

IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
INDIANA HARBOR LONG
CARBON PLANT

And

ArcelorMittal Case No. 70

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1010, USW

OPINION AND AWARD

Introduction

This case from the Indiana Harbor Long Carbon Plant (also called the Rolling Mill) concerns Grievant's discharge for engaging in a pattern of workplace harassment against other bargaining unit employees, and creating a hostile work environment. The case was tried in the Company's offices in East Chicago, Indiana over five days, beginning on October 27, 2014 and ending on January 9, 2015. Robert Casey represented the Company and Dennis Shattuck presented the Union's case. The parties agreed there were no procedural arbitrability issues and that the case was properly in arbitration.¹ The parties submitted the case on final argument.

Background

Grievant was employed as an expeditor in the billet dock. The rolling mill uses various grades of steel, which the mill receives in billets. The expeditor keeps an inventory of the steel stored on the billet dock and verifies the accuracy and quality of the material. He also tells the crane operator where to unload the steel. When the mill calls for a particular grade, the expeditor creates a lineup for the crane operators to follow when they deliver the billets to the mill. A typical billet dock crew consists of one expeditor and two crane operators. There is also a crane operator who divides his time between the two shifts.

William Logan is the Company's Director of Labor Relations for Long Carbon North America. During certain times relevant to this arbitration, Logan also served as the Company's Human Resources/Labor Relations Manager. At some point in October 2013, employee TB

¹ The Union questioned the procedure the Company used in the grievance procedure, including the process at the second and third steps and the Company's failure to provide certain information. However, it did not claim that these issues prevented the case from being arbitrated. Thus, there are no procedural arbitrability issues.

called Logan concerning allegations of harassment – including sexual harassment – and other inappropriate conduct by Grievant. Logan said he met with TB and she indicated a willingness to submit her complaint to the parties’ Joint Civil Rights Committee. Logan contacted Luis Aguilar, the Union Co-Chair of the Committee, who assigned Union Committee Member Gail Richardson to the case. Logan and Richardson met with TB in November. Subsequently, they talked to Steve Bogner, a Union Representative from the rolling mill, who said there was significant animosity between Grievant and TB.

Logan said because of the holidays and shutdowns, he and Richardson did not schedule another meeting with TB until February 2, 2014. Logan said Richardson canceled the meeting, and that he tried to contact her to reschedule, but she did not return his calls. He sent her an email on February 10, but did not hear back from her until February 26, 2014, when she sent an email that said, “I spoke with [Darrell] Reed of the grievance procedure and he will be handling this issue.” By this point, more than 60 days had passed since TB first contacted the Civil Rights Committee. The Agreement says “The Employee must provide the Joint Committee with at least sixty (60) days to attempt to resolve the matter.” See, Article 4, Section B-4-(b). As will be discussed in the Findings, Logan testified that when the case was assigned to Darrell Reed, he thought the Union intended to handle the issue through the grievance procedure. Reed is Vice Chair of the Union’s Grievance Committee.

On February 13, at TB’s request, Logan met with her and three other employees who worked on the billet dock: AW, SA, and MD. Logan said he thought the other three employees had come to support TB, but each of them also described Grievant’s conduct toward other employees, including themselves. After listening to their stories, Logan asked them to prepare statements, telling them that the statements would have to be signed and that they could be used in a disciplinary proceeding against Grievant. Ultimately, Logan obtained statements from four employees, some of whom submitted more than one. During the hearing, the parties reviewed the statements in some detail and, on cross examination, Logan acknowledged that there was material in the statements that was not considered when the Company decided to discharge Grievant. Thus, that information does not warrant significant mention. However, as will be apparent in the summaries of their testimony, General Manager Daniel Tunacik, who made the discharge decision, considered some allegations that Logan did not consider. I will not reproduce all of the statements, which would add undue length to the opinion. It is sufficient to summarize the material Logan and Tunacik deemed relevant to the discharge decision.²

² There was discussion at the beginning of the hearing about the extent, if at all, to which the Company had relied on its belief that Grievant was responsible for some profane graffiti written on a wall in the billet dock. The Company said it had not relied on the graffiti at all. The Union pointed out that the Company had refused to tell the Union what it relied on prior to the second step, and that the Company put the pictures in the record at the third step. But the Company said it did so in response to a comment made by a Union representative at the third step meeting. The Union called an expert witness who identified himself as a forensic document investigator who specialized in handwriting identification. I have reviewed his testimony, but after consideration of the record as a whole, I have accepted the Company’s claim that it did not consider the graffiti as a factor in Grievant’s discharge, and that it must prove there was just cause for discharge on the basis of other evidence. Thus, I have not considered the graffiti and there is no need to review the expert’s testimony, or the Company’s claim that such evidence is unreliable.

TB's Statements – In a statement dated February 17, 2014, TB described an incident that occurred in the expeditor's office used by SA. TB said she had eaten lunch in that office for some time. On February 11, 2014, she entered the office and asked Grievant if he would move out of a chair so she could eat lunch and go back to work. Grievant told her to go to the lunch room. TB said the lunchroom was "nasty and smells of urine and has paint falling off the ceiling." After a few more remarks, TB said, Grievant said to "get the f*** out of the office and eat in the f***** lunch room." TB described Grievant as "very aggressive." TB mentioned other incidents that she said had occurred over the previous three years, but Logan said management did not consider them.

In a subsequent undated statement, TB said Grievant had called her a "bitch, cunt, dyke" to several other several other employees, including some who gave statements. Logan also said he did not rely on statements from TB dated December 10, 2013, October 28, 2013, and October 30, 2013.³ Nor did he rely on a timeline TB created.

SA Statement: This employee's statement of February 17, 2014 said that because of Grievant, he had experienced a hostile work environment "for years." The first incident was when Grievant told him "He was going to fuck me in the ass until I bled." SA also said Grievant "always [has] something bad to say about other employees." Grievant called TB "a dyke and a bitch," and Grievant said the wife of another employee, TW, "does more than spin records on her job." SA said Grievant talked about other employees by using inappropriate language, and that he started rumors "which cause strife and discord." That, in turn, affected production.

SA submitted another statement on April 4, 2014. He said recently Grievant had brought in a CD player or radio that he played "very loud." Grievant also told SA he was "playing lesbo music for TB to hear." Grievant continued to refer to TB as a "dyke" and, SA said, had told employees TB had been molested by her father which had turned her into a lesbian. SA witnessed the confrontation between Grievant and TB on the day TB wanted to eat lunch in SA's office. He supported TB's account. SA said Grievant told him that TB "puts on a strap on and "fu --- TW in his ass."

TW Statement – In a statement dated February 17, 2014, TW said he had usually not been a victim, but had witnessed Grievant's conduct toward other employees. He said Grievant referred to TB as a bitch, both to him and other employees. He also knew that Grievant had made the does-more-than-spin-records comment about TW's wife which, TW said, "could have caused a workplace violence occurrence" if it had been said about a "less level headed employee." In a subsequent statement Logan received on March 14, 2014, TW

³ It is not clear from the record whether the statements were created on those days or after related episodes that occurred on December 10 and October 28.

said Grievant frequently called TB “the bitch, the dyke, or the cunt.” TW said Grievant started rumors to cause stress for TB, including a recent rumor that Grievant was going to become the crew leader. TW said other employees told him Grievant often made derogatory comments about TW’s wife. Finally, he said Grievant had told other employees that TW and TB were fucking “and she probably fucks him in the ass with a strap on.”

MD Statement – MD said in an accident investigation, Grievant referred to TB as a bitch and told MD never to trust her. He said he had heard Grievant talk to another female employee – Jodie Krout – “in sexual ways.” This included telling her he wanted to take her to the Hawaiian Island “com-I-wanna-lay-u.” Grievant also told MD “that TW and TB were fucking” and that “TB is a lesbian.”

Logan said when he received the initial statements on February 17, he did not contact Grievant because he was still collecting information. He told the employees who had given statements that he did not want any surprises, so they should continue to think about their experiences with Grievant. Division Manager James McKeever notified Grievant of the complaints on March 19, 2014.

Logan said once he received the initial statements, he met with General Manager Tunacik. He and Tunacik reviewed the statements and thought they were credible. They concluded that the statements outlined a pattern of harassment and abuse, despite Grievant having been counseled twice about his behavior, including warnings that his conduct could result in discipline. Logan said he and Tunacik sought legal advice about Grievant’s conduct, including what the ramifications might be to the Company as a result of Grievant’s actions. On April 10, 2014, the Company suspended Grievant for 5 days preliminary to discharge. The Discipline Statement charged Grievant with having engaged in a pattern of workplace harassment against several employees and the creation of a hostile work environment for those employees. Grievant was denied Justice and Dignity.

Logan acknowledged that no one from management interviewed Grievant prior to his suspension preliminary to discharge. Given the employees’ statements, Logan said, the Company thought it was imperative to remove Grievant from the workplace as soon as possible. Logan identified what he called “attesting documents,” obtained from the four employees who had given statements. These documents, dated April 15, 2014, attested that their statements concerning Grievant “are accurate and truthful descriptions of what I personally saw and heard.” They also said the statements were given “of my own free will” and were not directed by or coerced by the Company. Logan said the attestations were obtained after a comment in the second step meeting that some employees might change their testimony. He said the Company wanted to make sure the statements were accurate. The Company used the statements to support the discharge decision because the Agreement forbids it from calling bargaining unit employees as witnesses in an arbitration.

The parties met at Step 2 on April 14, 2014, which was before Grievant’s suspension was converted to discharge. Logan said the Union’s position was that the allegations the Company

had collected concerning Grievant's behavior did not amount to harassment or show the creation of a hostile work environment. Grievant did not testify at Step 2. Logan said when the parties discussed SA's claim that Grievant said he was going to fuck SA in the ass until he bled, Grievant "blurted out" that it occurred three years ago. He did not deny any of the other charges, Logan said. Following the meeting, Logan met with General Manager Tunacik to discuss what had happened in the meeting. The lack of any denials from Grievant meant that all the Company had were the employees' statements, which the Company believed were credible. Thus, on April 17, 2014, the Company converted Grievant's suspension to discharge. Grievant testified at the third step meeting on June 6, 2014, and denied the behavior mentioned in the statements.

The Company relied, in part, on its Fair and Equal Treatment Policy, which includes its Non-Discrimination and Anti-Harassment Policy. The policies will be treated in more detail in the Findings. The Anti-Harassment Policy forbids, among other things, "sexual and all other forms of unlawful harassment, as well as any inappropriate or unprofessional conduct...." On cross examination, the Union quizzed Logan about the meaning of "inappropriate or unprofessional conduct." Logan said if he was doing something "just to screw with you," that would be unprofessional. He also said motivation has a role in determining whether something is unprofessional. Logan testified that whether something is inappropriate can depend on the setting, although he acknowledged it was a judgment call.

James Chadwick McKeever, Division Manager, said he first became involved in the dispute between TB and Grievant in the summer of 2013. He was walking through the billet dock and found Grievant and TB in a heated dispute. He took them to a conference room and asked the Assistant Griever to join them. He said there was a fair amount of emotion between TB and Grievant, and that TB claimed Grievant was targeting her and picking on her, and Grievant "got real defensive real quickly." McKeever repeated that the room was "extremely emotionally charged" and that both he and the Griever were shocked by the degree of emotion. McKeever said it "was not an extremely productive meeting." Grievant walked out of the meeting while it was still in progress. Later, McKeever met with the two employees separately. He told them the Company would not tolerate this kind of behavior; they did not have to like each other, but they had to treat each other with respect. McKeever said he told both employees that aggressive dialog and profanity directed to each other were not acceptable going forward. He also said they were to communicate with each other only about work and that there was the potential for discipline if things did not improve. McKeever said he did not document the meeting, or issue any discipline as a result of the meeting.

McKeever met with both parties again on September 19, 2013, at TB's request. He said it was similar to the previous meeting, although "on a grander scale." Again, there was emotion and contention, exacerbated by the fact that Grievant and TB did not want to listen to each other. TB had brought another employee – JS – to the meeting. He did not offer much, McKeever said, other than to agree with TB on a few occasions. McKeever said he reviewed the Company's anti-harassment policy during the meeting, and repeated what he had said in the first meeting about the need to show respect for each other. The policy was reviewed in more detail for all employees in October 2013, which included showing a video outlining inappropriate behavior.

McKeever said he met with Grievant on March 19, 2014 at Logan's request to tell Grievant that the Company was conducting a formal investigation about claims he had harassed several coworkers, including remarks about sexual preference. McKeever said Grievant did not seem surprised by the investigation; nor did he ask why the Company was investigating him. McKeever said he told Grievant that in the future, the supervisor would give work directions to the employees. By this time, McKeever said, he had removed Grievant from expeditor work and assigned him to various tasks on the billet dock. On cross examination, McKeever agreed that in the first meeting he held with Grievant and TB, she did not claim that Grievant had called her names; rather, the bulk of her complaints concerned Grievant making her do more work. He did not get a lot of specifics, McKeever testified, because the meeting was very emotional. McKeever said he thought the incident was a "low level disagreement between two people who did not like each other." He did not think it was necessary to discipline either employee that day; he was simply attempting to "calm the waters." He also agreed with the Union's claim that nothing that happened at the first meeting constituted a violation of the harassment policy.

General Manager Daniel Tunacik said he became aware of the issue involving Grievant sometime in March 2014. He received the four February 17 statements at around the same time, and, after reviewing them, told Logan to suspend Grievant and then proceed with the process. Tunacik said he made the decision to suspend Grievant preliminary to discharge based on the statements from the four employees and Logan's assertion that he believed they were credible. After considering the statements in their entirety, Tunacik said he concluded Grievant had created a hostile work environment. He also made the decision to deny Justice and Dignity. Tunacik said he was concerned about providing a safe workplace, and he could not have employees subjected to what Grievant was doing.

Tunacik did not attend the Step 2 hearing, but he met with Logan afterwards, who said the Union did not offer any evidence that contradicted the statements. Tunacik then told Logan to proceed with the discharge. Tunacik attended the Step 3 meeting, but he said the Union did not offer anything except witnesses who vouched for Grievant's character and said he could not have done what the statements claimed. In addition, Grievant testified and denied most of the allegations. Tunacik said he considered this information, but it was not enough to change his mind about the discharge. He also agreed that he did not interview the employees who provided statements and he did not talk to Grievant prior to his discharge.

As it did with Logan, on cross examination the Union reviewed the statements and asked which matters Tunacik relied on in making the decision to discharge Grievant. For the most part, Tunacik's testimony mirrored Logan's. However, Tunacik said he placed some reliance on an allegation by TB that Grievant sometimes told the crane operators to let the chains go empty, thus shifting more work to the next shift. Tunacik said this "adds to the totality," but he did not give it great value because he did not know the details. He also put some weight on TB's allegation that Grievant knew her "personal issues," although again, Tunacik said he did not know any details.

Tunacik said he gave weight to TB's allegation that Grievant once told others that she had refused to leave the scale pit to work on another assignment. Tunacik said if the incident was true, then it should have been addressed by her supervisor. In an October 30, 2013

statement from TB, she claimed that Grievant yelled at her because she had given someone information about the transfer car. Tunacik said he took this into account as adding to the hostile work environment issue. He also considered an allegation that Grievant told a supervisor TB had gone over his head with a crane. Again, Tunacik said this was relevant because it helped show the relationship between TB and Grievant. The same was true of TB's allegation that Grievant threw her coffee cup in the trash, and of Grievant's claim that TB threw away his food. TB also claimed that Grievant and another employee sat and watched her work instead of offering to help.

Unlike Logan, Tunacik said he considered an alleged racial comment made about a black employee, and TB's assertion that Grievant's language sometimes caused "strife and discord." He gave some weight to TW's claim that Grievant lied in order to cause strife between employees. He also considered an MD allegation that Grievant once told him over the radio to "go fuck yourself."

The Union called Debra Dowden, an expeditor in the rolling mill. She was on leave from September 2013 until February 10, 2014. Thus, she said she was not on the property when many of the events cited in this case occurred. One of the items mentioned in the employees' statements was that Grievant had broken into SA's locker. However, neither Logan nor Tunacik said they relied on these allegations. Thus, it is unnecessary to summarize Dowden's testimony about that incident. She testified that she had worked with Grievant for several years, but had never heard him call TB a cunt or a dyke. She said Grievant once asked her if TB was a lesbian, and Dowden replied that TB was not. She had not heard him say anything about this to other employees.

Dowden said Grievant was not a "confrontational person," and she was not aware of him doing anything "to screw the other crew." She had not seen him in a confrontation with anyone other than TB. Dowden said she had not seen Grievant bully SA, but she described SA as "paranoid" about Grievant when Grievant wasn't even at work. TB, on the other hand, is a confrontational person, and Dowden said she had talked to management about that. Dowden described an incident in which she told TB she would have seven cars to unload. Later, however, it turned out there were ten cars. She said TB was angry and yelled over the radio that "the next time I'll bend over." According to Dowden, TB had also yelled at JS over the radio. Dowden testified that when she returned to the job on February 10, 2014, TB told her the only reason she got the job was because they were going to fire Grievant. Dowden said she had a hard time believing the allegations against Grievant, and that anything he did was no worse than the actions of other employees. She did not think Grievant had caused a hostile work environment.

On cross examination, Dowden said she was aware of the tension between Grievant and TB, but she said she had not heard Grievant use vulgar language toward TB. She said the allegations did not fit with her perception of Grievant, and that she saw "some kind of conspiracy." Dowden also said she had heard other employees make comments about each other's wives. She said men talk provocatively to each other, but not to women.

Jodie Krout is a crane operator in the billet dock. She worked with Grievant, TB and SA. Krout testified that she first met TB during training and that TB winked at her twice. There was some discussion of this on the billet dock and TB filed a complaint with the Civil Rights Committee charging Krout with creating a hostile work environment by saying TB was gay, which Krout denied. Krout said TB harassed her by claiming that she had faked a work injury. She also heard that TB had said if she were Krout, she would "blow her fucking head off." TB also confronted her on more than one occasion. Krout said she thought Grievant was a good expeditor and that she never had any trouble with him. She said she joked with Grievant, but that it was all in fun, like the "come-on-I-wanna-lay-ya" comment Grievant made on the radio. Prior to a grievance meeting she attended, Krout said she had never heard anyone say they were offended by Grievant's jokes. One of the supervisors had heard the jokes and conversations about sex, but said nothing.

Ken Finke, a Maintenance Technician Electrical (MTE) in the bar mill described an incident with TB a few years ago in which she got mad and called him a dickhead over the radio. After that, he told his boss that he would not answer service calls from TB unless he had an escort. He also related an event when TB threatened to report him for not wearing a hard hat, even though he was in an area where none was required. They buried the hatchet after that, Finke said, although he still did not trust her. On cross examination, he acknowledged that even though he was mad at TB, he did not call her a cunt or other names. Mark Schwartz, a Union Safety Advocate, recounted an incident in which TB was angry because she had not gotten on a crane safety committee. She asked Schwartz if he kept her off because she was a woman, and he told her she was calling him a sexist. They talked about it a little later and, Schwartz said, worked it out. He said he walks the billet dock once a day and has never seen Grievant do anything like the allegations made in the statements.

Dennis Shattuck is the Chairman of the Grievance Procedure. He said he worked with Grievant regularly between 1976 and 1995, and has had some contact with him since then. He was not aware of any sex-based or race-based discrimination claims against Grievant, and found none when he reviewed Grievant's personnel file. He said he was also unaware of any friction between Grievant and other employees. Shattuck said the crane operator's job in the billet dock is difficult. The crane operator, he said, does all of the work according to the expeditor's direction. The relationship was a source of friction, mostly with crane operators being upset with expeditors.

Shattuck also described a posting for an expeditor that went up in December 2013. Although there were three expeditors assigned to the billet dock, one had been off on sick leave for a long period, and only two expeditors were scheduled. The posting bothered SA, who feared he would lose his job if the new expeditor was senior to him. There was only enough work for two expeditors, so if someone had to go, SA thought he would be the one. Shattuck said he thought he had convinced Logan that there was no need for a third expeditor, and that the Company had abandoned its plans to hire one. He identified an exhibit showing that throughout 2013, the Company typically scheduled only ten to twelve turns in the billet dock, meaning that two expeditors could handle the work.

On January 30, 2014, Logan informed Shattuck that the Company had decided to go ahead with its plans to add a third expeditor. The Company posted the job and Debra Dowden was the prevailing bidder. She began working in early February 2014, and from the week of February 9 until the end of March, the Company scheduled three expeditors for 15-18 turns per week. But even though Grievant was assigned as an expeditor, he did not do any expeditor work. He spent his time finding billets and other miscellaneous work. Beginning the week of April 6, the Company went back to scheduling two expeditors, Dowden and SA. Grievant was suspended pending discharge on April 10. The Company did not schedule three expeditors at any point between April 6 and November 9, 2014, the latest data available at the time of Shattuck's testimony on November 11, 2014. Shattuck said the Company did not post for a third expeditor following Grievant's discharge.

Steve Bogner, an ID Tech, said in about 2011, he was on a radio frequency that allowed him to hear radio calls between Grievant and TB. He said he thought they were "romantically involved" because they were always joking and giggling. He then moved to another job and could no longer hear them. He had more contact with them after about a year and a half, and their relationship had changed. There was no more joking; they were strictly business and there was tension between them. Bogner said at one point he was in the same area as Grievant and TB, and she was complaining about a work assignment. Grievant said, "fuck this," and Bogner told Grievant that was no way to talk to a coworker. Grievant said "fuck you," and Bogner replied "fuck you, too."

Later, Bogner was called in by Logan and Richardson (the Union's Safety Advocate). Bogner said they asked him about the TB-Grievant relationship and he said he thought TB was upset because Grievant was trying to tell her where to unload billets, which he assumed was her decision. But he later learned that the expeditor could tell the crane operator where to put the steel. The first meeting that McKeever characterized as a counseling session was in July 2013. TB was upset and agitated during the meeting, and said Grievant was an asshole. There was still a dispute about where to put steel, which TB said had to be resolved. McKeever said they would return to the standard procedure, which apparently gave authority to the expeditor. TB would not let it go, Bogner said. She thought Grievant was out to get her and would not keep still or let Grievant speak, so Grievant left the meeting. There was nothing said in the meeting about name calling or about Grievant's relationship with SA. Bogner said he did not understand the meeting to be a counseling session. The same was true of the second meeting. He denied McKeever's claim that he reviewed the Anti-Harassment Policy with TB and Grievant. He also said TB never mentioned name calling, and that employees used strong shop talk.

On cross examination, the Company referred Bogner to a statement in the Step 2 minutes that said during an interview, Bogner said that in his opinion Grievant "initiates 80% of the negative activity, the other 20% is usually initiated in retaliation by those being attacked." He also said he thought Grievant "abused his authority, making life difficult for those he targeted." Bogner admitted making the comment, but he said this was before he realized that the expeditor's job included telling the crane operator where to put the steel. In the Step 3 meeting, Bogner was quoted as saying, "based on information received, he now believes that it is 60% [Grievant] - 40% [TB]."

Bogner had some difficulty explaining the basis for this estimation of fault. The Company asked why Grievant would have any part of the fault at all if he was merely following procedures when he told TB where to put the steel. Bogner said he was just changing the numbers he had given to Logan in the earlier meeting. But the Company persisted and Bogner finally said, "my opinion is my opinion." He also said that he had very little contact with Grievant and TB in the year and a half before Grievant was discharged. Bogner said shop talk was common and not taken seriously by most employees. He agreed, however, that when he heard Grievant say "fuck you" to TB, he (Bogner) told Grievant that was no way to talk to a coworker. He said he had not heard anyone say cunt or dyke on the mill floor, but that those words could be considered shop talk. Bogner also questioned McKeever's assertion that he reviewed any portion of the Company's harassment policy in the meetings Bogner attended.

Fabian Martinez, Griever, supported Shattuck's account of the third expeditor controversy. He also said he attended the September 9, 2013 meeting between Logan and TB and Grievant. JS was also there. Martinez said when he arrived, he asked what was going on, and TB said the meeting was about Grievant having given her extra work. JS did not say much during the meeting, other than mentioning a time he thought Grievant prevented him from working overtime. No one said anything about harassment or discrimination, and there was no discussion of SA's claims of discrimination. Martinez said he did not consider the meeting to be a counseling session. He described it as a "bitch session." Martinez also said profanity was common in the mill, including among supervisors. Martinez denied that any manager mentioned the non-discrimination or harassment policies in the September 9 meeting.

Luis Aguilar is the Union Chairman of the Civil Rights Committee. He said all of the committee's cases deal with issues of discrimination and harassment; they do not get involved in cases of employee conflict or actions that concern other issues. Once he became aware of this case, Aguilar said, he assigned Gail Richardson, who notified Logan on February 26 that she had turned it over to Darrell Reed. Aguilar noted that Logan sent Richardson an email on February 10 concerning scheduling a meeting with TB and Grievant. But on February 13, Logan interviewed the employees who gave statements without notifying the civil rights committee, as was required.

Grievant testified that an expeditor makes a plan for the shift based on the information he has, and uses the lineup to tell the crane operators what steel they need to move and feed to the mill. Sometimes the lineup changes, which can cause more work for the crane operator. Grievant said when the mill first reopened, the crane operator's job was fairly easy. But it became more difficult as the mill got busier. The situation was exacerbated, he said, because SA worked as the other expeditor, and he had a hard time learning the job. There were times when he did not have the steel ready that Grievant would need when he arrived for the next shift. This fell on the crane operator as well. But that was not because Grievant was trying to make things hard for TB; he was simply reacting to the needs of the mill.

Over time, Grievant said, friction developed between SA and him. SA was inexperienced and did not know what he was doing, and would leave extra work for Grievant and TB. Grievant said one day he had had enough, so he told SA, "if you think you're fucking with me, when I get done fucking with you your asshole will be bleeding." This occurred in the 2010-2011

timeframe, Grievant said. SA complained to management, and Grievant was required to meet with SA, supervisor Jamie Montemayor and another manager. Grievant said he told the managers what he said, and they seemed to understand it was from frustration; they did not understand his comment as a threat to forcibly sodomize SA.

Grievant also gave his perception of the two meetings he had with McKeever concerning his relationship with TB. Grievant said he had told TB not to put billets in prime locations if they were not ready to be used. He wanted them at the other end of the billet dock so he could keep high volume material nearby. TB was upset by this and there was a disagreement. McKeever saw them arguing and called an impromptu meeting. TB continued to "holler" about Grievant making her do extra work. Grievant tried to explain his actions, but TB continued hollering, so Grievant left. Later, McKeever spoke to Grievant and said he and TB needed to get along; he did not tell Grievant there was a problem with how he was doing his job. Grievant said when he was in the impromptu meeting, TB did not say anything about Grievant using sexually derogatory terms. Grievant said he and TB had had sexual discussions, including TB telling him that her step-father had molested her when she was younger. Grievant said they used sexual terms and TB never told him she was bothered by it. Grievant claimed TB told him she was divorced and that she did not need a man as long as she had a supply of batteries.

Grievant said the second meeting in September 2013 was with John Sadler⁴, Montemayor and McKeever. When Grievant arrived at work, SA said he was staying over and that Grievant had to attend a meeting "up front." Grievant said he was late to the meeting because he had to do the line up before he left the area. When he arrived at the meeting, TB was complaining that Grievant continued to give her extra work. Grievant said he was just doing his job the way it needed to be done to push production. According to Grievant, TB did not say anything about sexual harassment. JS was also at the meeting, and he was angry with Grievant because Grievant prevented him from working an overtime turn. Grievant said the electric furnace was down, so there was no need for another expeditor. Grievant said he had not seen the Company's Fair and Equal Treatment Policy prior to being fired, and he denied that it was reviewed at either of the two meetings involving McKeever and other managers. He also said he had not seen the recent video associated with the policy because no one told him about the meeting when it was shown. He agreed that he had seen the 2004 video.

The Union questioned Grievant about the incidents in the statements that either Logan or Tunacik said they gave weight in the discharge discussions. Grievant acknowledged that there had been a dispute with TB over her wanting him to move so she could eat lunch in SA's office. He agreed that the two of them had a back-and-forth discussion about TB being required to eat in the lunchroom. However, Grievant said he finally got up and went back to his office. Grievant said when he left, TB hit him with her shoulder. Grievant said this occurred after they had reassigned him to non-expeditor work, so the next day he cleaned the lunchroom and the refrigerator. Someone had urinated in the refrigerator. Grievant said there was a similar office/lunchroom incident a week later. He said prior to that confrontation, TB had opened the door to the office and had thrown her gloves at Grievant, although she apologized shortly afterward. Grievant said SA, who had witnessed both incidents, said Grievant should report it to

⁴ Sadler was mentioned several times in connection with the September 13 meeting. He is a manager, but his title and job assignment are not part of the record.

Montemayor. Grievant did so, he said, and Montemayor told the employees they could only eat in an expeditor's office if they had the expeditor's permission.

Grievant denied ever calling TB a bitch, cunt or dyke. Grievant said he left work after day turn one day and was stopped by security so they could search his van. Grievant said they searched it thoroughly, but found nothing. Grievant denied telling anyone that TB was responsible for the incident. Nor did he tell anyone TB had signed up another employee for global overtime. Grievant admitted that he and TB got in an argument and he told her "fuck you." And, after an admonishment from Bogner, said fuck you to him as well. Grievant said he thought he and Bogner "were kidding around." He also said there was an incident where TB sat in an inoperable scale pit crane all day rather than doing work that needed to be performed elsewhere. TB denied that she refused to do the work. Grievant denied telling Montemayor that TB was drunk when she got overheated and went to the clinic. Grievant also said he once called a black employee a "double chin, hog jowled, collard greens eating motherfucker." Grievant denied that he ever threw away TB's coffee, and he insisted that she had carried a crane load over his head.

Grievant said TW's wife does more than spin records because she and TW have a karaoke business. He said he also told SA he would not want his wife to be doing karaoke and being on the streets in the middle of the night. Grievant agreed that he brought a radio to his office, but he denied saying that he was playing lesbo music for TB. Grievant said TB and SA were in the adjacent office and would listen to him talk on the phone. TB once texted Dowden while Grievant was talking to Dowden on the phone. Also, Grievant did not like to hear what was going on in SA's office. Dowden suggested he bring in a radio and Grievant said he asked Montemayor, who said it was all right. Grievant denied saying that TB used a strap-on to fuck TW in the ass. Grievant also denied saying that being molested by her step-father turned TB into a lesbian.

Grievant denied TW's allegation that he told TB he (Grievant) was going to be the leader on her shift and that SA would be put on special assignment. Grievant said after he was taken off of expeditor duties, he was assigned to straight days. He asked Montemayor if he was in trouble and Montemayor said he was not. Montemayor approved his request to go back on shift work. Grievant said he relayed this to TW, and said that SA might go to straight days. MD's statement said during an accident investigation, Grievant called TB a bitch and told MD not to trust her. Grievant denied calling her a bitch. Grievant admitted saying to Krout "come-on-I-wanna-lay-ya." No one told him they were offended by this. And, he said he did not remember telling MD that TW was fucking TB, and he denied telling MD that TB was a lesbian.

Grievant acknowledged that he met with McKeever on March 19, but he said the April 10, 2014 Discipline Statement suspending him preliminary to discharge was the first notice he had that he was being investigated for harassment. On March 19, McKeever told him he did not need a Union representative because the meeting would be brief. McKeever said there were complaints against Grievant, although he did not say what they were. McKeever did not tell him it was a formal investigation. According to Grievant, McKeever told him to "stay professional." He also told Grievant not to carry a radio and if Grievant needed something, he should let one of the two expeditors know. Grievant said he "had an idea what the complaints were," and he

asked to tell his side of the story; however, McKeever did not want to hear it. Grievant said McKeever did not read or discuss the Fair and Equal Treatment Policy.

On cross examination, the Company said McKeever testified that on March 19, 2014 he told Grievant the Company was investigating coworkers' complaints of harassment; but, Grievant testified on direct that there was no mention of harassment. Grievant said he could not say McKeever's testimony was a lie, and it could be that he simply did not remember McKeever mentioning harassment. Grievant said it was common for TB to take an hour and a half to two hours for lunch. He told Montemayor about this, Grievant said, but Montemayor did not do anything about it. However, the Company pointed to a July 18, 2012 memo from Montemayor that said lunch periods of one or two hours were not acceptable and that employees were limited to "45 minutes tops."

Grievant acknowledged that the two lunchroom incidents occurred in SA's office, not Grievant's. And, even though Grievant complained that TB's presence in the office interfered with the business discussion he and SA were having, he agreed that the two of them could have gone to Grievant's office, which was right next door. Grievant said he was also annoyed because TB decided to eat in SA's office shortly after Montemayor told the employees they could only do so with the expeditor's consent. According to Grievant, SA did not want TB to eat in SA's office. Grievant said he tried to call Logan after each of the lunchroom incidents and he left at least one message, but Logan never returned his call. During the second incident, Grievant said, TB said if there was a problem, she planned to record the conversation. Grievant was upset by this.

Grievant also testified on cross examination about an incident the Company said it did not rely on. This concerned a day when Grievant was waiting to punch out and leave. He saw TB in her car heading toward Dickey Road (away from the plant) about two minutes before her shift was to begin. He said he called SA, the expeditor for the oncoming turn, because he thought SA would be short a crane operator, and an off-going crane operator was standing near him, waiting to swipe out. Grievant called SA again about 45 minutes later and asked if TB had reported for work, and SA said she had not. Grievant said he made the call because he was worried about TB. He also said he told SA he should report that Grievant had seen TB driving away from the plant in order to protect himself, because the Company could be liable if something happened to her. Grievant said he reiterated that advice on a third call with SA later that same night.

Grievant said he never told anyone that TB's step-father molested her, or that the molestation had made her a lesbian. He also said once SA learned to work as an expeditor the two of them got along fine and were friendly. He said he did not know why SA wrote a statement charging Grievant with misconduct, including an allegation that Grievant said TB was a lesbian because her step-father molested her. Grievant said SA might have done so because if Grievant returned to work as an expeditor, SA would be moved out of that position. Grievant acknowledged that discussing an employee's sexual orientation with others in a workplace is inappropriate. The same is true of calling an employee a bitch or dyke or cunt. Grievant agreed that if he had said those things then that would have "crossed the harassment line." But he denied saying them, and he said he had no problem with TB, although she "has it out" for him.

Grievant said he once heard TB and TW in SA's office. SA asked the two employees what "you two lovebirds" were going to do that night. The next day, he heard TB say that TW "wore my ass out last night." Grievant said he did not want to hear something like this, which was one of the reasons he brought in a radio. The Company asked Grievant about Dowden's comment that he had 38 years on the dock, so "what are they going to do to me." He said he told Dowden he had 38 years, but he did not remember saying "what could they do to me." Maybe he did, maybe he didn't, Grievant said.

Matthew Tegtman was a crane operator in the billet dock in 2011. Tegtman said Grievant was on sick leave when he first went to the billet dock, but he worked mostly with Grievant after he returned. He said name-calling and foul language were common on the dock and that management was aware of it, although not involved in it. However, he said in late 2012 McKeever asked him whether TB was a lesbian. There was friction on the billet dock even before Grievant returned from sick leave, Tegtman said, mostly about who was doing the most work. He said TB liked to accuse other employees of not helping her, and she tried to cause a confrontation between the two of them. Grievant and TB were friendly when Grievant first came back from sick leave, and other employees wondered if they had a romantic relationship outside of work. He didn't know why their relationship changed. He said he never heard Grievant call TB a bitch, dyke or cunt. But he said once Grievant returned he overheard TB and SA making derogatory comments about Grievant, calling him a dumb ass and an asshole. Tegtman said he thought that was unprofessional.

Tegtman bid out of plant 4, in part because of his contentious relationship with TB. The Union introduced a series of messages and Facebook entries that showed significant tension between Tegtman and TB. Part of this involved Facebook posts about a betting pool on how long it would take Tegtman to fail at his new job and return to the billet dock. There was also an exchange of messages between Tegtman and TB that showed the tension between the two of them, and a long and vitriolic text message from Tegtman to TB. That message included comments that other employees could not stand Grievant and that TB and Grievant were "perfect for each other." There were also references about Grievant getting "all crazy with his mouth," lying, and being "the benchmark of evil." Tegtman said these comments about Grievant occurred when TB and SA told him that Grievant told Montemayor that Tegtman was not willing to work, that he was using drugs in the crane, and was having sex in the crane. Tegtman said he got tired of hearing Grievant complain about how he was always getting screwed by the previous crew. Finally, Tegtman said he knew Grievant was not at the meeting where the 2013 anti-harassment video was shown.

One dispute between the parties is whether a hostile work environment must be tied to harassment or discrimination over a protected characteristic under law, like race, gender, religion, or natural origin. The Company argues that the term hostile work environment as used in its policies is broader than the definition under law, and need not be tied to a protected characteristic. David McCall, the Union's District 1 Director, testified that he has been involved in negotiations at Indiana Harbor since 2002. He said there was never any discussion about applying the hostile work environment language to behavior that was not tied to a protected characteristic under law. Moreover, he said language in the Company's Fair and Equal

Treatment Policy about “inappropriate or unprofessional conduct” does not extend the scope of a hostile work environment.

Matt Beckman, Secretary of the Grievance Committee, said the Union has had experience with employees who believe they have suffered discrimination or are in a hostile work environment. Employees sometimes think there is a hostile work environment because they get a job assignment they don't like, or because their supervisor doesn't like them. The Union has tried to tell employees that the concepts do not apply in those situations, although not with great success. Beckman also identified documents showing the procedure the parties used in another discrimination case. The Joint Civil Rights Committee investigated the case, and the employee was put on a 5-day suspension subject to discharge. The Union asked for all documents the Company intended to use at the second step. The Company furnished the information, including statements from the employee's coworkers. Ultimately, the parties reached an agreement allowing the employee to retire. But, Aguliar testified that the Civil Rights Committee did not get an opportunity to complete its handling of the instant case.

Gail Richardson said Aguliar notified her that TB wanted to file a complaint with the Civil Rights Committee. She met with TB and Logan, and TB complained mostly about work issues, not harassment. Richardson's impression was that the case concerned two people who did not like each other. Later, Richardson met with Logan and Bogner. After that, she expected a call from Logan to set up another meeting, but he did not contact her. She agreed that on February 10, Logan e-mailed her and said if they could not find a time for the meeting they should at least warn TB and Grievant to treat each other with respect. Richardson said she did not think this was appropriate, but she did not answer Logan's message. Later, she turned the case over to Darrell Reed and notified Logan of that fact on February 26. On cross examination she said she did not remember Logan having left her a message. She also said it sometimes takes the committee months to complete the interviews.

Darrell Reed reiterated Beckman's testimony about how employees sometime misunderstand the meaning of harassment or hostile work environment. He also said when he told Richardson he would handle TB's case, he expected Logan to call him to set up a meeting. On the flat side, where he normally works, that is the procedure. But he never heard from Logan. Reed said he did not know what happened in the case after he spoke to Richardson.

Union witnesses, including Grievant, said there had been no discussion of the Fair and Equal Treatment Policy in either of the meetings McKeever held with TB and Grievant. On rebuttal, McKeever said he did not pass out copies of the policy and review it, but he said he told the two employees they had to treat each other with respect and dignity. This, McKeever said, was consistent with the spirit of the policy. Grievant testified that McKeever did not tell him in the March 19 meeting that the ongoing investigation was about harassment. McKeever said that was “absolutely incorrect.” Also false, McKeever claimed, was Grievant's claim that McKeever did not ask for Grievant's side of the story in the March 19 meeting. McKeever said he also told Grievant he could ask questions.

McKeever said he had three expeditors for a period of time in 2013, and when he had three expeditors, he used three. Sometimes one would have to backfill for someone who was

absent. If all three were there, one of them would remain in the LOP as an expeditor, but could be assigned to other duties. He also said when Dowden was awarded the job in early February 2014, they did not know Grievant would be suspended two months later. McKeever also said Tegtman's testimony that McKeever asked Tegtman if TB was a lesbian was "absolutely not true."

Logan testified that the Union grieved the Company's decision to post for an expeditor in August 2013. At that time there were three expeditors, but one of them – Kochenash – was on leave. Logan said he thought the rolling mill manager granted the grievance with an understanding that the Company could use Dowden to fill Kochenash's spot temporarily when needed. Dowden did not actually bid into the expeditor job until February 2014. Logan said the head count allowed three expeditors and even though he was on leave, Kochenash counted as one of them. Once Kochenash retired, the Company posted his position on August 5, 2013. This was the posting that prompted discussion between Shattuck and Logan about hiring in another position. Logan said he considered that a "win/win," and he wrote up an agreement for Shattuck to sign; however, Shattuck would not agree.

Although the Union said the contract allowed the Company to fill a different job even without Shattuck's agreement, Logan said his superiors were insistent that he have three expeditors – at least on paper – unless there was a written agreement otherwise. In addition, Logan pointed to grievances the Union had filed contending that the Company had used non-expeditors to do expeditor work. The Company introduced two grievances, one dated December 12, 2013 and the other dated January 14, 2014. At that time, the only two expeditors were Grievant and SA; Dowden was not filling temporary vacancies because she was on leave.

Logan identified an email he sent the Union on February 6 saying that Dowden would begin work as an expeditor on February 10, 2014. Part of the email chain shows that Logan wrote to a Company nurse on February 3, 2014, asking for information about Dowden. The email said she was the prevailing bidder for the expeditor posting and there were questions about whether her medical restrictions would permit her to do the work. Logan's message said the case had just been given to him and he did not know anything about Dowden's restrictions. On February 5, the nurse responded that Dowden thought she could do the work. The same message went to McKeever, and the nurse asked if he could accommodate Dowden's restrictions; McKeever responded that he could. Then, Logan informed the Union on February 6. At this time, Logan said, he did not know Grievant was going to be suspended on April 10. On February 6, Logan said he had a complaint from TB, but had not received statements from the other employees, who did not come forward until February 13.

Logan also contested a Union claim that he had done nothing to investigate the case except read the employees' statements. He spoke with all of them multiple times, he said. TB and SA called him often to ask about the status of the case, and to say that they wanted the Company to take some action. On a couple of occasions they were very emotional and anxious for something to happen. Logan also spoke to management about the case. Logan identified a memo from him to McKeever dated February 7, 2014, saying that he and a Union designee from the Civil Rights Committee (Richardson) would be there on Monday, February 10 to meet with Grievant. However, he was not able to contact Richardson, and his February 10 email to her was

not acknowledged until February 26, when she told him Reed was taking over the case. Logan said when he learned Reed had the case he assumed that meant it was in the grievance procedure, since Reed was Vice Chair of the Union's Grievance Committee. He did not call Reed to arrange a grievance meeting because he understood the Union typically took the initiative on such meetings. Logan said he had not had any prior contact with a Civil Rights Committee case.

Logan said he had met with Bogner and Richardson at the end of October 2013 in connection with the case and Bogner told him the problem was 80% Grievant and 20% TB. He also said Bogner "absolutely" did not tell him that Grievant and TB were romantically involved. That would have been important, Logan said, and he would have asked TB about it. Logan denied Grievant's claim that he called Logan and left messages after the lunchroom incident. Logan said he did not get any phone messages, and he did not hear from Grievant via email or in his office. Nor did he hear anything from Grievant after his March 19 meeting with McKeever.

On cross examination, Logan said he and Tunacik planned to talk to Grievant, but as they began receiving more detail in statements from TB and the other four employees, they decided the situation was serious enough to warrant getting Grievant out of the plant. Logan said they also thought holding off on any meetings until the second step would be better for Grievant because in that setting he would have a more experienced Union representative. He said he and Tunacik probably had those discussions in early March. If there was a serious safety issue, the Union asked, why did they let Grievant continue to work from early March until April 10? Logan replied that they decided to discipline Grievant "after everything was put together."

Positions of the Parties

The Company says it discharged Grievant for a pattern of workplace harassment against several employees and for creating a hostile work environment. The Company acknowledges that there is sometimes discord and disagreement between employees. It also says it realizes that employees sometimes use shop talk or sexual banter. But, the Company says, that is not what happened in this case. Grievant did not merely tell a coworker to fuck off and tell some sex jokes; rather, Grievant was guilty of serious and continuing harassment. There is no middle ground, the Company contends; if Grievant did what the Company alleges and said what other employees claim, then he was guilty of harassment and creating a hostile work environment, and discharge was warranted. Even Grievant acknowledged that if he did what his coworkers alleged, it crossed the line of harassment and would violate Company rules.

The Company says Grievant's conduct and words were profane, threatening and abusive, and properly perceived as such by his coworkers. The misconduct was not limited to TB or to the other three employees who gave statements. Even Tegtman, who was clearly biased in Grievant's favor, said he got tired of Grievant's complaints. Tegtman sent a message to TB acknowledging that Grievant's coworkers could not stand him, that he did not like working with Grievant, and that he had considered Grievant the benchmark of evil. And, Bogner said most of the problems on the dock were caused by Grievant. The Company says Grievant was "fixated" on TB's sexual orientation and had been for several years. There is no reason to believe that SA could have or would have constructed a lie claiming that TB was a lesbian because she had been

sexually assaulted by her stepfather. This all came from Grievant, the Company insists, who was the only one who questioned TB's sexual orientation. The Company also points out that even though some other employees testified they had had problems with TB, all of them said they had resolved the issues and were able to work together; but not Grievant or Tegtman. Grievant, in fact, continued to mistreat TB right up to the time of his discharge. Moreover, some of the Union's witnesses who supported Grievant were not even in the billet dock at the relevant times – or, at least, had lengthy absences – and could not know what happened when they were gone. The Company says the Union knew the Company would not be able to call any of the bargaining unit employees in rebuttal, so it put on people like Tegtman to paint TB in a bad light.

Although the Company said it did not rely on the so-called Dickey Road incident, it argues it is relevant to show how far Grievant would go to get TB in trouble. Grievant was not even working when he called SA and told him TB was heading away from the workplace. He claimed he was concerned about SA having a sufficient number of crane operators, but there were already two other ones assigned and, in any event, it was SA's problem, not Grievant's. Nevertheless, Grievant called before he left work and again on his way home, trying to get SA to report that TB was AWOL. Grievant also showed how he "messed with" TB in the lunchroom incident, when he told TB to get the fuck out of SA's office and eat in the lunchroom, even though he knew it smelled like urine. The Company says Grievant lied when he claimed he called Logan after the lunchroom incidents. There was never a message for Logan, and Grievant did not make that claim in either the second or third step.

The Company says much of what Grievant said about TB and other employees was unlawful and created a risk of liability for the Company. Calling TB a bitch or cunt or lesbo could give rise to a Title VII action against the Company. The Company cited federal court cases in support of that claim. The Company says the purpose of its Fair and Equal Treatment Policy and the training about the policy was to avoid such incidents. The goal, the Company says, is to have employees respect each other. The Company also says an employee's conduct does not have to violate the law to constitute a violation of the Policy.

The Company argues that a preponderance of the credible evidence supports a conclusion that Grievant said what the statements claim he said, and that his gender bias affected everything else he did. The totality of circumstances analysis showed that Grievant used discriminatory and degrading language toward TB and other employees, and that his conduct was severe and pervasive enough to be actionable. He also made work harder for the employees who worked with him and those on other shifts. There was also evidence of hostility against TB that was not gender-based, like the lunchroom incident. TB and the employees who gave statements against Grievant had no incentive to lie. Moreover, the Company points out that it is not common for employees to provide evidence against coworkers, and the willingness to do so in this case is significant.

The Company argues that its decision not to interview Grievant prior to suspending him preliminary to discharge is a red herring raised by the Union to deflect attention from what Grievant did. There was a bona fide reason for its decision, namely, to get Grievant out of the workplace once the extent of his activities became known. Moreover, there was no denial of due process. Grievant was told on March 19 that he was the target of an investigation concerning

harassment. He had the opportunity to tell his story during the grievance procedure, Step 2 of which was prior to the discharge. Grievant did not say anything at Step 2, but he gave his position at Step 3. The Company also argues that Grievant was not prejudiced by the procedure the Company used, citing a case that says when facts are demonstrably true, there is no harm in not discovering the facts sooner.

The Company argues that Grievant thought his 38 years of service made him bullet-proof, which was demonstrated when he asked Dowden, "what can they do to me?" But length of service cannot protect Grievant in a case like this one, the Company says. Not only were Grievant's actions severe, but he has shown no remorse and has not apologized to TB or anyone else for his conduct. Moreover, if the statements are true, as the Company insists they are, then Grievant lied under oath at the arbitration hearing. Grievant, the Company concludes, does not deserve a break.

The Union argues that the Company has defined Grievant's violations as harassment and the creation of a hostile work environment. The Company's own documents, the Union contends, say that a hostile work environment must be based on victims who are members of a protected class. The issue is not merely whether they feel uncomfortable at work but, rather, whether they have been disadvantaged because of membership in a group that is protected under law. In the Step 2 meeting, Logan said the hostile work environment was based on Grievant's discrimination against coworkers on the basis of sex, mental disability, and race, although the race allegations were withdrawn. Moreover, the Company said it did not discharge Grievant for actions premised on mental disability. Thus, the hostile work environment charge, the Union contends, must be based on discrimination on the basis of gender.

The Union reviewed the statements on which the Company relied and, it says, found no evidence that the difficulties between Grievant and TB or the other employees were based on sex discrimination. TW's statement said Grievant would tell his crane operators not to unload cars, and then tell the next shift that the crane operator refused to do so. But this has nothing to do with sex discrimination, the Union says. TW also said he had heard Grievant call TB a bitch and other employees had told him that Grievant said TW's wife does more than spin records. But the latter comment does not relate to someone's membership in a protected class, and was not even heard first hand by TW. And, while TW said Grievant laughed about SA being in the "nut house," there is no evidence that SA has any mental disability. TW also said Grievant likes to bully employees, but even if true, the examples involve both men and women and, thus, is not evidence of discrimination based on sex.

The Union also argues that MD's statement does not support any claim of discrimination against a protected class. MD and Grievant got in a dispute about billets being in the wrong place, with Grievant telling him to go fuck himself and to fuck off. But this has no relationship to sex discrimination. The same is true, the Union contends, about allegations that Grievant wanted to make more work for the other crew. Moreover, TB's initial statement described the lunchroom incident, but there was no evidence it was based on sex discrimination. There is no doubt TB and Grievant were angry with each other, but this was simply a dispute between two employees, and not action taken against TB because of her sex or because of sexual orientation. The next lunchroom incident involved TB stating her intention to tape the confrontation. But,

the Union says this does not show Grievant was making the workplace untenable for TB. It seems more likely that TB was trying to pick a fight with Grievant. The Union also references a transfer car disagreement and a dispute about how to handle garbage, both of which TB cited as evidence of harassment. But there was no evidence that this was based on sex discrimination.

The Union said the so-called Dickey Road incident was also not evidence of sex discrimination. Grievant called SA twice concerning whether he had enough crane operators, and to tell him to call supervision to protect himself if something happened to Grievant. But he did not call SA the third time. TB had returned to work at some point before 5:43, but when SA called Grievant at 5:43, he told Grievant TB had not yet returned. How is it harassment, the Union asks, when SA and TB call Grievant? And how would it show sex discrimination? The Union also notes that in TB's February 17 statement, she said Grievant "apparently" called her a bitch or dyke, indicating that she had no firsthand knowledge about the issue. The Union also says TB did not mention the alleged slurs when she first reported that Grievant was harassing her.

MD's statements mention the alleged name calling only once. He said during an accident investigation Grievant called TB a bitch and said MD should not trust her. MD also reported sexual banter between Grievant and Krout, but Krout clearly understood it as a joke, and there is no evidence TB knew about it. In addition, despite the employees' statements alleging that Grievant had used sexual slurs toward TB, there was very little evidence of when that occurred, and certainly no justification for Logan's allegation in the third step that it happened on a daily basis. Krout and Dowden both testified that there was no sexual harassment on the billet dock. All the Company has really shown, the Union argues, is a personality conflict between two workers. However, it has no evidence that any of the conflict was caused by sex discrimination.

The Union also reviewed SA's statement. The fuck-you-in-the-ass-until-you-bleed comment was not a threat to sodomize SA; rather, it was simply mill talk. Moreover, it happened more than three years ago. SA said Grievant used slurs when referring to TB, but he gave nothing specific. Similarly, SA said Grievant used inappropriate talk about others and started rumors that caused discord. But again, there is very little in the way of specific examples, and most of those he gave were not from first-hand observation. The Union says SA's credibility was compromised by his refusal to provide any information to support his claim that Grievant caused him mental distress. The expeditor bid also damaged SA's credibility. If the Company filled the third expeditor position, SA believed he would be pushed out of his job. But that would no longer be a cause for concern if Grievant were discharged. This gave SA a motive to lie about what Grievant said and did.

The Union says the Company's argument is that once Grievant said TB was a bitch, then everything else was tainted by sexual harassment. But, the Union says, courts do not accept that kind of analysis. The disputes between Grievant and TB were over work-related issues, and they cannot be considered as a pattern of sexual harassment just because Grievant called TB a bitch or cunt, etc. Rather, the Union says the totality of the circumstances must establish that the workplace became hostile because of sexual harassment.

The Union says there was no problem between Grievant and TB until Grievant returned from sick leave. At that point, TB started having to do more work, which changed the relationship. Moreover, Grievant took steps to insure that TB and other employees stopped taking extended lunch periods. But none of this had anything to do with sexual harassment. These were work issues and not evidence of a hostile work environment. The Union relies on some of the Company's program materials to show that work issues alone will not support a claim of hostile work environment. It also submitted a memo from a law firm for a program entitled Rude & Boorish Behavior vs. Actionable Harassment. The document cites cases, including one in which a court said that Title VII was not "a general civility code for the American workplace", and another that says offensive or hostile behavior is not enough to establish a hostile work environment; rather, the test is whether a reasonable jury could conclude that a plaintiff's "mistreatment was due to her gender." The Company's evidence does not satisfy that standard, the Union says.

The Union also cites what it says are serious procedural problems. The Company did not give the Union information required by the contract in Step 2, and it added things – like an alleged abusive language violation – after Grievant had already been suspended. The Company also refused to answer questions and, in the third step, said it would answer questions only if ordered to do so by an arbitrator. In addition, Grievant was not allowed to tell his side of the story prior to his discharge. In form, he had the right to do so in Step 2. But Grievant and the Union had not seen the employees' statements until Step 2, so the Union had not been able to plan a defense. An attempt by Grievant to rebut charges he did not know about would have been meaningless.

The Union says this issue was created by the Company's failure to develop the case during the investigation. Traditionally, the second step has been a hearing, with both sides calling witnesses and presenting their case before the Company decides whether to discharge an employee who has been suspended preliminary to discharge. But here the Company did not disclose the information needed to prepare a defense until the second step, meaning that the hearing was held in the third step, after Grievant had already been discharged. There is nothing in the contract that authorizes this procedure, including the issuance of third step minutes. In addition, the Company failed to properly utilize the Civil Rights Committee process where, the Union points out, it could have called the employees who gave statements to testify, and the Union could have cross examined them.

Findings and Discussion

Applicable Standards

As is common in this industry, the Company is prohibited from calling any bargaining unit employee to testify in arbitration, and the Union is unable to call any non-bargaining unit employee. In this case, then, it was not possible for the Company to call TB or any other employees who made statements concerning Grievant's behavior. McKeever and Montemayor, both managers, had observed some interplay between Grievant and TB, but neither one was witness to the principal charges against Grievant. In such situations, steel industry arbitrators

have sometimes permitted an employer to submit statements from bargaining unit employees. See e.g., *ArcelorMittal Case No. 63* (2013). As I noted in that case, the weight to be given to statements depends on the circumstances. In the instant case, the employees approached the Company of their own free will. Moreover, they were not ordered to give statements, and the Company did not compel other employees to provide statements, even though at least one employee apparently had information about Grievant's conduct. In addition, some of the employees were willing to submit statements supporting TB's claims, knowing their names would be disclosed to their coworkers, even though they were not targets of Grievant's behavior. In these circumstances, I conclude that the statements are entitled to substantial weight. In addition, the Union could have called the employees and cross examined them during the arbitration hearing.

The 5-day suspension preliminary to discharge document states two reasons for terminating Grievant: he engaged in a pattern of workplace harassment against several employees; and, he created a hostile work environment for those employees. The document also says the Company considered either of the offenses to be grounds for suspension preliminary to discharge. During the arbitration hearing, the principal focus was on whether Grievant had created a hostile work environment, but the evidence was relevant to both that charge and the sexual harassment issue.

The Non-Discrimination and Anti-Harassment Policy, which is part of the Company's Fair & Equal Treatment Policy, says, in part:

ArcelorMittal expects that all relationships among persons in the workplace will be business-like and free of bias, prejudice and harassment. In accordance with these commitments, it is the policy of ArcelorMittal to forbid sexual and all other forms of unlawful harassment, as well as any inappropriate or unprofessional conduct, whether or not such conduct rises to the level of unlawful harassment. ArcelorMittal will not tolerate any conduct that violates this policy; anyone found to be in violation of this policy will be subject to discipline, up to and including discharge.

This policy extends to each employee at every level of our organization. Specifically, no employee ... shall discriminate against, harass or treat inappropriately or unprofessionally anyone on the basis of race, sex, religion, creed, color, national origin, citizenship, disability or handicap, age, military status, marital status, sexual orientation, ancestry, veteran status ... or any other basis prohibited by law....

During the hearing, the parties debated whether the prohibition against creation of a hostile work environment mirrored the requirements of federal law; namely, whether the harassment leading to the hostile work environment has to be tied to a protected status. Specifically, the Union argued it is not enough to show that Grievant's conduct caused employees to feel uncomfortable; rather, the Company has to show that the conduct leading to the hostile environment was based on sex discrimination. Much of the Company's argument centers on its claim that Grievant's actions against TB were motivated by sex discrimination; however, the Company also argues

that the prohibition against a hostile work environment in its Non-Discrimination and Anti-Harassment Policy is not limited to conduct based on a protected characteristic.

The Company's Non-Discrimination and Anti-Harassment Policy, quoted in part on page 22, also says,

Although it would be impossible to provide a definition that would cover every form of unlawful harassment, such harassment has been found to include the following:

Sexual Harassment: Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when: (a) submission to such conduct is made explicitly or implicitly a term or condition of a person's employment; (b) submission to or rejection of such conduct is used as a basis for an employment decision affecting that individual; or the purpose or effect of such conduct is to interfere substantially with the affected individual's work performance or to create an intimidating, hostile, or offensive work environment. Some examples of unwelcome behavior that can be construed as sexual harassment include, but are not limited to: sexual advances, propositions, off-color jokes, touching, physical assault, sexually explicit or suggestive objects or pictures, references to a person's body parts, request for sexual activity, and/or sexually explicit conversation.

Other Forms of Harassment: Verbal or physical conduct relating to an individual's race, religion, creed, color, national origin, citizenship, disability or handicap, age, military status, marital status, sexual orientation, ancestry, veteran status ..., or any other basis prohibited by law when this conduct: (a) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (b) has the purpose or effect of unreasonably interfering with an individual's work performance; or (c) otherwise adversely affects an individual's employment opportunities. Some examples of conduct that may constitute prohibited harassment include, but are not limited to: slurs, jokes, cartoons, stereotypes and statements with regard to any other basis prohibited by law. We take allegations of unlawful harassment and inappropriate/unprofessional conduct very seriously.

Thus, the Company's Policy recognizes that a claim of hostile work environment exists within the context of discrimination based on a protected characteristic. But the Company points to other language which, it says, shows that a hostile work environment under its Policy does not require a showing of conduct aimed at a protected characteristic.

In a Company document entitled "Fair & Equal Treatment Policy Frequently Asked Questions," (FAQ) one of the questions is, "What does 'hostile work environment' mean exactly?" In relevant part, the answer is, "It is important to note that only conduct based upon a

protected characteristic – race, sex, age, etc. – can create a ‘hostile work environment’ under the law.” The answer continues by saying that a hostile work environment can result even from a single incident. It then continues:

It is important to note that from a Company perspective, even if the single incident was not sufficiently severe to create a ‘hostile work environment’ under the law, it could still violate our policy and result in discipline for the offending individual, up to and including termination.

However, despite the Company’s interpretation, this language does not compel a finding that a hostile work environment can exist without a tie to a protected characteristic.

Although the Company’s policy was obviously based on legal standards, the issue in this case is not whether there was a violation of federal law. Rather, the issue before me is whether the Company had just cause for discharge; there is no issue in this forum about whether the Company is liable for allowing a hostile work environment to develop, which is the question addressed in Title VII actions. Thus, while I agree with the Union’s assertion that the existence of a hostile work environment must be tied to a protected characteristic, it is not necessarily true that the quantum or type⁵ of proof required in this contract action is equal to what courts require in Title VII damage actions. Stated differently, I need not find that the circumstances existing in the billet dock at the relevant time would have violated Title VII in order to find that Grievant’s conduct constituted just cause for discharge. This is how I understand the “not sufficiently severe” language quoted above. It does not mean that a hostile work environment can arise which is not tied to a protected characteristic; instead, it means that given the differences in forum and issues, the evidence of a hostile work environment based on a protected characteristic might establish just cause for discharge even though it would not support liability in a Title VII action.

The Merits

As I will explain below, I find that the evidence supports the Company’s claim that Grievant’s conduct was sufficient to establish a hostile work environment that violated the Company’s Policy. In addition, the Company’s Policy is not limited to proof of hostile work environment, and the evidence supports a conclusion that Grievant was also guilty of sexual harassment.

Despite Grievant’s denial, I am satisfied that Grievant called TB a bitch, cunt, and dyke on numerous occasions. There is no evidence supporting Logan’s claim in the Step 3 minutes that this occurred on a daily basis; nevertheless, I cannot find that Grievant’s use of such slurs was occasional or isolated. In her February 17, 2014 statement prepared after her meeting with Logan, TB said “apparently [Grievant] refers to me as the b**** or dyke.” A handwritten statement TB prepared at about the same time says, “Call me bitch, cunt, dyke to [other

⁵ The record in an arbitration case might contain evidence that would not be admissible in a Title VII action tried in federal court. The rules of evidence do not apply in arbitration and, even though arbitrators may prohibit evidence based on relevance or other evidentiary factors, it is common for them to admit and consider certain kinds of hearsay and other evidence that would never reach a jury in federal court.

employees].” Both of SA’s statements say Grievant called TB a dyke and a bitch. TW’s statement says Grievant “frequently” called TB a bitch, dyke or cunt. He also told SA and others that TB was molested by her father, which was why she was a lesbian. And, MD said Grievant referred to TB as a bitch during an accident investigation, and had told him TB was a lesbian.

In addition to the name calling, there is other evidence of acts or speech consistent with sex discrimination, that contributed to the hostile atmosphere. Grievant told some employees that TB and TW were fucking and that she used a strap-on to fuck him in the ass. Grievant also said he was playing lesbo music on the radio for TB’s benefit, and he said TW’s wife did more than spin records at her job, which I understood as a claim that she was having sex with someone other than TW. Finally, Grievant told Krout over the radio that he wanted to take her to come-on-I-wanna-lay-ya.

Also relevant was Bogner’s statement in a discussion with Logan that Grievant was 80% at fault for the strife between Grievant and TB. Bogner modified those numbers during the grievance procedure because, he said, he had learned more about the expeditor’s job duties. But he still said Grievant was responsible for 60% of the problem, and he was unable to explain why Grievant was responsible for any of the problem if he was simply performing the expeditor’s job.⁶ Similarly, Tegtman’s indignant email to TB referred to Grievant as “the benchmark of evil” and said Grievant and TB – whom he called “a no good drama causing worthless hack” – were “perfect for each other.” Tegtman also said he could not stand to work with Grievant and that coworkers “can’t stand him equally.” These are not the kinds of comments one normally expects from someone called to support a coworker’s claim that he was not guilty of wrongdoing, especially when the wrongdoing concerns harassment and the creation of a hostile work environment.

Although the contractual and legal standards can differ, court decisions are still relevant to explain sexual harassment and the creation of a hostile work environment. As explained by the Seventh Circuit Court of Appeals in *Passanti v. Cook County*, 689 F.3d 655 (7th Cir. 2012), and by numerous other courts, a claim of sexual harassment requires a showing that the work environment was both objectively and subjectively offensive; that the harassment was based on sex; and that the conduct was severe or pervasive. There is no question that the environment was objectively offensive. A reasonable person would be offended by Grievant’s name calling, by his frequent references to TB’s sexual orientation, and by his strap-on descriptions. Whether the environment was subjectively offensive is more difficult. There is no evidence that Grievant ever called TB a bitch, dyke, cunt, or lesbo to her face. However, TB’s typed February 17 statement and a handwritten statement apparently prepared at about the same time indicate that she knew Grievant used slurs when talking about her to other employees. Thus, her subjective perception of the work environment included a recognition that Grievant was belittling her to coworkers by using sexually degrading slurs. As recognized by the Seventh Circuit in *Hall v. City of Chicago*, 713 F.3d 325 (7th Cir. 2013), the burden of showing subjective harassment “is not high”:

The defendant ‘suggests that plaintiff should have to do more than declare she was harassed, yet that is the whole point of the subjective inquiry: we

⁶ When pressed for an explanation, Bogner simply said, “My opinion is my opinion.”

inquire into whether the plaintiff perceived her environment to be hostile or abusive.’ 713 F.3d at 332, quoting *Haugured v. Amery School District*, 259 F.3d 678,695 (7th Cir. 2001)

This is not to suggest that an employee’s perception of discrimination can always satisfy part of the burden of proving harassment; however, in this case the perception turned out to be true. Grievant, in fact, was doing what other employees told TB he was doing.

Although the Union denies that Grievant used the words cunt, lesbo, dyke and bitch to describe TB, it also says that even if he did his conduct did not rise to the level of sexual harassment under law, which, it says, is the relevant inquiry. As the court recognized in *Passanti*, “Title VII is not a general prophylactic against workplace animus. It is only concerned with animus motivated by certain protected characteristics.” The Union submitted a memorandum prepared by an attorney (not specifically for this case) stressing that Title VII is not concerned with rude or boorish behavior, teasing, and personality conflicts. Rather, the test is whether the abusive terms or other conduct was motivated by the target’s membership in a protected group.

There is certainly evidence of boorish behavior. Grievant told SA he would fuck him in the ass until he bled, he told employees to fuck off or to go fuck themselves, and he yelled at employees over work issues. Much of this was directed at male employees. Moreover, Bogner testified that he and Grievant exchanged “fuck yous” and then worked it out. None of this seems to have been related to the sex of the target, and some of it might properly be characterized as shop talk. But that is not true of Grievant’s treatment of TB. No one can deny that the words cunt, dyke and lesbo are slurs against women. Moreover, although it may have a broader usage, the word bitch is often used as a derogatory term aimed at women. On numerous occasions, then, Grievant used words to describe TB that were intended to demean her or humiliate her in the eyes of her coworkers. The words were insulting and intended to be so, and the words themselves show sexual harassment. As the *Passanti* court said,

But we do reject the idea that a female plaintiff who has been subjected to repeated and hostile use of the word “bitch” must produce evidence beyond the word itself to allow a jury to infer that its use was derogatory against women. The word is gender specific, and it can reasonably be considered evidence of sexual harassment. 689 F.3d at 666.

It is also clear that there was more than mere name calling in this case. Grievant’s willingness to disparage TB extended to telling coworkers her father had molested her, and claiming she was using a strap-on to have sex with TW. This is sufficient to persuade me that Grievant’s actions concerning TB were harassment that was motivated in significant part by TB’s gender.⁷

⁷ See, *Forrest v. Brinker, International Payroll Co.*, 511 F.3d 225, 229-30: “A raft of case law ... establishes that the use of sexually degrading, gender-specific epithets, such as slut, cunt, whore and bitch ... has been consistently held to constitute harassment based upon sex.” See also, *Windsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000-01 (10th Cir. 1996).

This conclusion colors Grievant's other conduct toward TB. There were allegations by TB that Grievant made work more difficult for her than for other employees, but for the most part the Company did not rely on them when deciding to discharge Grievant. However, there were several examples of Grievant trying to get TB in trouble. In the scale pit incident, Grievant told McKeever that TB had refused to perform a job. At another time, TB said she got overheated and went to the clinic. Grievant responded by telling her supervisor she was drunk. He also told supervision TB had gone over his head with a crane.

The lunch room incident also raises issues about Grievant's treatment of TB. It may be that TB was more aggressive than she admitted when she asked Grievant to move so she could sit down and eat lunch. TB's statement said she always sat in that chair, but Grievant initially refused to move and told her to get the fuck out of the office and go to the fucking lunch room. What is difficult to understand is why Grievant would have cared whether TB ate lunch in SA's office. TB had not tried to eat lunch in Grievant's office and there was no evidence he had any real need to be in SA's office. Grievant's outburst against TB, then, suggests he did not have a problem with a crane operator eating in SA's office; rather, he had a problem with TB eating there. And, once again, Grievant went to a supervisor, who issued a memo telling employees they could not eat in the offices without the expeditor's permission.⁸

Under law, sexual harassment has to be serious or pervasive in order to constitute a hostile work environment. Grievant's repeated references to TB as a cunt or a bitch or a dyke not only affected TB's subjective impression of her working environment, but it also exposed other employees to Grievant's sexual harassment of TB. Moreover, Grievant's willingness to incorporate other employees (or their wives) into his sexually based comments could not have been lost on coworkers. A quick review of cases indicates that courts are not in agreement about the extent of conduct necessary to meet the hostile work environment threshold. But there are cases in which the repeated use of sexist slurs has been deemed serious enough to meet the test. See e.g., *Forrest v. Brinker International Payroll Co.*, supra at n. 2. In addition, the USS-USW Board of Arbitration has upheld the discharge of an employee for violation of the employer's Discriminatory Harassment Policy based on one incident of calling a supervisor a "fucking bitch" and a "fucking cunt."⁹ The instant case is not limited to one incident of slurs; moreover, there are examples in which Grievant's treatment of TB can reasonably be related to his belief that TB was a lesbian.

⁸ Although both parties spent considerable time on the so-called Dickey Road incident, the Company said it did not rely on the incident in making the discharge decision. Nevertheless, given the volume of evidence submitted, I find that the incident is relevant to credibility issues. In particular, Grievant claimed that he called SA for the second time about forty minutes after he left work because he was concerned about the Company's liability and also because he was worried about TB. It is not clear there would be any liability if the Company had nothing to do with TB's absence, especially if she was off Company property, as Grievant apparently believed. But the second explanation is more telling about Grievant's willingness to lie about his concern for TB. His testimony that he was worried about TB was obviously false, which taints some of Grievant's attempts to explain away other conduct concerning Grievant.

⁹ The employee had been discharged for two separate offenses. In addition to the violation of the harassment policy, the employee was also discharged for using foul or abusive language to a supervisor. The Board found proper cause for discharge on each charge.

Grievant clearly violated the harassment prohibitions defined in the Non-Discrimination and Anti-Harassment Policy. The definition of sexual harassment, quoted above at page 23, principally describes a type of behavior that Grievant did not display. There is no evidence that he made sexual advances or asked for sexual favors. Nor were there allegations of unwanted touching, explicit or suggestive pictures, or other conduct intimating that a sexual relationship would somehow benefit TB. Grievant did, however, engage in “other verbal ... conduct of a sexual nature” and the “purpose or effect of such conduct” was to “create an intimidating, hostile or offensive work environment.” Grievant’s conduct also fits easily within the behavior proscribed by the section on “Other Forms of Harassment.” The list of protected classes does not include sex or gender, but the language says the prohibition extends to discrimination “on any other basis prohibited by law....” Of significance is the inclusion of the word “slurs” in the list of offending conduct; slurs were Grievant’s principal means of humiliating TB in her coworkers’ eyes.

The same section prohibits creating a hostile work environment on the basis of sexual orientation. Although Grievant may not have been “obsessed” with TB’s sexual orientation, as the Company claimed in its final argument, it was certainly a matter of interest to him; or, at least, it was a subject he liked to talk about with coworkers. He called TB a dyke or lesbo, both of which are commonly used to disparage lesbians. He also told coworkers TB was a lesbian because she was molested by her step father, and Grievant said he brought in a radio to play lesbo music for her benefit. A finding that Grievant engaged in conduct relating to TB’s sexual orientation does not depend on whether TB is actually gay. The point is that Grievant used crude sexual references intended to embarrass TB by invoking questions about her sexual orientation.

Union witnesses testified about experiences with TB that suggest she is contentious and not always easy to work with. They also indicated that she complains about work assignments. It is worth remembering that the Company was not able to call TB to rebut any of the testimony, or any other bargaining unit employee who had knowledge of TB or her activities. Still, the Union is in a very difficult position in this case; it is the exclusive representative of both Grievant and TB and owes each of them the duty of fair representation. There is no reason to suspect that the Union would deliberately make the situation even harder by knowingly calling witnesses who would lie about either TB or Grievant. But the point is that no matter how disagreeable TB might have been, there was no excuse for calling her a bitch, a cunt, a lesbo, or a dyke. Nor was there any justification for telling employees that she was having sex with a coworker, including using a strap-on to have anal intercourse. This level of sexual harassment cannot be explained away.

In these circumstances, I find that Grievant was guilty of sexually harassing TB and that his conduct created a hostile work environment. I could not say with great confidence whether a court would find Grievant’s conduct sufficient to establish a hostile work environment. But I am persuaded in the instant case that his actions violated the Company’s Non-Discrimination and Anti-Harassment Policy. Grievant engaged in a continuing course of conduct in which he disparaged TB by the use of sexual slurs, including some that were related to sexual orientation. Given this conduct, it is reasonable to assume that at least some of his treatment of her – like the lunchroom incident – and some of his attempts to get her in trouble were an outgrowth of this sexual harassment. There is no other plausible explanation for his conduct. And, even if there

were, Grievant's decision to deny everything precluded him from offering an explanation that, if not exculpatory, might have been considered in mitigation.

Other Issues

The Union argues that Grievant cannot be held to the standards in the Policy because he had not been properly trained. I did not believe Grievant's claim that he had never seen the Policy prior to his discharge. I am willing to believe he did not read it, but the Policy was distributed to all employees, and there is no reason to think Grievant was excluded. There is some question about whether Grievant saw the 2013 video produced to introduce employees to the Fair & Equal Treatment Policy, which includes the Non-Discrimination and Anti-Harassment Policy. Grievant denied having seen it, although such denials are not uncommon in circumstances like these. Tegtman testified that he saw Grievant and Krout while the meeting was going on and asked why they weren't there. According to Tegtman, Grievant said he had not been notified of the meeting. Although Tegtman was not the Union's most credible witness, his story was plausible, in part because the meeting had been scheduled on short notice and it is reasonable to believe that some employees may have missed the announcement. In addition, I am troubled by the Company's inability to produce the sign-in sheet for the meeting where the video was shown, especially when it had the sheet from the 2004 meeting that showed Grievant was there.

Nevertheless, Grievant saw the 2004 video, a series of vignettes about harassment. There were some examples of how name calling could constitute harassment, but none involving words as crude as the ones Grievant used to describe TB. Moreover, even without training, it begs credulity to believe that someone could think it was permissible to describe a coworker as a dyke, a cunt, a bitch or a lesbo. Nor could anyone reasonably believe it was acceptable to tell employees that one of their coworkers was fucking another employee in the ass with a strap-on. The narrator summarized the 2004 video by saying, "The one feature [the vignettes have] in common is the lack of respect for a coworker." This case clearly demonstrates a lack of respect for TB and for the employees who had to listen to Grievant's name calling.

McKeever testified that he covered parts of the Policy with Grievant at both of the meetings he held between Grievant and TB in 2013. On rebuttal, he clarified (or amended) his testimony to say that he had told both employees they had to treat each other with respect and dignity (which he also said in his testimony during the Company's case-in-chief) and that this was consistent with the "spirit" of the Policy. I think it is likely that McKeever did not specifically reference the Policy in the meetings. But I thought his testimony about telling them to treat each other with respect and dignity was credible. Grievant could not have believed these statements were merely exhortatory, and that he was free to continue referring to TB with offensive terms like cunt and dyke and lesbo and bitch.

The Union contends that Grievant was prejudiced by the procedure the Company used in this case. There was a very short meeting when the Company gave Grievant the April 10, 2014 notice suspending him for 5 days preliminary to discharge. During that meeting, the Company did not provide the Union with any information about whom Grievant was supposed to have harassed, or when it occurred. The Union said the procedure typically has been for the Union to

get information from the Company about the basis for its action prior to the second step. Then, at the second step the Union presents its defense of the affected employee. The third step, the Union says, is a review by people who are higher in both the Union and Company hierarchy. In this case, however, the Company did not give the employees' statements to the Union until the second step, meaning that the Union had no opportunity to review them prior to the meeting. Moreover, the Union argues that the Company made the decision to discharge Grievant without first giving him the opportunity to be heard.

The procedure the Union describes is similar to the one included in steel industry collective bargaining agreements prior to 2002 or 2003. Thus, the 1999 Ispat Inland-USW Agreement provided that once an employee was suspended for five days preliminary to discharge, he could request a hearing (sometimes called an Article 8 hearing) during which the "facts and circumstances" were disclosed. After the Article 8 hearing, the Company would decide within five days whether to convert the suspension to discharge. If it did, and if the employee wanted to contest the discharge, then a grievance would be filed in Step 3 (of a four step grievance procedure.) Similar procedures are still used in some parts of the industry. But the language in the ArcelorMittal-USW Agreement is significantly different.

Unlike prior agreements, the language no longer calls for a hearing prior to entry into the grievance procedure. Instead, when an employee is suspended for five days preliminary to discharge, the procedure is as follows:

The grievance protesting the intended discharge shall be filed at Step 2 of the grievance procedure and the Step 2 Answer shall be given prior to the Company converting the suspension to a discharge. At the Step 2 meeting the Company shall provide a written statement fully detailing all of the facts and circumstances supporting its proposed disciplinary action.

There is no reason to question the Union's claim that the parties have exchanged information prior to the Step 2 meeting, and then used that meeting as the principal airing of the parties' positions. It is not entirely clear why the Company did not use that procedure in this case. But the language in Article V, Section I-9-a-(3) is not ambiguous. The parties held the Step 2 meeting and the Company did not convert the suspension to discharge until after it issued the Step 2 minutes.

The Union claims that the Company did not comply with the requirement to provide a written statement outlining all of the facts and circumstances it relied on. But, as I understood Logan's testimony – and as I understand the Company's case – it relied almost exclusively on the employees' statements, all of which were given to the Union at the Step 2 meeting. The principal difficulty was that Logan refused to tell the Union whether there were allegations in the statements that the Company did not consider in making its decision to discharge Grievant. It is not clear why the Company did not reveal this information. The Union's right to information about the grievance – including the reasons for discharge – is not limited to the contract; the law also requires disclosure. In this case, however, I find that Grievant was not prejudiced by the Company's failure to tell the Union if there was material in the statements it had not considered.

The Company did not conceal any of its grounds for discharge, so the Union was not surprised at arbitration and it clearly was prepared to defend all of the Company's allegations, including the ones the Company said influenced its decision.

The same contract provision answers the Union's claim that Grievant did not have an opportunity to tell his story before being discharged. The current agreement (and at least some predecessor agreements) includes a procedure for a discharged employee to offer his defense prior to discharge. Employees are not summarily discharged but, instead, are suspended preliminary to discharge. The 5 day suspension period is intended, in part, to give emotions time to cool, but it is also a period when the parties investigate the facts and circumstances of the case. Part of that process is a hearing that allows the Union to present whatever evidence it wants, including having the Grievant respond to the charges. Grievant had that opportunity in this case. There is no longer a formal hearing prior to the grievance procedure, but Step 2 seems to have replaced the Article 8 hearings. Grievant could have told his story at Step 2, thus insuring that the Company knew his position prior to his discharge.

The Union says it did not have Grievant testify at Step 2 because it had not gotten information about the case until the Step 2 meeting and, thus, did not have time to prepare. But, as already discussed, there is nothing in the Article 5-I-9 procedure titled "Suspension and Discharge Cases" that compels the parties to share information in advance of the Step 2 meeting. That does not mean the parties cannot share information in advance, as they apparently had been doing prior to this case; but I cannot find that the Company violated the contract when it failed to do so. Nor can I find that waiting until Step 2 to provide the information deprived Grievant of his right to tell his story prior to being discharged.

The Union also argues that the Company did not utilize the Civil Rights Committee procedure the parties had agreed to. TB initiated proceedings in October, 2013, and Union Vice President Aguilar promptly advised Committee Member Richardson of that fact. Logan and Richardson met with TB at some point in November, and a few days later they interviewed Bogner, who confirmed that there was animosity between Grievant and TB. After that, Logan said the process was delayed because of holidays and shut downs. On February 10, 2014, Logan sent an email to Richardson saying he wanted to schedule a meeting with Grievant and TB soon because they were going to be working the same turns. He said he had left messages for her prior to February 10, but Richardson had not returned his calls. The February 10 message also said if Richardson was not available to meet, he thought it would be advisable at least to warn Grievant and TB "in a non-accusatory fashion" that they needed to treat each other with respect, and that inappropriate behavior would not be tolerated. Logan did not hear back from Richardson for sixteen days, when she told him Darrell Reed was going to handle the case.

Richardson testified that she did not think it was appropriate for the two of them to meet with Grievant and TB without the rest of the committee. But I understood Logan's testimony to mean that they had already met with TB and Bogner without the rest of the committee. Moreover, Richardson did not tell Logan she thought it was improper to warn TB and Grievant; she did not respond at all, even though she knew of Logan's concern that Grievant and TB would be working together. Nor did Richardson explain the sixteen day delay. Frankly, I did not believe Richardson's testimony that she waited from December 10 (when TB contacted her

complaining of the delay) until February 10 for Logan to call a Civil Rights Committee meeting, and then complained to Shattuck because Logan had not done so. Not only did she fail to respond promptly to Logan's February 10 email, she also did not forward TB's December 10 message to Shattuck until May 26, more than a month after Grievant was discharged, and there is no evidence she sent it to Logan. On the other hand, it is hard to understand why Logan – who was apparently expected to schedule Civil Rights Committee meetings – did not do anything between some point in November and early February 2014, when he said he tried to call Richardson.

The parties also did not contact each other after Richardson transferred the case to Reed in late February. Logan said that once he heard Reed had the case, he assumed it was in the grievance process, and he waited to hear from Reed because the Union typically took the initiative in setting up grievance meetings. Reed, on the other hand, said the case was still with the Civil Rights Committee, so he waited to hear from Logan because the Company took the lead in setting up Civil Rights Committee meetings. Both witnesses were credible. I also believed Aguilar's testimony that even though Reed is Vice Chair of the Grievance Committee, he is considered a member of the Civil Rights Committee in some cases. But no one told Logan what Reed's status would be, and Richardson's February 26 email to Logan said she had spoken to "D Reed of the grievance procedure and he will be handling this matter." (emphasis added). It was reasonable for Logan to understand this to mean that the case would now be processed through the grievance procedure.

I agree with the Union's claim that proper use of the Civil Rights Committee process could have yielded important information that the Union otherwise did not receive until the Step 2 meeting. But I am not able to find that the Company was principally at fault for the failure of the committee process, or that the actions it took were any more prejudicial to the Union's position than the actions the Union took. This is not intended to suggest that anyone from either the Company or the Union was guilty of any wrongdoing. Logan and Reed were understandably confused about which procedure the case was in, with each one waiting on the other to make the next move.

The Union also suggests that the time line is suspicious, principally because Grievant's termination would insure that SA would not be moved off the billet dock. This, the Union says, gave SA an incentive to lie. But as it relates to TB, the allegations in SA's statement are repeated in the statements of other employees. It could be, of course, that all four employees conspired to tell similar stories. It also could be that one or two employees lied about what Grievant said or did. But I have difficulty believing that such a conspiracy could encompass four employees, all of whom were willing to take the risk they could be fired if they were found out, and possibly sued by Grievant. Moreover, by submitting statements against Grievant, the employees knew they risked the wrath of coworkers, who sometimes believe that bargaining unit employees should not implicate each other in misconduct. Even if SA and TB had ulterior motives, it is hard to understand why TW and MD would put themselves at risk by conspiring against Grievant; neither employee had much, if anything, to gain by ousting Grievant. In addition, I thought Logan's explanation of why he wanted to post for a third expeditor was credible.

As further proof of a conspiracy, the Union points to Dowden's testimony that when she returned to work on February 10, TB told her the only reason she got the job was because they were going to fire Grievant. As reflected in the Background, Dowden was informed she had gotten the expeditor bid on February 6. This was before Logan met with Grievant and the other three employees; that meeting occurred on February 13. Logan did not receive the statements until February 17. Also, on both February 6 and February 10, Logan thought the case was still in the Civil Rights Committee process. On February 10, he sent his email to Richardson attempting to set up interviews with TB and Grievant as part of the Committee process. At that point, Logan did not yet know that the Committee process would fail and, if the Committee process had gone forward, he would not have known how the case would be resolved. TB may have thought the Civil Rights Committee process would result in Grievant's termination. But in these circumstances, it seems unlikely that Logan or anyone else from management would have told TB that Grievant was going to get fired.

Mitigation

The Union argues that I should consider Grievant's length of service and his good disciplinary record in mitigation. Grievant had about 38 years of service at the time of his discharge. The Union asserted that Grievant had no citable discipline on his record, and the Company did not claim otherwise. Arbitrators often give weight to both factors in making a just cause determination. But the factors do not stand in isolation. They have to be weighed against the seriousness of an employee's misconduct. In this case, Grievant engaged in a pattern of behavior that included referring to his coworkers with sexist and homophobic slurs. He did so despite training on proper behavior, and he continued even after McKeever told him twice that employees had to treat each other with respect. In these circumstances, I am satisfied that Grievant's discipline cannot be reduced because of his length of service. Grievant, in fact, had been around the mill long enough to understand that his behavior would not be tolerated. Moreover, Grievant never admitted to any inappropriate behavior or apologized to any of his targets. I cannot find, then, that Grievant would benefit from the use of progressive discipline.

Justice and Dignity

Article 5-I-9-b provides, in relevant part:

- (1) In the event the Company imposes a suspension or discharge, and the Union files a grievance within five (5) days after notice of the discharge or suspension, the affected Employee shall remain on the job to which his/her seniority entitles him/her until there is a final determination on the merits of the case.
- (2) The paragraph will not apply to cases involving offenses which endanger the safety of employees or the plant and its equipment, including use and/or distribution on Company property of drugs, narcotics and/or alcoholic beverages; possession of firearms or weapons on Company property; destruction of Company property; gross insubordination; threatening bodily harm to, and/or striking another employee; theft or activities prohibited by Article Five, Section K (Prohibition on Strikes and Lockouts).

The Company denied Grievant Justice and Dignity, relying on subsection (2), above. The Union argues that nothing in subsection (2) makes Grievant ineligible for the benefit provided by subsection (1). It relies, in part, on *Arcelor Mittal Case No. 63*.

In *ArcelorMittal Case No. 63*, the Company discharged an employees for using racial and homophobic slurs and epithets, sometimes directed to specific employees, and other times made more generally. I found that the employee had used the language as charged by the Company, and that there was just cause for discharge. The Company had denied Justice and Dignity, which the Union said was inappropriate. I agreed with the Union, saying:

I understand the Company's reluctance to retain Grievant in the workplace pending completion of this case. But the contract language controls and the parties' agreement does not provide an exception for cases like this one. Nor, in my view, does the "including" clause contemplate that circumstances like those at issue here would warrant a denial. There is also some merit to the Union's claim that Justice and Dignity could be denied in a large percentage of cases if the standard was whether some retaliation was possible. I certainly do not condone Grievant's behavior, but I cannot read the contract to exclude him from Justice and Dignity.

The Union argues that there is no difference between the instant case and *ArcelorMittal Case No. 63*. There, as here, the employee used slurs and epithets towards members of two protected classes. And, as is true in this case, there were no threats of bodily harm.

The Company contends that eligibility for Justice and Dignity depends on the offense alleged, and whether repeated conduct would pose a hazard – either physical or mental – to other employees, or the plant. The Company also points out that in *Case No. 63*, the Company argued the employee should not be retained on the job because of the fear of reprisals against the employees who signed statements accusing him of misconduct. I rejected that contention, noting that there is always someone accusing a discharged employee of misconduct, so if the possibility of reprisals were the standard, the Justice and Dignity benefit would disappear. The Company also cites two USS-USW Board of Arbitration cases involving discharges for using racial epithets in which the Board construed the same language at issue here and denied Justice and Dignity.

The focus of the Justice and Dignity language is clearly on the type of conduct that caused the discipline. As applied in this case, Subparagraph (b)(2) says the benefit "will not apply to cases involving offenses which endanger the safety of employees...including" examples of various kinds of behavior. The "cases involving offenses" language focuses on the conduct that resulted in discharge. The availability of Justice and Dignity does not depend on a finding that an employee is likely to repeat the same misconduct, although that possibility might have influenced the parties when they negotiated Subsection (b)(2). On its face, Subsection (b)(2)

simply says that Justice and Dignity is not available to employees who have committed an offense that threatened the safety of coworkers.

Although the distinction is difficult, I cannot find that *ArcelorMittal No. 63* requires that Grievant be afforded Justice and Dignity in the instant case. The decision to grant Justice and Dignity in *Case No. 63* was premised in part on a rejection of the Company's retaliation theory, which it did not advance in the instant case. In addition, I noted in *Case No. 63* that the employee had not committed any of the specific violations that made Justice and Dignity unavailable. But the specific violations enumerated in Subsection (b)(2) are not exclusive; the provision says that Justice and Dignity does "not apply to cases involving offenses which endanger the safety of employees ... *including*" the specific examples. The word "including" makes it clear that Justice and Dignity could be denied in situations not specifically identified in Subsection (b)(2). It is true that I found the "including" clause inapplicable in *Case No. 63*; but I did not say it could never apply. Rather, I said it did not apply in "circumstances like those at issue" in that case. Those circumstances included the fact that supervisors had witnessed similar behavior from employees in the past, but had taken no action. This obviously was relevant to a determination of whether the employee's conduct endangered the safety of the employees or the plant and its equipment. If the Company thought it did, then presumably it would have taken action in those other instances.

As in *Case No. 63*, Grievant used slurs that were tied to a protected status. He did not directly threaten the safety of other employees, but Subsection (b)(2) does not say it is limited to physical threats. The repeated use of slurs and epithets can take a toll on an employee's sense of wellbeing, which is what the prohibition of a hostile work environment is meant to prevent. In addition, employees who are preoccupied about the hostile environment may be less attentive to their job duties and inadvertently endanger themselves or coworkers.

There was testimony in the instant case that supervisors were aware of shop talk and that some had heard employees tell sex-themed jokes. But there was no evidence that supervisors were aware of the slurs Grievant used to describe TB. McKeever was aware there was tension between the two, and he reminded both employees to treat each other with respect and dignity. When the Company began hearing about Grievant's use of slurs, it collected information from several employees and, on March 19, advised Grievant that he was being investigated for harassment. The Union points out, the Company might have acted more expeditiously in removing Grievant from the plant. But the Company removed Grievant from his expeditor duties at some point before March 19, which was intended to minimize conflict between Grievant and TB and, probably, other employees on the billet dock. In addition, the investigation continued beyond March 19; the Company received at least one statement (from SA) as late as April 4, 2014. In these circumstances, I cannot say that the Company was indifferent about Grievant's conduct and the impact it might have on employees. Thus, I cannot find that the Company violated the Agreement when it refused to give Grievant Justice and Dignity.

AWARD

The grievance is denied.

Terry A. Bethel

Terry A. Bethel

April 24, 2015