IN THE MATTER OF ARBITRATION	)	
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	)	
CLEVELAND-CLIFFS STEEL LLC CLEVELAND WORKS	)	
	)	
	)	
	)	
and	)	Grievance No. 1033
	)	Case 142
	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 979	)	
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	)	
	)	

Susan Bungard, for the Employer
James Walker, for the Union
Before Matthew M. Franckiewicz, Arbitrator

OPINION AND AWARD

This arbitration proceeding involves the termination of Grievant David B. Clark.

A hearing was held on August 3, 2023 at Cleveland, Ohio. Both parties called, examined and cross examined witnesses, and offered documentary evidence. The Parties agreed to waive the requirement for a decision within two days (Article Five Section I (8) (a) (5)) and agreed that I should issue a decision with full opinion within 30 days.

Contract Provisions Involved

ARTICLE FOUR - CIVIL RIGHTS

Section A. Non-Discrimination

1. The provisions of this Agreement shall be applied to all Employees without regard to:

   a. race, color, religious creed, national origin, handicap or disability or status as a veteran; or

   b. sex or age, except where sex or age is a bona fide occupational qualification; or

c. citizenship or immigration status, except as permitted by law.

2. Harassment based on any of the characteristics as set forth in this Section shall be considered discrimination under this Section.

3. The Company shall not retaliate against an Employee who complains of discrimination or who is a witness to discrimination.

4. There shall be no interference with the right of Employees to become or continue as members of the Union and there shall be no discrimination, restraint or coercion against any Employee because of membership in the Union.

5. The right of the Company to discipline an Employee for a violation of this Agreement shall be limited to the failure of such Employee to discharge his/her responsibilities as an Employee and may not in any way be based upon the failure of such Employee to discharge his/her responsibilities as a representative or officer of the Union. The Union has the exclusive right to discipline its officers, representatives and employees.

6. Nothing herein shall be construed to in any way deprive any Employee of any right or forum under public law.

Section B. Civil Rights Committee

1. A Joint Committee on Civil Rights (Joint Committee) shall be established at each location covered by this Agreement. The Union shall appoint two (2) members, in addition to the Local Union President/Unit Chair and Grievance Chair. The Company shall appoint an equal number of members, including the Plant Manager and the Plant Manager of Industrial Relations. The parties shall each appoint a Co-Chair and shall provide each other with updated lists of the members of the Joint Committee.

2. The Joint Committee shall meet as necessary and shall review and investigate matters involving civil rights and attempt to resolve them.

3. The Joint Committee shall not displace the normal operation of the grievance procedure or any other right or remedy and shall have no jurisdiction over initiating, filing, or processing grievances.

4. In the event an Employee or Union representative on the Joint Committee brings a complaint to the Joint Committee, the right to bring a grievance on the matter shall be preserved, in accordance with the following:

   a. The complaint must be brought to the attention of the Joint Committee within the same timeframe that a complaint must be brought to the First Step 1 of the grievance procedure.

b. The Employee must provide the Joint Committee with at least sixty (60) days to attempt to resolve the matter.

c. At any time thereafter, if the Joint Committee has not yet resolved the matter, the Employee may request that the Grievance Chair file it as a grievance in Step 2 of the grievance procedure, and upon such filing the Joint Committee shall have no further jurisdiction over the matter.

d. If the Joint Committee proposes a resolution of the matter and the Employee is not satisfied with such resolution, then the Union may file the complaint at Step 2 of the grievance procedure, provided such filing is made within thirty (30) days of the Employee being made aware of the Joint Committee's proposed resolution.

Section C. Workplace Harassment, Awareness and Prevention

1. All Employees shall be educated in the area of harassment awareness and prevention on no less than a yearly basis.

2. A representative of the Union's Civil Rights Department and a representative designated by the Company's Labor Relations and/or Human Resources Department will work together to develop joint harassment and prevention education, with input from the plants and Local Unions.

3. Within six (6) months of the Effective Date of this Agreement, members of the Joint Civil Rights Committee will be trained in matters relative to this provision.

4. All new Employees (and all Employees who have not received such training) will be scheduled to receive two (2) hours of training as to what harassment is, why it is unacceptable, its consequences for the harasser and what steps can be taken to prevent it.

5. All Employees shall be compensated in accordance with the standard local plant understandings for time spent in training referred to in this Section.

ARTICLE FIVE - WORKPLACE PROCEDURES

Section I. Adjustment of Grievances

8. Rules for Hearings

a. The parties agree that the prompt resolution of cases brought to arbitration is of the highest importance. Therefore, except as provided in paragraph 8(b) below, arbitration hearings shall be heard in accordance with the following rules:

(1) the hearing shall be informal;

(2) no briefs shall be filed or transcripts made;

(3) there shall be no formal evidence rules;

(4) the arbitrator shall have the obligation of assuring that the hearing is, in all respects, fair;

(5) the arbitrator shall issue a decision no later than two (2) days after the conclusion of the hearing. The decision shall include a brief written explanation of the basis for the conclusion; and

(6) the board shall adopt such other rules as it deems necessary.

c. The Company agrees that it shall not, in an arbitration proceeding subpoena or call as a witness any bargaining unit Employee or retiree. The Union agrees not to subpoena or call as a witness in such proceedings any non-bargaining unit employee or retiree.

9. Suspension and Discharge Cases

b. Justice and Dignity

(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; acts of workplace harassment; threatening bodily harm to, and/or striking another employee; theft; or activities prohibited by Article Five, Section K (Prohibition on Strikes and Lockouts).

e. Should the arbitrator determine that an Employee has been suspended or discharged without just cause, the arbitrator shall have the authority to modify the discipline and fashion a remedy warranted by the facts.

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.

The Facts

Grievant David Clark began working for the Company on May 31, 2022. The current grievance protests his suspension with intent to discharge and subsequent termination. Clark had no prior discipline. At the time of his termination he was a Crane Operator in #2 Steel Producing.

On May 12, 2023 the Joint Committee on Civil Rights (Joint Committee) received an anonymous report that Clark had used the "N word" twice at work. The caller attributed this information to Andre Smith.

The Joint Committee arranged to interview Andre Smith that day. Smith reported a comment related to him by Sonji Mouser, although Smith did not hear the remark himself. According to Smith, Mouser told him Clark said he felt unsafe the way Smith boarded a crane. Smith contended that Clark has a problem with the N-word, and that Mouser had told him that she had two strikes against her because she was female and black, and also had said that if he saw a black person do something wrong he called him a [N], and if he saw a white person do something wrong he called him an inbred hillbilly. Smith went on to say that Toni Palya told him that Clark was dropping N-bombs.

The Joint Committee interviewed Sonji Mouser later that day by phone while she was in her car. Mouser stated to the Joint Committee that Clark told her she had two strikes against her because she was female and black, and that Clark said that if he saw a white person do something wrong he called him an inbred hillbilly and if he saw a black person do something wrong he called him a [N]. Mouser told the Joint Committee that if someone moved them so they were not working together it might resolve matters, and she did not feel Clark made his comment with malice. Mouser herself did not report Clark's statements to the Joint Committee. She explained that on a prior job she had made a report of misconduct and felt retaliated against as a result, although she was not afraid that Clark would retaliate against her.

As a result of the interviews the Company issued a suspension with intent to discharge letter to Grievant Clark that same day for harassment (Company Exhibit A). On June 20 it converted the suspension to a discharge (Company Exhibit B).

The Company interviewed Mouser on May 23. Mouser stated that the first time she worked with Clark, she asked who did I piss off to get here? And Clark responded you have two things against you, one is that you're female and one is that you're black. Mouser recounted that Clark went on to say when I see a white person doing something wrong, I call him an inbred hillbilly and when I see a black guy doing something wrong I call him [N].

The Company interviewed Toni Palya on May 25. Palya is a white female, who has a biracial son. According to Palya at shift change she was discussing her son and his fiancee, and Clark told her, you need to teach your son how to treat women better, but that on another occasion Clark told Trevor Heil everything here is [N]-rigged.

Neither Mouser nor Palya complained directly to the Joint Committee. They came to the Joint Committee's (and the Company's) attention because of Andre Smith's report. The Company was precluded from calling Mouser or Palya as witnesses at the arbitration hearing, and the Union did not call them.

The Company interviewed Heil on May 31. Asked whether he heard the statement related by Palya, Heil responded not that I recall, but he added that Clark talks a lot and he sometimes tunes him out.

At the Step 2 meeting on May 16, Clark denied telling Mouser that when he sees a black person doing something wrong he calls them a [N] or that when he sees a white person doing something wrong he calls them an inbred hillbilly. Clark indicated that he believed Mouser was making up her story because she wanted to be moved from a crane and that she "bitches" all the time. Clark denied telling Palya that her son needed to learn how to treat women or that everything was [N]-rigged. Clark responded that the "N-word" never came out of his mouth here, in response to a question whether he has used the "N-word" at the plant.

Grievant David Clark testified that on the first day he worked with Mouser they discussed how cranes were allocated. Clark told her that the senior Employee usually made the choice but tried to be fair. She asked to ride in the cab with Clark and he demonstrated the working of the crane. Mouser asked why she had been assigned there and indicated she thought she was being punished and did not want to be there. He denied saying that she had two strikes, that she was female and black. Mouser objected to a particular crane and Clark let her pick her crane, although he was senior.

He stated that thereafter he usually saw Mouser only at the beginning of the shift. According to Clark about a month before he was suspended, he and Mouser had a conversation about an electrician walking the crane rails, and Mouser asked him if she could go with him to watch as he put a test weight on. He also noted that Mouser had never complained to him that he had said anything offensive.

According to Clark he and Palya worked on different shifts, rarely worked together and communicated only at shift change. He denied telling her that her son needs to learn how to treat women better. He denied using the phrase [N]-rigged but acknowledged that he uses the phrase jerry rigged, a phrase that his father had used. (Although the dictionary spells the phrase "jury rigged," it sounded to me that Clark was saying jerry rigged.)

Clark denied ever saying the N-word or using racially charged language at work. He stated that he hoped the job at Cleveland-Cliffs would change his life and that there was no way he would jeopardize it.

Clark acknowledged having said that Mouser "bitches" and complains about running the cranes.

At the arbitration hearing Trevor Heil testified that he broke Clark in on the crane, and that he has had several conversations with Clark about the conditions of the cranes. He stated that he did not recall Clark saying that everything was [N]-rigged, or making any other racial slurs. Heil also stated that Clark talks a lot, he has heard all of Clark's stories several times, and that he tends to tune out Clark, but when he was paying attention he never heard Clark use racially offensive language.

Safety Administrator Arbert Gonzalez testified that he interacted frequently with Clark because of Clark's safety concerns. He also related that Clark talks a lot but that he never heard Clark say anything improper, and that he was shocked by the allegations against Clark.

It is undisputed that at least since Clark was hired there has been no dedicated harassment training for Employees.

As part of his orientation, Clark signed an acknowledgment dated May 31, 2022 for receipt of corporate policies "Article Four - Civil Rights - referencing Non-Discrimination per Bargaining Labor Agreement effective 9/1/2015." He remembered no specific training on harassment during his initial training, but does not dispute that he knows racial slurs are not appropriate.

Issue

The issue, as agreed to by the Parties, is whether the Company had just cause to discharge the Grievant, and did the Company have just cause to deny the Grievant justice and dignity, and if not, what shall be the remedy.

Position of the Employer

The Company notes that Grievant Clark had less than one year service at the time of his suspension. It maintains that he was trained on the Company's harassment policy when he was hired.

It submits that Mouser and Palya have been consistent in their accounts of what they heard Grievant say. It reasons that it is unlikely two unconnected Employees would fabricate stories. It sees no evidence of why they would do so. It stresses that while it could not call these two Employees as witnesses, the Union could have but did not. It considers that while neither complained to the Joint Committee, one feared retaliation and the other was a probationary Employee.

The Company contends that justice and dignity does not apply in harassment cases based on the recently added Article Five Section I (9) (b) (2).

It relies on a prior arbitration decision by Arbitrator Terry A. Bethel between the same Parties. It notes that Arbitrator Bethel relied on hearsay from Employees whom the Company cannot call as witnesses in arbitration. It quotes his statement that using the N-word is never appropriate in the workplace and calls for significant discipline, even though not made to or about a co-worker, and not as part of other demeaning or racially derogatory language or conduct. It views the current case as similar but stronger in that there were two incidents involving separate Employees, one black and the other the mother of a biracial child, and the Grievant in this case was a short term Employee as compared to a nine year Employee.

The Employer sees the lack of harassment training as a red herring. It urges that Clark was given the Company's policy, and in any case everyone knows that racial slurs are not acceptable.

It characterizes the Grievant's action as egregious, and it argues that "His short time and the awfulness of his actions should lead to his termination." It fears that if the Grievant is returned to work, word will spread that racial epithets are acceptable.

It asks that the grievance be denied.

Position of the Union

The Union assigns the burden of proof in this case to the Company, and in view of the nature of the accusation it contends that the applicable standard should be "clear and convincing proof." It insists that the Company has not proved any misconduct by Grievant Clark. It regards his denials as consistent.

It faults the Company for removing the case from the Joint Committee part way through the Joint Committee's investigation, arguing that the purpose of creating the Joint Committee was to permit it to hear

complaints, investigate them, and then make a recommendation. It complains that instead the Company heard one side of the story and rushed to termination.

As a factual matter, the Union asserts that the area where the Clark-Palya conversation allegedly took place is very loud, and further that the third Employee who was present did not substantiate the accusation. It perceives "jerry rigged" as the more plausible version. The Union also emphasizes that neither of the accusers complained to the Joint Committee itself, conflicting with any claim they were offended. By contrast it sees the Employee who triggered the investigation as having an axe to grind with Clark because of Clark's negative comments about his unsafe operation of the crane. It regards as odd that Mouser would ask to ride in the crane cab with the Grievant if in fact he had made the comment she attributed to him.

The Union stresses that the Company has done no harassment training for years, contrary to Article Four Section C (1) of the collective bargaining agreement. It points to an element of just cause that the rules be communicated to Employees. It deems that if anything training is more essential following the Bethel decision.

It maintains that the investigation was tainted by two Employees conversing about the incident.

It compares the case decided by Arbitrator Bethel: in that case there were corroborating witnesses, and Bethel reinstated the Grievant where the offensive word was not directed at someone.

The Union stresses that the alleged comments (which it denies were made at all) were not directed at an Employee, and were not a case of name calling.

It fears that if anyone can claim misconduct by a fellow Employee without corroboration, personality clashes become discharge events.

It asks that the grievance be sustained and that Grievant be reinstated and made whole for lost wages, benefits and seniority.

Analysis and Conclusions

In Arbitration Case No. 1033 between these same Parties, during the course of the Company's investigation of a complaint by an Employee, a second Employee, who was identified as a potential witness, related that the Grievant had used the "N-word" in referring to a contractor employee in a telephone conversation with a dispatcher for the contractor. Although the Grievant denied making the racial slur, when the Company interviewed the dispatcher with whom the Grievant had spoken on the phone, the dispatcher confirmed that the Grievant had used the racial slur. The dispatcher also testified to the same effect at the arbitration hearing.

Arbitrator Terry A. Bethel reached a number of conclusions that are pertinent to the current case. He decided that it was not improper for the Company to use information that had been revealed to the Joint Committee. He noted that the Company could not call the Employee accuser as a witness and that the Union did not. He stated "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." Arbitrator Bethel found the outside witness credible,

and that the Employee witness seemed to be a reluctant one. Bethel stated "I also have significant doubts about Grievant's credibility. . . . Finally, I simply did not believe Grievant's denial of the charge."

Arbitrator Bethel found that use of the N-word is never appropriate and its use justifies significant discipline, but not necessarily discharge. He noted that the Grievant did not make the comment to a co-worker or directly to the individual referred to, and it was not part of other demeaning or racially derogatory language or conduct, and that the word "seems to have been a very poorly-intentional attempt at a joke." He acknowledged additional factors: Grievant refused to acknowledge the conduct, but had nine years service and no disciplinary history. He determined that there was no basis for concluding the Grievant would not be amenable to progressive discipline. While he deemed that "This is a close case," he concluded that there was not just cause for discharge and reinstated the Grievant without backpay. (The Grievant in that case was discharged on December 12, 2022 and Bethel's decision issued February 13, 2023, so that the result was a suspension of roughly two months.)

Because Arbitrator Bethel's decision involved the same Parties, it constitutes a binding precedent for three propositions, which I will discuss separately below. It also provides useful guidance for resolving factual issues where the Company relies on statements made to the Company by Employees whom the Company is precluded from calling as witnesses at an arbitration hearing, and I shall discuss these later in this decision.

I regard the Bethel award as authority for the following propositions, which later arbitrators are required to follow:

1. The Joint Committee on Civil Rights is a parallel method, not the exclusive method, for addressing complaints and issues relating to civil rights. Resort to the Joint Committee does not foreclose the Company from imposing discipline over the same matters that are brought to the attention of the Joint Committee, nor from relying on evidence or information that was initially brought to the attention of the Joint Committee. This is in keeping with Article Four Section B (3) of the collective bargaining agreement, which provides that the Joint Committee does not displace "any other right or remedy." Among those rights which are not displaced by the Joint Committee is the Company's right to impose discipline for proper cause. (See Article Five Section J.) The Company's right to issue discipline for workplace harassment is also specifically recognized in Article Five Section I (9) (b) (2). In the present case the Union complains that the Company invoked the disciplinary process before the Joint Committee had concluded its work. Bethel's decision makes clear that the Company acted within its prerogative in doing so, even if this had the effect of making the Joint Committee's work moot in this case.

2. An Employee statement to the Company is admissible in an arbitration hearing, even though that Employee is not a witness in the arbitration. This is a conclusion that is essentially compelled by the interaction of three provisions in Article Five Section I (8), namely the exclusion of Employees as Company witnesses in arbitration (Section I (8) (c)); the rejection of the formal rules of evidence (Section I (8) (a) (3)); and the arbitrator's duty to assure a fair hearing (Section I (8) (a) (4)). Unless the Company is permitted to adduce evidence of what Employees told it, it would be powerless to address most offenses committed by one Employee against another, except in the rare instance in which such abuse was witnessed by a Manager. Although in his decision Bethel noted that there were other factors that enhanced the reliability of the hearsay statement, the clear implication is that such hearsay will still be admissible even when other forms of corroboration are absent. Of course

the admissibility of such hearsay is an entirely different consideration from the weight to be accorded to it, a topic on which I shall have much more to say later.

3. Voicing racial epithets amounts to serious misconduct. Arbitrator Bethel's decision stands for the proposition that the Company need not follow the usual course of progressive discipline in a case involving racial slurs. While not every dirty word spoken provides just cause for the ultimate sanction of discharge (as Bethel held in the case before him) defamatory racial remarks justify "significant discipline."

One of the heaviest responsibilities an arbitrator undertakes is the resolution of which conflicting version of the facts is to be accepted. Some of my arbitration colleagues profess to be able to observe a witness carefully and detect whether the witness is telling the truth or not. I was not blessed with such a gift. I have no simpler method than to trudge through all the evidence in the effort to determine which of the competing versions to accept.

That task is all the more difficult in a case like this which involves comparing an accusation from a person I never met against a denial from a person in the same room with me. In the typical case where there is conflicting testimony, an arbitrator can balance one witness against the other: Did one contradict himself? Did one show reluctance when a particular topic was raised? Did one have difficulty remembering? Did something about one just not seem right? None of these comparisons can be made when one is balancing a live witness against a statement. Some cases simply reduce to the question do I believe the Grievant or not?

In the inquiry into this area I once again consult the Bethel award. Terry A. Bethel is one of the most respected arbitrators in the steel industry, and it is not by happenstance that his name is listed first among panel of arbitrators the Parties designated to decide their cases. (My own name is last on this list, which helps me to maintain a healthy sense of humility.) I recognize that the evidence in the two cases is substantially different; yet his method provides some helpful guidance to the task of resolving the factual dispute. I start by identifying a few considerations that Bethel did not apply is arriving at his factual findings.

- Among these is the notion of an adverse inference, a formula that might be applied, but is probably better avoided. As Bethel observed, while the Company could not call the accusing Employee to testify, the Union had no such restriction. The failure to take the opportunity could suggest an adverse inference, that calling the witness would weaken the Union's case. Bethel did not draw such an inference, saying simply that "for obvious reasons," the Union did not call the Employee. I also decline to draw any inference from the Union's failure to call the two Employees who reported that the Grievant had used a racially offensive term. The Union owes a duty to all its members, and calling members for the sole purpose of discrediting them hardly seems in keeping with this duty. In my view, the fact that the Union did not call the two Employees who claimed to have heard Grievant Clark use the term at issue, is a non-factor.

- Bethel did not employ the common but too facile platitude that the Grievant's account should be discounted because the Grievant has a stake in the outcome. Resort to this credibility resolution method seems to me a simplistic way of shirking the difficult duty of trying to deduce what actually happened. Further, this credibility resolution shortcut amounts to imposing a presumption against the Grievant and effectively shifting the burden of proof from the Employer to the Union and the Grievant. I draw no inference from the fact that the Grievant is an interested witness.

- Bethel also did not consider the fact that the Employee who accused the Grievant did not herself report the incident as not detracting from her credibility. Indeed he found her reluctance as a witness to enhance her credibility. In the current case the two Employee witnesses did not themselves initiate complaints with the Joint Committee, nor did they try to avoid answering when interviewed. In my estimation these considerations neither strengthen nor weaken the credibility of their accounts.

Having pointed out some considerations that Bethel did not find useful in resolving the factual dispute in his case, I now note some of the factors that he did rely upon.

One of these was corroboration. In Bethel's case that corroboration came from a live witness who had the rare circumstance of being an observer affiliated neither with the Company nor the Union, and thus not excluded under Article Five Section I (8) (c), who confirmed the account of the Employee whom the Company could not call as a witness.

In the current case, the impact is exactly the opposite. Toni Palya told the Company that she overheard Grievant Clark using the term [N]-rigged, while Clark was speaking to Trevor Heil. Heil himself testified that he did not recall Clark using the term. Heil acknowledged that he sometimes tunes out Clark, who apparently is quite a talker. But even if Heil was paying no particular attention, the offensive word itself likely would have drawn Heil's attention. The word itself is something of an alarm bell by now, and I would think it likely that if Clark had used the term, it would have had an impact on Heil. The lack of corroboration for Palya's version calls the accuracy of this account into question, particularly since the non-corroboration comes from the very person to whom the remark was supposedly addressed.

Arbitrator Bethel also based his factual determination on his impression of the Grievant's testimony. In many cases where no live witness corroborates the hearsay account of a person who did not testify, the decision resolves to the simple question of whether or not the arbitrator believes the Grievant's testimony. In some cases the most convincing witness for the Company is the Grievant. Sometimes an arbitrator, even without being able to articulate the reason why, forms the strong impression that a story is inaccurate. Sometimes the most an arbitrator can say in this regard is what Bethel said "Finally, I simply did not believe Grievant's denial of the charge."

As with the point about corroboration, the current case is the opposite side of the coin from Bethel's case. Nothing about the Grievant's testimony as I heard and observed him led me to believe that his story was unbelievable.

I return to a point I made at the outset of the discussion: the process of balancing a hearsay accusation versus a first hand denial is an uncomfortable one. The two accounts simply cannot be weighed on equal terms. First, and most obvious, the Grievant's account was given under oath, and the statements from Mouser and Palya were not. This is not to suggest that many people are deterred from lying only by the oath and possible consequences. But in my experience at least some witnesses are impressed by the oath into being as careful and precise as possible in relating what happened. This seemed exactly the case with Heil, who did not simply flatly deny that Clark used the offensive term, but testified that he did not recall hearing Clark say the word, but that he does not always pay attention to what Clark is saying. Second, the absent witness cannot be tested as to the accuracy of his/her perception or recollection. Palya was not present to ask how much attention she was paying to a conversation between two other people. Neither Palya nor Mouser could be questioned as to the background noise level when the comments were supposedly made or whether they

were wearing hearing protection. Third, the past and current memory of the absent witness cannot be compared. (The Grievant's inconsistency in Bethel's case was a factor in Bethel rejecting his testimony.) Perhaps Mouser or Palya would remember things differently today than they did when they spoke to the Joint Committee. But the experiment simply cannot be conducted. Fourth, the absent witness cannot be questioned about whether prior interactions with the Grievant shaped his/her perception or recollection of what the Grievant said. As Union Grievance Committee Chair Tony Panza observed, based on his 37 years of experience, what a witness thinks he or she hears may be influenced by what the witness expected to hear, based on past interactions with the Grievant. Here again the effect of past interactions between Grievant Clark and Mouser or Palya on what the latter heard (or thought they heard) is impossible to assess. In this vein the Union attributes at least to Mouser some personal considerations based on her past relations with Grievant Clark, and once again these cannot be explored with a witness who is not present to answer questions. Finally, while I heard Grievant Clark's account from his own mouth, the statements of Palya and Mouser were filtered through other ears and mouths. Whatever these two Employees said, and how they said it was not recorded, nor were they asked to write out their own statements of what had occurred. This is not to suggest any conscious effort to "sanitize" their statements. But there may well be an unconscious tendency to make more sense out of what a witness said than the witness' own garbled account. So the Employee's statement as reported by a second person may be more convincing than as originally related. The danger is that the story as retold makes more sense than the story as originally told.

Having discussed all these obstacles in deciding whether to credit unsworn assertions from individuals I never met over first hand denials by the accused, I now turn (finally) to specify my findings and the reasons for them.

As to the assertion that Grievant Clark used the phrase [N]-rigged in speaking to Heil, as recounted by Palya, I find the evidence insufficient to support the accusation. As noted above, according to Palya, the Grievant made this statement not to herself, but to Heil. Heil denied hearing the Grievant use the offending word, although he conceded that he does not always listen closely when Grievant Clark is talking. This leaves unanswered the question of how close attention Palya was paying to a conversation between two other individuals.

According to Grievant Clark, what he actually said was jerry rigged, not [N]-rigged. The difference between his and Palya's accounts amounts to a single two syllable word in a two word expression, devoid of any particular context. Although the two words do not sound at all similar, it seems to me most likely that Palya misheard or misunderstood what Clark said. According to Clark, the phrase jerry rigged was one that his father had used, and which he adopted. It is a phrase in common enough usage that it appears in the dictionary (although as mentioned earlier in slightly different spelling from what I thought I heard Grievant Clark say). By contrast the phrase [N]-rigged makes no particular sense.

On balance, I think it more likely than not that Palya was mistaken as to what Grievant Clark said to Heil, and that Clark did not use a racial epithet during this conversation. There is thus no basis for the imposition of any discipline based on this conversation. I make no finding as to whether or not Clark told Palya at one point that her son needed to treat women better. In itself this remark seems inoffensive even if perhaps intrusive, but it sheds no light on whether or not Clark used a racial epithet in a different conversation.

I reach a different finding as to the statements attributed to Grievant Clark by Mouser. Mouser told the Company that in her response to her complaint about her assignment, Clark said that she had two strikes against her, being black and female, and then commented that when he saw a white person doing something

wrong he called him an inbred hillbilly and when he saw a black person do something wrong he called him a [N]. The initial statement may amount to nothing more than a recognition of a long history or race and gender discrimination. The importance of this sentence is that, unlike the account from Palya that Clark dropped a [N]-bomb into a sentence out of context, in this case race was part of the conversation, and Clark brought it in. The next comments fit in with a topic already begun. Unlike the Palya situation, it seems to me unlikely that Mouser misunderstood the phrase inbred hillbilly (or else that she was making it up). The juxtaposition of the white slur and the black slur makes complete sense in the entire context. The back-to-back insults of white people and black people suggest that it is highly unlikely that Mouser misunderstood what Clark was saying. Further, unlike Palya who related a conversation between Clark and Heil, Mouser was relating a conversation in which she was a participant.

While it seems to me that Mouser was not likely mistaken, the Union suggests that she may have been fabricating the comment to gain personal advantage. This seems improbable to me. If Mouser sought to gain something for herself, she would have initiated a complaint with the Joint Committee or with the Company, but she did not do so. Instead, she came to the Joint Committee's attention only because of the report from a third person, Andre Smith. The Union also contends that Smith may have had a bias against Grievant Clark, but Smith never claimed to have heard Grievant make any improper remarks, and Smith's credibility is irrelevant.

The overall conversation reported by Mouser has a ring of truth to it. This is not a conversation that anyone would likely misconstrue or make up.

In his testimony Grievant Clark denied telling Mouser she had two strikes (black and female). He denied ever using the critical racial term, and he did not specifically address the "inbred hillbilly" statement. If I regard him as implicitly denying the hillbilly comment, this seems just too much denying. If I regard him as admitting this remark, I doubt that he would have limited his derogatory comments to one race rather than dovetailing them with a corresponding slur, as attributed to him by Mouser. Clark denied ever using the offensive word at all, but as characterized by other witnesses Clark often ran off at the mouth, and I find that on this occasion he did so in a highly inappropriate manner.

In summary, I find that the Grievant told Mouser that when he saw a white person do something wrong he called him an inbred hillbilly and when he saw a black person do something wrong he called him a [N].

As Arbitrator Bethel held, use of the single most offensive racial slur constitutes a violation of the Plant Rule forbidding harassment. Indeed the facts of this case, as I have determined them to be are remarkably similar to those in the case Bethel decided.

Both cases involve use of the same racial epithet on a single occasion. In both cases that epithet was not directed at the person with whom the Grievant was speaking. The word was not used in anger or in the context of an argument. In the current case, as in the case before Bethel, the comment "seems to have been a very poorly-intentioned attempt at a joke."

The close similarity of the facts in the two cases commends similarity of outcome. Even a single use of this offensive word "justifies significant discipline," but there is no basis to conclude that the Grievant would not be amenable to progressive discipline. In the current case the Grievant made a point of emphasizing how much he values the opportunity his job has created for him, and that recognition, together with the imposition of significant discipline should prevent any recurrence of the offensive conduct.

The Union raises at least one consideration not addressed in Bethel's decision, the failure to conduct harassment training. (See Article Four Section C (4).) By now all Employees know, regardless of any training, that the use of racial insults is not acceptable in the workplace and will subject an offender to significant discipline. On cross examination Grievant Clark acknowledged that he knew racial slurs were not appropriate.

Accordingly, I shall direct the Company to reinstate Grievant Clark without backpay, effectively modifying the termination to a lengthy suspension. I recognize that Grievant Clark has much shorter service than the Grievant in the other case, although the suspension here is a longer one, but the underlying offense in this case is no more severe, and not so intolerable as to warrant termination for a first offense.

Finally, I note that the issue as framed by the Parties references the justice and dignity provision. Article Five Section I (9) (b) (2) explicitly states that this provision does not apply to acts of "workplace harassment." The Grievant's conduct in my view amounts to an act of harassment.

Award

The grievance is sustained in part. The termination of Grievant David Clark is abrogated and modified to an unpaid disciplinary suspension of time served. The Company shall promptly reinstate Grievant Clark with no loss of seniority, but without backpay. Jurisdiction is retained for the limited purpose of resolving any disputes that may arise in connection with the implementation of this remedy.

Issued August 22, 2023

Matthew M Franckiewicz