and final settlement of grievance number Sp13-17. **The terms of this agreement will be expressly adhered to.** Failure to meet any of the conditions set forth above or any repetition of the conduct which led to this suspension/discharge action will be cause for Mr. Rukas's immediate termination. The terms of this Last Chance Agreement shall not constitute a precedent and shall not be relied upon or cited by either party in any other situation.

The parties' Last Chance Agreement, in the first paragraph describes the conduct for which the Grievant was then suspended that resulted in the Last Chance Agreement, that conduct is: (Company exhibit 15, first paragraph)

> On August 22, 2013 [the Grievant] was properly suspended and subsequently discharged for violation of Personal Conduct Rule 2 A. *Fighting with, or attempting bodily injury to another employee or non-employee on Company property. [emphasis added showing the language of Rule 2.A.]*

The offense that is the subject of this aggrieved disciplinary action is not a violation of Personal Conduct Rule 2.A. The offense here is resetting the caster. Management attempted to persuade the Arbitrator that resetting the caster was the same as fighting or attempting bodily harm because there were potential safety issues and that it cost the Company production. The Arbitrator is persuaded by the clear identification of the rule and the fact the Grievant was

involved in an altercation and that no such behavior is in evidence in this matter. In examining the Personal Conduct Rules (Joint exhibit 4) there are rules proscribing unauthorized use of computers (Personal Conduct Rule 2.U), neglect of careless use of Company property (Personal Conduct Rule 2.P, and destruction of Company property (Personal Conduct Rule 2.L) which may fit the Grievant's conduct here, but fighting or attempted bodily harm simply misstates what the Grievant has done.

The Union complains that the Company violated the Justice and Dignity clause of the Basic Labor Agreement (Article Five, Section I.9.b.) The Union contends that the Grievant was entitled to remain on the job, hence payroll until this matter was resolved (paragraph 1). However, the second paragraph of Article Five, Section I.9.b states that the Justice and Dignity clause will not apply when the matter involves "destruction of Company property."[4]

This Arbitrator is persuaded that the reset of the caster on July 13, 2016 falls within this exception. The record shows that the slab was saved and that engineers were able to provide the requisite tracking data, but it required a significant allocation of time – hence wages (or salary) for this to occur. Therefore the Company w as deprived of resources which could have been to productive efforts which is destruction of Company property. Therefore this Arbitrator is persuaded that the Justice and Dignity provision does not apply in this case but because of the Company's loss of resources, not because the Grievant violated the Last Chance Agreement as

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[4] The Union complains that the Last Chance Agreement was violated by Management and that Arbitrator's Bethel's award should provide guidance. Albeit the facts are different, Arbitrator Bethel's award resulted in the grievance being sustained because there were not issues of other misconduct, as here. In USS-46-007 that issue involved an accident, not misconduct as here.

alleged by the Company.[5]

**Timeliness of Disciplinary Action**

The Union complains that there was a lapse of time from the July 13, 2016 incident until the Grievant's suspension, on August 12, 2016 (Company exhibit 1) and the subsequent conversion of the suspension to discharge on September 20, 2016 (Company exhibit 2)[6] This is a period of two months and one week from the incident of July 13, 2016.

Justice delayed is justice denied, however, investigations may require a significant period of time, if the issues are technical and discovery is delayed by reasonable factors beyond the control of Management. In this particular case there are technical issues involving both the caster and identification of the computer and its operator. Whether two months of delay are warranted is not clear from this record; but neither does this record show that the two months is outside the realm of reason.

This Arbitrator notes that the letter to the Grievant on September 20, notes that the Union was informed on August 30, 2016 of the conversion of the suspension to discharge. Without evidence to the contrary this Arbitrator is not persuaded to disturb the penalty assessed in this case.

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[5] The Union cites Arbitrator St. Antoine's award in USS-43, 074 where it was found that the Grievant was denied the benefits of the Justice and Dignity language of the contract. The facts in that case involved an accident, not the willful act in evidence here and therefore provides no guidance in this matter.

[6] This notice states that the conversion was effective on August 30, 2016 and it's the Company's claim that the Union was notified of the action on August 30.

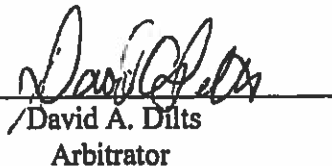
**Conclusion**

The Arbitrator is persuaded that the Grievant engaged in the misconduct of resetting the caster for which discharge is the appropriate penalty. The record falls short proving the Grievant violated his Last Chance Agreement. The second paragraph of the Justice and Dignity language of Article Five, Section I.9.b exempts this matter from application of the Justice and Dignity provisions. Finally, this Arbitrator is persuaded that it was not shown that this discipline was untimely. The Arbitrator has no alternative save to deny this grievance as being without merit.

## AWARD

The grievance is denied.

At Fort Wayne, Indiana
June 16, 2017:



David A. Dilts
Arbitrator