

IN THE MATTER OF THE ARBITRATION BETWEEN

CLEVELAND-CLIFFS LLC  
CLEVELAND WORKS

And

Grievance #1033  
Stacey Lapick Discharge

UNITED STEELWORKERS  
INTERNATIONAL UNION AND  
LOCAL UNION 979

Case 134

OPINION AND AWARD

Background

This case from the Cleveland Works concerns the discharge of Grievant Stacey Lapick for intimidating or threatening a fellow employee, and racial harassment through use of the N-word. Grievant had worked for the Company (or its predecessors) for almost nine years at the time of her discharge on December 12, 2022. The case was tried in the Union's offices in Cleveland on January 19, 2023. Kerry Hastings represented the Company and Patrick Gallagher presented the case for Grievant and the Union. Grievant was present throughout the hearing and testified in her own behalf. The parties agreed there were no procedural arbitrability issues and that the issue on the merits is whether there was just cause for discharge and, if not, what the remedy should be. The parties submitted the case on closing arguments.

The case began following a complaint by Employee J to the Joint Committee on Civil Rights created by Article 4-B of the BLA. The Joint Committee has an equal number of Union and Company representatives and investigates civil rights issues brought to its attention by bargaining unit employees. According to Company witness Susan Bungard, Senior Labor

Relations Representative and a member of the Joint Committee, in late September 2022, Employee J complained to the Joint Committee that Grievant was intimidating and was bullying other employees, including Employee J, who is Black; Grievant is White. Grievant is a Union Steward and a backup Safety Representative. Employee J related an incident in which Grievant allegedly told a relatively new employee to get his head out of his ass. She also asked employees to muffle the siren on a crane the crane repair crew was working on.

Employee J gave the Joint Committee the names of other employees to interview. One of them said Grievant had improperly signed herself off as qualified to work on a job. More significant for this case was the interview with Employee W, also a relatively new employee. The Committee asked her if she had ever heard Grievant call someone an asshole, a smurf, or stupid; Employee W said she had not. The Committee then asked Employee W if she had heard Grievant make derogatory comments about other employees. Bungard testified that Employee W did not want to talk and remained silent for a while, even though Committee members pressed her to answer. Employee W remained hesitant and began crying, but finally said that she had heard Grievant refer to a contractor employee as the N-word during a telephone conversation. Grievant was talking on the telephone with the dispatcher of a trucking contractor named Big Blue, which made deliveries to the plant. Although it is not clear whether Employee W could hear the Big Blue representative's side of the conversation, the Company alleges that the dispatcher told Grievant a Black former employee would be returning to Big Blue as a truck driver and Grievant responded by asking why Big Blue would bring that N-word back. Employee W told the Committee that when Grievant realized her comment had made Employee W uncomfortable, Grievant told Employee W, "You know, like a rapper or someone who lives on the street." Employee W said she had not reported the incident because she was the only one

in the room with Grievant, so Grievant would know who had made the report. Bungard described Employee W as terrified. Employee W told the Committee she was concerned that Grievant would have her fired.

Bungard described the Joint Committee's interview with Grievant. She said Grievant admitted telling an employee to get his head out of his ass, but claimed she was trying to motivate him, not demean him. She also acknowledged making the comment about muffling the crane siren. But, Bungard said, Grievant adamantly denied using the N-word in the telephone conversation with the Big Blue dispatcher. Grievant also discussed a meeting she had with employees concerning the need to get to the job on time. Employee J had reported the meeting to the Committee and apparently thought the comments in the meeting were directed at him. However, Grievant said she had had complaints from trucking firms that trucks were backing up because Company employees were late starting work. Grievant said she emphasized the need to start work on time in order to keep the employees from getting in trouble. Bungard said the Joint Committee also interviewed the employee whom Grievant had told to get his head out of his ass. He said he did not find the comment to be positive or motivational; he said it was demeaning and that new employees were afraid of Grievant and intimidated by her. Bungard said the Committee tried to interview the Big Blue dispatcher, but either Big Blue would not permit it or the dispatcher declined to be interviewed.

Bungard explained that following the investigation, the procedure is for Marsha Harris, HR Section Manager, to prepare a summary of the evidence and a recommendation, which can include a recommendation for discipline. However, the Joint Committee does not impose discipline. Following completion of the report, there is a close-out meeting where the parties discuss the summary and the recommendations. The Company introduced the summary and

recommendation for Grievant, which is dated October 17, 2022 and notes that it was revised on October 26, 2022. The report says, in part:

Based on our findings the investigation team is referring [Grievant] for discipline and/or soft skill/people skill training for the use of the N-word (albeit uncorroborated), and for acting in an unprofessional fashion, creating a hostile work environment as a union representative charged with the responsibility of being an advocate for the workers she represents. These things are corroborated by several witnesses. Her dual role compounds the severity of her actions, although she was acting within her rights when she counseled [Employee J] and others about arriving on the bin floor timely. However, she should not take those appropriate actions using an intimidating, demeaning or hostile tone. The level of discipline will be determined by Sue Bungard (Labor Relations), Janet Jordan, Area Manager, HR/LR, and #1 SPO management.

The report notes that Union Grievance Chair Tony Panza did not agree with the recommendations, principally because the allegation that Grievant used the N-word was uncorroborated. Bungard said she thought the other two Union members of the Committee believed Employee W's claim that Grievant used the N-word. Bungard also said that following completion of the Joint Committee process, management decided to suspend Grievant with intent to discharge because use of the N-word at work "was not acceptable in any circumstances." Grievant was sent a notice of suspension on October 26, 2022.

During the Step 2 meeting on October 31, 2022, Bungard testified, the Union argued that the Company should not take the N-word charge into account in disciplining Grievant because there was no corroboration. According to Bungard, after the Step 2 meeting Acting Plant Manager John Macino was "adamant" that he was going to save Grievant's job by talking to the Big Blue dispatcher. Bungard said Macino called Big Blue's owners and asked to meet with the dispatcher, although he did not tell them about Employee W's allegation. On November 1, Macino and Bungard went to the Big Blue offices and met with dispatcher Paul Royal in a

conference room. Bungard said they asked Royal if he had ever heard Grievant use the N-word, and he said he had, although he could not recall the context. They asked if it was in reference to one of the truck drivers, which apparently refreshed Royal's recollection. He said he was on a call with Grievant and told her that a certain truck driver was returning and Grievant asked why they were bringing that N-word back. Royal said he ended the call quickly after that. He also said he did not report the conversation because he did not want to get Grievant in trouble. At the same interview, the Company obtained a signed affidavit from Royal saying that Grievant had used the N-word in relation to one of Big Blue's drivers. The affidavit was notarized by Bungard, who is an attorney. Bungard said the Company gave a copy of the affidavit to the Union prior to the Step 3 meeting on November 17, 2022 and before conversion of Grievant's suspension to discharge on December 12, 2022.

The Company called Royal to testify in arbitration. He said Big Blue is not owned by Cleveland Cliffs, although Cliffs is an important customer. Big Blue hauls furnace coke and lime to Cleveland Cliffs. He said he interacted with Grievant by telephone almost every day. On the day in question, Royal said he told Grievant he was excited about a driver who was coming back and Grievant replied by referring to the driver as the N-word. Royal said he did not remember how he responded, although he said it was "a quick conversation after that." He acknowledged talking to Cliffs' representatives in November and signing the affidavit. Royal said no one from Cliffs put pressure on him. On cross examination, Royal said he had been contacted about Grievant prior to November, when he met with Macino and Bungard, but declined to speak to anyone because he did not want to be involved. He said he did not want to talk to anyone until he spoke to Big Blue's owners. He also said Grievant was one of his favorite people to work with.

Grievant testified that she explained each issue to the Joint Committee. She said Union Committeeman Jack Sabolich told her it was all right to meet with employees about getting to the bin floor on time, which Sabolich's testimony confirmed. She said she told the employees there were complaints about trucks backing up and she wanted to warn them about it before supervisors noticed. She denied calling out Employee J or any other individual in that meeting. She said she did not raise her voice or intend to be demeaning. She agreed that she told another employee to get his head out of his ass. Grievant said she was trying to be instructive and that the employee's performance improved after the incident. She acknowledged that this might not have been the best way to deal with the issue, but she said that was how she was brought up in the steel mill. She said she did not demean the employee or yell at him. She also agreed that she suggested muffling the crane siren for a brief time, but she said it did not happen and management dealt with the issue.

Grievant testified that Royal's testimony and affidavit were not accurate and that it was "absolutely not true" that she said the N-word. She said the contractor driver at issue was a friend of hers, that she did not know the driver had even left Big Blue's employment, and that she enjoyed working with her. Grievant said she had a conversation with Royal about a new Big Blue driver who came in without PPE, a uniform, or an ID. She did not know who he was and she was working alone after dark. She said she tried to describe to Royal what the employee looked like and she probably used some derogatory terms, saying that he looked like he came from the projects or was selling drugs. Grievant said this conversation was the only time she could think of where Royal might have thought she was making racial comments, although that was not her intent. She said it was a scary situation. On cross examination, Grievant said she knew that it was unacceptable to use the N-word at work and that it was a dischargeable offense.

Tony Panza, Grievance Committee Chair, is a permanent member of the Joint Civil Rights Committee. He questioned Company testimony that the Committee reviewed the October 17 report before it was amended and released. He said no one asked him about it before it was issued. He also said a review of the Committee's action was not part of the Step 2 or 3 grievance meetings. Panza said the Union objected to the Company's use of previous discipline against Grievant because it was unrelated to the kind of offense at issue in the instant case and was more than two years old. Panza said there was nothing in the BLA about having the Joint Committee make recommendations for discipline, which it did in this case. He said he thinks the Committee has been making disciplinary decisions. On cross examination, the Company pointed to an email dated November 7, 2022, addressed to Panza and others, to which the October 17 memo from the Joint Committee was attached. Panza said he might not have read this email. Panza testified that he agrees employees cannot use the N-word at work, although he believed it was not necessarily a dischargeable offense. People are salvageable, he said, and he believes in progressive discipline. He said he was also concerned that there was no corroboration of Employee W's claim until after-the-fact.

The Union also called Willa Evans, an Executive Officer of the Union and Union Chair of the Joint Civil Rights Committee. Evans said the Committee held a close-out meeting of Grievant's case on October 17, but the report was not circulated on that day and she had not even seen it until the day before the arbitration hearing. On cross examination, Evans said she believed Employee W's claim that Grievant had used the N-word. Employee W was sincere and was very reluctant to talk about it. Evans said the Committee had referred Grievant for soft-skill training. Mike Mosley, Union Treasurer and a member of the Joint Committee, said there was a close-out Committee meeting on October 17, but, like Evans, he had not seen the memo Harris

prepared until the day before the arbitration hearing. He said the Committee did not agree with the recommendation Harris included in the memo, that the Joint Committee had never recommended discipline for employees, and that the Committee was misused in this case. On cross examination, Mosley said Employee W was reluctant to talk about the N-word incident and that she feared retaliation. He said he thought she was sincere.

### Positions of the Parties

The Company says the case is about the N-word and includes two issues: did Grievant use it in the telephone call with Royal and, if so, is the discharge penalty appropriate. The Company says the report from Employee W was credible. She had no reason to lie and lots of reasons not to report it. Moreover, if she was willing to say Grievant did not make the comment, the Union could have called her to testify in arbitration, unlike the Company, which is precluded by the contract from calling bargaining unit employees. Even the Union's witnesses described Employee W as a reluctant witness before the Joint Committee and two of the three Union members believed her. In addition, the Company says Royal's testimony at arbitration was credible. Like Employee W, he had no reason to lie. He even testified that he liked Grievant and enjoyed working with her. Grievant, the Company says, was not credible. She had a motive to lie to save her job. Moreover, her testimony in arbitration was the first time she had mentioned a different conversation with Royal in which she admitted to using racially derogatory language, although not the N-word. The story is suspect, the Company argues, because it was never mentioned before.

The Company says Grievant was also guilty of bullying behavior, but it agrees that this was not the reason for the discharge. Rather, the case turns on Grievant's use of the N-word,

which the Company characterized as a “big deal.” Using the word at work is a dischargeable offense, the Company insists, which Grievant herself acknowledged. It is a “horrible racial epithet” that creates legal repercussions for the Company and its use need not be pervasive to justify discharge, the Company contends. The Company points to Grievant’s denial and her lack of remorse as aggravating factors in the case.

The Company characterizes many of the Union’s defenses as red herrings. The Union claims that the Joint Committee was misused by recommending discipline but, the Company says, that has nothing to do with just cause. The Committee investigated an allegation and found facts which the Company was able to use in making a disciplinary decision without repeating the same investigation. In addition, the Company tried to do more investigation, but the Union refused to allow more employees to be interviewed after the Committee was finished. The Company also points out that this defense was not raised at or before Step 3, so it cannot be used in arbitration. The Company says the Union’s claim that Committee members did not see the report until recently is simply a “distraction.” Union witnesses agreed that the document accurately summarized the deliberations the Committee had in its meeting on October 17. Finally, the Company says the Union had the Joint Committee report and Royal’s affidavit before Step 3 and before the suspension was converted to discharge.

The Union says there is no claim by the Company that Grievant engaged in a pattern of racial slurs or abuse and it argues that the Company has not proven that Grievant called anyone the N-word or acted in a racially derogatory manner. Grievant denied making any such comments. The Union also argues that Royal’s testimony was coerced because the acting Plant Manager called Big Blue’s owners to have him testify. The Union says Grievant acted appropriately in the other charges made against her. She performed her proper duties by telling

employees trucks were being held up and they could get in trouble by not starting work on time. And, while she told an employee to get his head out of his ass, she did so to improve his performance and not in a demeaning or intimidating manner. And, even if it had that effect on the employee, Grievant did not know it, was not warned about it, and was not given a chance to correct her behavior. The Union insists that the Company fabricated a case against Grievant, but it says even if she were guilty, there still was not just cause for discharge. Grievant did not directly call anyone the N-word; the statement allegedly was made about a driver who was not even part of the conversation and who was not appropriately dressed to be in the plant. And, the Union points out, Grievant was not given progressive discipline.

The Union also says there were numerous missteps by the Company. It misused the Joint Committee by having it recommend discipline and it included information in the Step 2 minutes that was not actually addressed in the Step 2 meeting. The Company also cited discipline that was more than two years old and was not related to the offense at issue in this case. The Union concludes that there was not just cause for discharge and that Grievant should be reinstated and made whole for all losses.

### Findings and Discussion

At the outset, the Union claims the discharge was flawed because the Company misused the Joint Committee process, especially when the Committee recommended discipline. Article 4-B-2 addresses the role of the Joint Committee: "The Joint Committee shall meet as necessary and shall review and investigate matters involving civil rights and attempt to resolve them." The language does not address the potential scope of any resolution and does not say that the Committee can or should (or should not) recommend discipline as a potential resolution. I

understand the Union's concern that the Committee not be turned into a forum for subjecting employees to discipline. But this case is not the appropriate vehicle to resolve those concerns. There is conflicting evidence about how the Committee has operated in the past, and no documentary evidence about what happened in previous cases. The role of the Committee in recommending discipline, if any, should be explored in a case where the grievance record considered those issues thoroughly.

I find no impropriety in the Company using information revealed to the Joint Committee as part of its investigation into Grievant's conduct. The Committee did not begin an inquiry into allegations of racial harassment; rather, it looked into allegations that Grievant had been bullying new employees. But once Employee W revealed the telephone conversation between Grievant and Royal, the management members of the Committee could not simply ignore that information. And, given the circumstances, there was no reason for the Company to repeat the same interviews with Employee W and Grievant.

Although the case began with allegations that Grievant had bullied and intimidated employees, and even though the Joint Committee's investigation revealed some evidence of such conduct, the discharge hinges instead on the Company's claim that Grievant used a racial epithet during her telephone conversation with Royal. It is true, as the Union claims, that the evidence from Employee W is hearsay. The Company could not call Employee W to testify in arbitration and the Union, for obvious reasons, did not. But some steel arbitrators, including me, have recognized that hearsay statements from employees who cannot be called to testify may be admitted, especially if there is corroboration or if there are other circumstances supporting the statement's credibility, see e.g., *USS-48,629 et.al.* (Bethel/Das, Chairman 2019) and *ArcelorMittal-USW Case No. 63* (Bethel 2013). Both factors exist here.

Royal corroborated what witnesses said Employee W told the Committee. Royal was a credible witness. I believed his testimony that Grievant used the N-word during his telephone conversation with Grievant and I believed his assertion that he did not report her because he did not want to get her in trouble. That also explains why he refused to speak to Cliffs' officials about the conversation until the matter was brought to his employer's attention. I find no evidence that Royal was forced to speak to Macino and Bungard or, even if he was, that anyone told him to lie. I also find nothing untoward about Macino asking Blue Boy's owners to allow him to speak to Royal. Even if I were to discount Bungard's testimony that Macino's aim was to save Grievant's job – although there is nothing to suggest it was not credible – it was appropriate for the Company to pursue potentially relevant information through Royal, especially when the Company knew it could not call its own employee to testify if the case went to arbitration.<sup>1</sup>

Nor is there any merit to the Union's claim that the corroboration was after-the-fact. It is true, as the Union claims, that the Company, in effect, used the Joint Committee interviews as a

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<sup>1</sup>The Union contends that it was improper for the Company to call Royal, relying on Article 2-F-9-b, which says:

b. Outside Individuals Testifying in Arbitration

No testimony offered by an individual associated with an Outside Entity may be considered in any proceeding unless the Party calling the outsider provides the other party with a copy of each Outside Entity document to be offered in connection with such testimony at least forty-eight(48) hours ... before commencement of that hearing.

It is not clear to me that this language applies to the instant case. It is found in the Bargaining Unit Work Section (Article 4-F) of the BLA, which defines an Outside Entity as an employee or entity who performs bargaining unit work. The section largely concerns exceptions to the guiding principal that bargaining unit employees are to perform work they are capable of performing and the procedures used to determine capability or the scope of the exceptions. There is no claim in this case that Blue Boy is performing bargaining unit work or that any case exists concerning contracting out work to Blue Boy. Historically, I have understood this language since its inception to apply only to contracting out (bargaining unit work) arbitrations. But even if it does apply, there is no violation. The only document the Company offered that could be considered an Outside Entity document was Royal's affidavit. The Company gave that to the Union before Step 3 of the grievance procedure, which was long before 48 hours in advance of the arbitration hearing.

significant part of its investigation. But that does not mean the investigation had to end there. The suspension was still in the grievance procedure at the time of the Royal interview and the Union was given the affidavit before Step 3 and, importantly, before the discharge. Continuing the investigation during the pendency of the suspension was, in fact, consistent with the suspension-pending-discharge procedure. This is not a case in which the Company made a disciplinary decision and then tried to justify its action. The Company suspended Grievant after officials interviewed Employee W, who even two of the Union Committee members thought was truthful. And, following Panza's complaint that there was no corroboration, the Company secured an affidavit supporting the employee's claim prior to converting the suspension to discharge.

There are also circumstances supporting Employee W's credibility, even without Royal's corroboration. As noted, two of the three Union Joint Committee members observed Employee W's interview. They noted her reluctance to reveal Grievant's conduct and her anxiety about the possible consequences of doing so. Both of them thought she was sincere. I also have significant doubts about Grievant's credibility. There is nothing in the Step 2 or Step 3 minutes, and nothing in the Union's additions and corrections to the minutes, suggesting that prior to the arbitration hearing, Grievant claimed the incident was simply a misunderstanding of a conversation with Royal about a different employee who showed up in the dark without uniform or ID. Surely, Grievant would have mentioned this before the arbitration, had it actually happened. Finally, I simply did not believe Grievant's denial of the charge. Thus, I find that during a telephone conversation with Royal, Grievant responded to his news that an employee was returning by saying, why are you having that N-word back. This was a violation a Plant

Rule that forbids “engaging in ... other forms of harassment of another Employee....” The rule says employees violating the rule are subject to discipline, “including suspension and discharge.”

The question then becomes whether Grievant’s conduct was just cause for discharge. I agree with the Company’s claim that use of the N-word is never appropriate in the workplace. I also agree that its use justifies significant discipline. But that does not mean it always warrants discharge irrespective of surrounding circumstances. Unlike many of the cases upholding discharge (see e.g., *ArcelorMittal-USW Case No. 63*), Grievant did not make the comment to or about a coworker and she did not say it to the Big Blue driver involved. Nor was it part of other demeaning or racially derogatory language or conduct. There is no evidence that she said the word to any Black employee or contractor. Royal is White and nothing in the record identifies Employee W as Black, even though the Joint Committee report and the grievance minutes identify other employees as Black. The driver who was the target of the word did not hear Grievant say it. It is not clear what prompted the comment – in large part because Grievant falsely denied making it – but the word was not used in anger or as part of a dispute with a coworker. Rather, it seems to have been a very poorly-intentioned attempt at a joke. When Grievant realized Employee W was offended by her use of the N-word, Grievant appears to have tried to soften its impact by referencing rappers or street people. Certainly, this does not excuse what Grievant did. But I am not able to conclude that her conduct was so egregious that it precluded consideration of other circumstances that are typically considered in discharge cases.

There are other aggravating and mitigating factors. Grievant refused to acknowledge her conduct, she made up a new story to tell in arbitration, and she bullied some of her coworkers. But Grievant had about nine years of service and she had no relevant disciplinary history.<sup>2</sup> There

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<sup>2</sup> The Union objected to the Company’s introduction of a previous 5-day suspension issued in September 2019 following Grievant’s aggressive and profane encounter with a supervisor. Article 5-I-9-d says the

is no basis for concluding that Grievant would not be amenable to progressive discipline, especially if the discipline is converted to a suspension of sufficient length to emphasize to Grievant the seriousness of her offense and the likely consequence of recurrence. This is a close case, but on balance, I am persuaded that the Company did not have just cause for discharge.

I find that the Company did not have just cause for discharge, but that it did have just cause for significant discipline. I rarely reinstate employees without back pay. In this case, however, Grievant has been off work a relatively short time and she committed a serious offense. Thus, I will direct the Company to reinstate Grievant without back pay, with the time off work to be considered a disciplinary suspension. I will retain jurisdiction for a period of 60 days to address any issues concerning the remedy.

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Company cannot use previous discipline more than two years old “except records relevant and necessary to establish progressive discipline of the action in dispute, but in no event longer than five (5) years.” The Union points out that the previous offense was not racial harassment and, thus, did not count as progressive discipline for the discharge at issue. It is not entirely clear to me why the Company tendered the exhibit, since it argues that Grievant’s conduct justified discharge even without prior discipline. The exhibit would likely be relevant and admissible if Grievant had been discharged because of bullying and non-racial demeaning comments to other employees, like those that initially prompted the Joint Committee investigation. But the previous discipline was not a progression step for racial harassment and I have not considered it as relevant to this case.

AWARD

The grievance is sustained, in part. Grievant is to be reinstated without back pay with the time off work to be considered a disciplinary suspension. I will retain jurisdiction for a period of 60 days to address any issues concerning the remedy.

*Terry A. Bethel*

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Terry A. Bethel, Arbitrator  
February 13, 2023