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In the Matter of Arbitration Between:)
ARCELORMITTAL)
and)
UNITED STEELWORKERS,)
LOCAL 1010.)
*****)

Grievant: R. Kerr
Arb. Docket No. 120208
Grievance No. 26-Y-021
Case 56

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. The hearing was held on February 29, 2012 in East Chicago, IN.

Mr. Dennis Shattuck, Grievance Chair, represented United Steelworkers Local 1010, hereinafter referred to as the Union or the Local. Mr. Shattuck; Mr. Robert Bateman, Locomotive Operator; Mr. John Kilbourne, Switchman and Union Griever for Logistics; and Mr. Ryan Kerr, Grievant, testified on behalf of the Union.

Mr. Philip Brzozowski, Labor Relations, represented ARCELORMITTAL, hereinafter referred to as Arcelor, the Company or the Employer. Mr. Jim Whited, Rail Operations Shift Manager; Mr. Maly Earving, the Grievant's Supervisor in Rail Operation; Mr. Bill Calhoun, Manager of the Rail Operations Group; Ms. Tracy Brough, Director of Internal Logistics; and Mr. Jim Vilga, Manager of Labor Relations, all testified on behalf of the Company.

Each party had a full and fair opportunity to present and cross-examine witnesses and to present evidence at the hearing. The parties presented post-hearing arguments over the telephone on March 7, 2012, at which time the hearing was closed.

Issue(s)

Was the Grievant terminated for just cause and if not, what shall the remedy be?

Background

The Union challenges the Company's discharge of the Grievant for "repeated violations of Personal Conduct Rule 2 P... neglect or carelessness in the performance of duties assigned or in the use of Company property." In addition, the Grievant was cited for violating two safety rules and on the basis of his "overall unsatisfactory work record."

The discharge action resulted from an incident which occurred on December 29, 2010. Mr. Jim Whited, Rail Operations Shift Manager since 2006, testified that he is in charge of coordinating and directing rail movement at East Plant No. 2. He stated that on the day in question he was in the office with Mr. Malty Earving, the Grievant's Supervisor in Rail Operations. Whited said that he told Earving to call the Grievant and tell him to deliver two loads from the 7 Blast Furnace to the 4 BOF Hot Metal Station, also referred to as the 4 SP (Steel Products).

The loads in question are two Pugh ladles full of molten iron mounted on rail cars. Each Pugh ladle carries about 162 - 220 tons of iron. Employees in the Tower at 7 Blast Furnace are notified that a move is going to occur. The Locomotive Operator then pushes the Pugh Ladle cars on the hot metal track to the 4 BOF. Earving testified that at the switch going into the 4 BOF, the Operator detaches and moves the locomotive from a position behind the Pugh ladles to a position in front of them. As he pulls north of the station, he must wait for the green light. He blows his horn as he proceeds through the hot metal station so that the employees in the station can take down the numbers of the Pugh ladles. When he has the green light, he then reverses the locomotive and pushes the Pugh ladles back south into the station, using a remote control device and riding on one of the Pugh ladle cars.

According to Earving, a red light does not mean that the Locomotive Operator may not proceed north of the station; it only means that he may not push the Pugh ladles south back into the station. If the employee is not sure of the status of the light, he can call employees at the station or call back to Earving. Earving testified that it is important to have the green light coming back into the station because there could be other Pugh ladles waiting in the station. Employees at the station are required to move the Pugh ladles around with a car puller and attach electrical wires to them in order to pour the metal. A collision between the Pugh ladles could be extremely dangerous to employees and to the Company's equipment in the area, since it could result in the spilling of hot iron.

The employees at the hot metal station notified Management that they did not see the Grievant going through the station headed north. Whited testified that Management realized that the Grievant had returned to 7 Blast Furnace from 4 BOF, but that his loads had not been entered into the 4 BOF tracking system. Whited said he called the person in charge of the 4 BOF, who said that he was surprised to find the Grievant's loads in the hot metal station there. Whited said that he discussed the situation with Earving, and Earving talked to the Grievant. Earving told Whited that after talking to the Grievant he concluded that the Grievant had entered the 4 BOF on a red light and had not called for clearance back to the 7 Furnace from the 4 BOF.

Whited said that he and Earving called the Grievant on the telephone for an explanation. He said that the Grievant told them that it was very steamy and that he did not see the red light. Whited said that the Grievant gave no explanation for failing to obtain clearance for his return. Whited told the Grievant that because of his rule violations, Whited was coming with Plant Protection to escort him out of the plant.

After arriving at the Grievant's location Whited sent him for a fitness for work evaluation, because, he said, the Grievant had performed this job many times and on this day he deviated from the way in which he normally performed it. He had performed the job correctly in the past, even earlier that same day. He had also been trained on the correct procedures. During the grievance procedure Whited also said that the Grievant's anger contributed to the decision.

Under questioning from the Union, Whited acknowledged that there is now a more formal method of communicating locomotive movements than was in existence at the time of this incident. The Union pointed out that one of the rules with which the Grievant is charged says that the employee must announce that he is moving, but does not require seeking approval for movement. Whited stated, however, that the rule has been interpreted to require clearance from Management before moving on a rail line where hot metal is transported.

The Union also questioned why Management did not investigate the GPS records or the telephone records between the Grievant and others near the time of the incident. In addition, the Union questioned why he did not send anyone to examine whether the area was unusually steamy. Whited replied that he did not think any of these steps were necessary. The Union questioned Whited about whether the Grievant's anger arose after the apparent change in the decision to send him home immediately, and if so, questions how that anger could form the basis of the decision to send him for an evaluation instead.

Earving testified over the objection of the Union because he had not been present at any of the grievance meetings where he could have been subject to questioning from the Union. He has been with the Company since July of 2010, and had just completed his training as a

supervisor of Rail Operations at the time of this incident. He had worked at a local railroad for 14 years, prior to his job with the Company.

Earving testified that after delivering the Pugh ladles to the station, the employee is required to ask for clearance to return back on the same tracks to the 7 Furnace. Earving testified that he received a telephone call from the supervisor at the 4SP, asking him whether he knew that one of his employees had made a delivery on a red light. Earving and Whited knew that the Grievant's locomotive was back at the 7 Furnace. They could determine this by looking at a screen in the office, which tracks the locomotives via a GPS system, which is generally but not completely accurate.

Earving testified that the Grievant had moved his locomotive without clearance on the hot metal track the way back to the 7 Furnace. He said that without clearance the Grievant could have run into another locomotive transporting Pugh ladles on the track. Earving concurred in the decision to send the Grievant home, because he had violated important safety rules, delivering hot metal on a red light and occupying the hot metal track without authority.

Under questioning from the Union, Earving testified that it would take about 15 minutes for the Grievant to perform the shuttle operation of moving the Pugh ladles to the 4SP and returning to the 7 Blast Furnace. He could not recall whether he noticed the Grievant's whereabouts on the GPS while he was transporting the two ladles from 7 Furnace. If he had noticed that the Grievant had moved without clearance, he would have tried to radio the Grievant.

Earving did not recall his conversations with the Grievant or with any other employees that night. He acknowledged that he did not question other operators in the area that night and

did not check the audiotapes or GPS records. He said that nothing that the Grievant said about the situation led him to believe that it was necessary to check the tapes of telephone conversations or the GPS records. Earving did not appear at the second or third step hearings. He provided a written statement about the incident after the third step hearing, about seven months after the incident.

Earving also testified that when he talked to the Grievant, the Grievant said that it was steamy and he could not see the light well. According to Earving the Grievant told him that as he got up close to the station when he was pushing the Pugh ladies back into the station, he could see that the light was red. Earving said that once the Grievant realized that he had a red light, he should have called the station or Earving.

Mr. Bill Calhoun is Manager of the Rail Operations Group and has 34 years with the Company. He said he first learned of the December 29 incident when Whited and Earving woke him with a telephone call. After what they told him, he told them to tell the Grievant to go home, and wait for Management to call him, because of the serious nature of the incident. He said that Earving and Whited stayed late and performed an investigation, and on the following day it was determined that the Grievant should be suspended pending discharge.

Calhoun said that he was involved in the decision, and concluded that the Grievant had committed two serious safety violations. One of his chief concerns was the level of danger to other employees in the area from the Grievant's actions. He also considered the Grievant's past discipline for carelessness. In addition, he considered the Grievant's six years of service, and concluded that he was due no special consideration for this, as he was a relatively short-term employee.

Calhoun said he concluded there was no reason to listen to the tape recording of conversations that night. He acknowledged that during the investigation no one from Management talked to employees at the 4 BOF or to any other employees other than the Management supervisors. He said that he would have done so if the incident had been classified as a "near miss," but it was not considered a "near miss."

Calhoun also acknowledged that many Locomotive Operators have run through switches, which is something the Grievant was disciplined for in the past under the same general negligence rule at issue here. Calhoun said that it would be rare for a Locomotive Operator to go through his career without running through a switch. He said that 30% of Switchmen have run through switches in the last 10 years.

Mr. Dennis Shattuck, Chairman of the Local Union grievance procedure since 1995, testified that another employee was involved in a rail incident shortly before the incident here, and an issue arose concerning whether the employee had clearance on the hot metal track. The Union requested the tapes of the telephone conversations between the Locomotive Operators and Rail Operations with regard to this earlier incident. The parties discovered that they could not retrieve the archived recordings at that time. Shattuck testified, however, that this should not have affected the Grievant in this case because the problem was recognized by the time this incident arose and the Union requested tapes in this case during the second step of the grievance procedure. However, the Union did not receive the audiotapes, and Shattuck was notified that he could pick up the GPS records only a week before the arbitration hearing.

Shattuck also testified that he had heard during the investigation of the grievance that another employee, Mr. Robert Bateman, Sr., had some important role in the incident. The Union

was not able to successfully reach out to Bateman to come forward and give his information until a few days before the arbitration hearing. Shattuck was considering subpoenaing Bateman to appear at arbitration when he came to Shattuck's office and agreed to testify.

Bateman testified that he has worked for the Company since 2004. On the night in question he was transporting two "pumpkin" ladles and some empty cars from the 4 BOF to the 2 BOF. He said that he asked for clearance on the hot metal track and was told that he had clearance but to watch out for the Grievant who was making a delivery at the 4 BOF. When he approached the site where there had been a recent "near miss" incident, he requested clearance again and was told by an unknown supervisor that the Grievant was waiting for Bateman to pass by at the "runaround," the switch area near the 4 BOF. At the runaround Bateman got off his engine to realign a switch and spoke to the Grievant briefly about repairs to Bateman's motorcycle. He also stated that he heard someone from the Command Center tell the Grievant to wait for Bateman to pass. He said that if he had been the Grievant in that situation, he would have concluded that he had clearance to move after Bateman had gone by, without additional contact with the Command Center. He testified, however, that clearance procedures are stricter now.

Bateman testified that he was approached by the Union earlier to provide this information, but that he never gave this version of events to the Company until very recently. He said that he did not like the Grievant, that the Grievant always had a better way of doing things, and this was one reason he did not come forward earlier. In addition, Bateman had significant medical problems at the time, which eventually resulted in a diagnosis of leukemia, which he received five days after his father's death. He said that he changed his mind about coming forward because he finally thought about how the Grievant was a Union brother, and if their

situations were reversed, he would want the Grievant to come forward for him. For this reason he decided to testify at arbitration.

Mr. John Kilbourne testified that he has worked for the Company for about 12 years as a Switchman; he has also served as an Assistant Griever for Logistics for the Union. He testified that he has run over a switch and that it is very common occurrence. The Company does not demote employees for running over a switch. He also testified that if he had found himself in the same situation as the Grievant, as described by Bateman, he would have believed that he had clearance to move on the hot metal track.

The Grievant testified that he began working for the Company in 2004. He said that on the day in question he was up at the 7 Blast Furnace when he first received the call from Earving to move the Pugh ladles. He asked Earving if he could finish his lunch. He said that Earving hung up and called him back and said "no." The Grievant said that he interrupted his lunch, cut the load and proceeded towards the 4 BOF. He said that upon arriving near the 4 BOF he set the switch to proceed with his ladles into the runaround. He then disconnected the ladles and went around them to come back to the same track as the ladles, now in front of them with the locomotive. He testified that he then began pulling the Pugh ladles along the delivery track and when he passed through the station he blew his horns and bells to alert the station employees, so that they could record the Pugh ladle numbers. He said that he saw a green light as he went through the station, and that once one sees the green light, the employee need not check again.

The Grievant testified that when pushing the Pugh ladles into the station, the railroad cars are on an incline coming into the Station. Therefore, the Operator must carefully control the speed of the railroad cars during this operation. At this point he was operating the locomotive from a remote control device, while riding the Pugh ladle car, and therefore said that he had an

extra incentive not to bump anything, since he risked spilling hot iron from the Pugh ladle onto himself.

The Grievant testified that when he went to make the cut to leave the Pugh ladles at the station, he realized that the light was red, not green, and believed that he had made a mistake. He testified that he was "freaked out" and "flustered" to realize that he had made such a mistake, which he said is a mistake he would never make. He said that he pulled the pin to detach the Pugh ladle cars from the locomotive, blocked the Pugh ladle cars, proceeded north with his engine and then south back to the switch. He said that once he realized what he had done he was scared and wanted to leave the area. The Grievant said that he told his co-worker Tim Hubbard that he thought that he must have gone through a red light, thinking it was green because the area was so steamy.

The Grievant said at that point he had heard Bateman call for clearance on the hot metal track. The Grievant testified that Earving then told the Grievant that Bateman was on the way up with the pumpkin and that the Grievant should stay in the clear until Bateman went by. The area is "tight," according to the Grievant, and so both Operators were off of their locomotives and talked with each other briefly about repainting Bateman's motorcycle, which is a hobby of the Grievant's.

The Grievant testified that Earving called him shortly thereafter on the telephone and asked him what had happened. He said he explained to Earving that there was a lot of steam, and he thought he had a green light and when he realized he didn't, he got scared and left the area. The Grievant testified that Earving did not say at that time that there was a problem with the Grievant's clearance in returning. Whited called him a few minutes later and said he was sending him home because there was a problem with clearance.

When Whited arrived at the 7 Furnace he said that he was sending the Grievant for a fitness to work exam. The Grievant said that he was upset at being sent for the test, because nothing had happened; there had been no accident and he hadn't wrecked anything. He went for the fitness to work exam and passed it. He was sent home. He said that after that, the Company never asked him for his version of the events.

The Grievant was asked by the Company at arbitration why he did not notify a supervisor when he realized the light was red. He said that he did not do so because he had already made the cut and disconnected the Pugh ladle cars when he realized his mistake and then got scared and wanted to get out of the area. He said that he never purposely violated the rule against moving on a red light. He testified that he did not tell Earving immediately about the incident because he was afraid that Earving would look for "any reason to hang him" and he wanted to figure out first what had actually happened. He said that he could not remember whether he had raised at Step 2 or Step 3 of the grievance procedure the telephone conversations regarding his clearance to move.

Whited testified that Bateman told him for the first time just the week before the hearing about the information he gave at arbitration. He said that he did not overhear a conversation between Earving and the Grievant about clearance on the hot metal track on the day of the incident and that he was with Earving in the office that day. He said that in any event such a conversation would not have constituted clearance. Earving also testified that he did not recall this conversation, and even if it had occurred, it did not constitute clearance.

On rebuttal Calhoun testified that he disagreed with Kilbourne that a lot of employees run switches and are not disciplined. He said that 28 switches had been replaced this year and that

often the Company does not know who has run over them. When the Company is aware of who has run over switches the employees are disciplined. He said that he was aware of another employee being demoted for 30 days for running a switch.

Ms. Tracy Brough testified that she is Division Manager of Internal Logistics and she was present at the second step grievance meeting. She said at that time that the Grievant said he believed he had clearance because he had talked to Bateman, not because he had had a conversation with Rail Command. Mr. Jim Vilga, Manager of Labor Relations for the past two years, testified that he attended the Step 3 hearing, and the Grievant gave the same explanation at that point in time.

The Company's Position

- Several of the Union's facts and arguments should be ignored by the Arbitrator because they were not raised during the grievance procedure. According to the contract, facts not presented prior to Step 3 of the grievance procedure may not be presented in arbitration. In addition, raising these facts and arguments at this point in time calls into question their credibility and the weight they should be given.
- Included among these facts and arguments are the testimony of Witness Bateman and the arguments regarding sending the Grievant for a fitness to work evaluation.
- The Union's arguments regarding sending the Grievant for a fitness to work evaluation present a new theory of the case and may be an effort to try to bring this case under the umbrella of another arbitration award that was issued after the grievance procedure in this case was conducted.
- The arguments suggesting that the Company mishandled the investigation in this case are a new argument and a red herring.
- The Union also raised a new argument with regard to discipline of employees for running switches, which is something the Grievant had been disciplined for in the past. The Company does not discipline for all overrun switches, because it does not know the

identity of the employees who ran them. When the Company knows who is responsible, Management disciplines employees.

- Although the Union may have asked for the audiotapes of conversations, this case is different than the other case where the employee insisted he had received clearance. Here the Grievant did not make that statement earlier in the proceedings and there was no need to obtain the tapes before they were erased.
- The contractual procedure was properly handled and the suspension was converted to a discharge. The Union had the ability to raise all the facts and issues, including whether there was a conversation with Earving regarding clearance that was directed at the Grievant and overheard by Bateman. The Company's evidence is consistent with the Grievant's testimony at arbitration that he wanted to get out of the area fast and that he concluded that that he could proceed on the hot metal tracks from his face to face conversation with Bateman.
- These red herrings should not deflect the Arbitrator's attention from the real facts of the case. The Grievant was terminated for violations of two rail safety rules. It is undisputed that he moved hot metal on a red light. He had moved hot metal at the 4 BOF before and steam is a common condition in the plant.
- The consequences of moving hot metal on a red light can be very serious. A collision among Pugh ladles may cause hot metal spillage, resulting in major damage to equipment, and possible injury to other employees.
- When the Grievant realized his mistake, he did not call a supervisor. Although the Union argues that this did not technically violate the rule, he should have called the supervisor at that point in time. Because he was afraid of the consequences, he did not report the situation but simply returned to the 7 Furnace and finished his lunch.
- Even if the Arbitrator were to look past the inconsistencies between what was reported at Step 2 and Step 3 of the grievance procedure, the Grievant has not presented convincing evidence that he had clearance to enter the hot metal tracks. In contrast, Bateman asked for clearance multiple times before entering the area.
- The parties stipulated that after the recent incident, employees are now required to ask for clearance more clearly. However, this does not mean that employees were not required to ask for clearance in the past before the new procedure went into effect.

- Bateman's testimony demonstrates that the Grievant is an employee who does what he wants to do and likes to do things his way. His short career with the Company supports this view of him. He has a history of safety violations, and in this case engaged in very serious safety rule violation. He has also demonstrated a lack of remorse or accountability. Reinstating him would place other employees and the Company's property in jeopardy.
- The Company also submitted a number of arbitration awards in support of its position. In one case, an employee with a discipline record which the Company said is like the Grievant's record left his station without permission and showed such wanton disregard for his job that the arbitrator upheld the termination. Here the Grievant demonstrated a wanton disregard for the rules and after going through a red light, he did not report it, but went back and finished his lunch.
- For all of the above reasons, the Company argues that the grievance should be denied and the discharge upheld.

The Union's Position

- The Union distinguishes the arbitration award submitted by the Company in which the employee was terminated for leaving his workstation. Here the Grievant was not terminated for the same offense and responded to discipline by improving on his earlier conduct, in contrast to the employee in the other award.
- Another decision relied upon by the Company here involved an employee with a much longer and more serious disciplinary record than the Grievant's.
- Other cases cited by the Company involve the railroad industry, where the rules cited stated that employees would be discharged for a single offense. The language of the rules here does not state that an employee will be terminated for a single offense. In other cases cited by the Company, the employee had engaged in the same serious misconduct on earlier occasions.
- The Arbitrator should consider Bateman's testimony because he could have been called to testify as a rebuttal witness to the direct testimony of Earving and Whited, since much of their testimony was evidence that the Union heard for the first time at the hearing. The Union had repeatedly asked the Company for the testimony of Earving. In addition, the

Union has no ability to compel employees to testify until arbitration, and considered doing that with Bateman here. Bateman testified as to why he did not come forth sooner.

- Furthermore, if the Arbitrator cannot consider the testimony of Bateman, then she should not consider the testimony of Earving either, since he did not provide his testimony before the arbitration.
- As for the fitness to work issue, the Union never has claimed that this was the reason for the Grievant's discharge in this case. However, the Union has raised this issue simply as part of its larger due process issue about how the Grievant was treated in this case. He was sent for the test because he made the wrong decision, which is not a good reason.
- The incident at issue here should have been treated as a "near miss" situation, and a "near miss" investigation should have been conducted.
- The Union is not dismissing the importance of running through a switch. However, it is not uncommon to run through a switch and the Union is arguing that running through a switch should not weigh so heavily as part of the Grievant's record.
- The Union disputes the Company's allegation that the Grievant never made the argument before arbitration that he had clearance to return to the 7 Furnace. The process of obtaining clearance was much looser and more conversational at the time and the Grievant had clearance under this procedure. Furthermore, if the Grievant did not have clearance under this looser process, then it is not clear how Bateman had clearance.
- Earving's written statement was produced after the third step meeting was held and long after the incident occurred. It appears to be addressed to issues that the Company considered important at that time. His statement only refers to "clearance" with regard to the red light issue.
- The Union requested at the second step audiotapes of Rail Operations conversations over the radio on the day in question. Earving was the only Management witness with first-hand knowledge, and he did not testify at the second or third step. The tapes would have demonstrated what conversations occurred, and they should have been preserved and presented. This is not a new argument. The Union took the position that the Grievant had clearance from the beginning, and asked for the tapes during the grievance procedure to establish the conversations between the Grievant and his supervisor.
- In addition, the Union asked for the GPS records. They were never delivered to the Union and the Union had come get them the week before the hearing.

- The Grievant had made this move numerous times in the past without incident, including on the day in question. The Company has not demonstrated that the Grievant showed wanton disregard for the rules. Most likely what happened was he made a mistake that he recognized very quickly. He could have simply lied and said that the light was green, and the fact that he did not do so enhances his credibility.
- While the Union would have advised him to notify a supervisor immediately after running a red light, his failure to do so is more understandable, in light of what did happen to him when it was reported. His concern that the Company would use the incident as a pretext to get rid of him is borne out by what did happen -- he was terminated. The Grievant stands up for himself, and is not liked by Management or by Bateman. He also knew that an employee who was absolutely innocent had recently been fired for a similar incident.
- Bateman's conduct shows someone acting very carefully, asking for permission several times to make sure that he would not get into trouble, after the other employee was fired. The GPS photos are consistent with Bateman's and the Grievant's testimony.
- The rule itself requires only that the employee announce his intention to move, not that he must wait for clearance. However, the practice is to require more than just announcing one's intention to move. Both operators had been given clearance to go forward with the next move -- the Grievant to go on to the hot metal track and Bateman to go on the side rails to get the cars -- as long as they watched out for each other. Employees at Rail Command have only an approximate idea of where the operators on the ground are located. Both employees had clearance, in the broad conversational way that it was given at that time.
- It does not make sense that Earving could tell that the Grievant was in the turnaround if he and Whited were not watching the GPS. Earving did not raise any issues about the Grievant's clearance back to 7 Furnace until he found out that the Pugh ladle numbers had not been recorded.
- Bateman's testimony was not refuted by Earving or Whited, who said they could not recall the facts. The Union had sought to bring Earving into the process earlier for just this reason, to determine the facts.
- The evidence indicates that the Company is trying to add the clearance issue onto the hot metal issue in order to add substance to the discharge.

- Calhoun never called the Grievant to give his side of the story. No one was sent to look at the site to evaluate the steam situation. The Company did not keep or review the audiotapes, even though Management was aware of the importance of such tapes, because of what had happened days earlier in another case. The Union requested the tapes while they were still available. This should have been treated as a "near miss" and investigated thoroughly.
- Earving did not testify that the Grievant expressed anger about the assignment; he merely asked if he could finish his lunch first. When he was told no, he went to do the assignment. It does not make sense that he would endanger himself by going through a red light, just because his lunch was interrupted. In addition, he immediately admitted his mistake which is not consistent with the theory that he deliberately went through a red light or that he did not care about it.
- If the Company is arguing that the Grievant deliberately went through the red light, then his past discipline for negligence is not relevant. If the Company is arguing negligence, then the past discipline is relevant, but the Grievant had not had any problems since 2008, except for running a switch, which is not uncommon.
- Even if the Company has reason to discipline the Grievant for running the red light, discharge is not warranted. The Company committed a major due process error by not even bringing him in to question him about the incident, which suggests that the Company was on a fishing expedition to terminate him.
- The Union cites an arbitration award in which the arbitrator ruled that the conduct of one of the supervisors was like that of a prosecutor building a case.
- The Union argues that the termination here should be overturned because one of the two main charges against the Grievant cannot be sustained, i.e. the charge that he did not have clearance on the hot metal track. Even if discipline is sustained for the charge of running the red light, termination should not be sustained for this charge alone, because one major charge cannot be sustained and because Management engaged in such significant due process violations in this case. In addition, the Grievant did not engage in a wanton disregard for the safety rules.

Findings and Decision

The Company has terminated the Grievant for a violation of several safety rules, a general rule regarding negligence and carelessness, and on the basis of his overall record. The Employer bears the burden of proving in this case that the employee engaged in the conduct for which he is charged and that termination is appropriate under the standards of just cause. The Company argues that it has met this burden with regard to the Grievant's termination, and the Union disagrees.

The Grievant was discharged for several safety violations in relation to an incident which occurred on December 29, 2010. The Company charges the Grievant on that date with: 1) failing to wait for a green light to enter the 4 SP (Steel Products) hot metal station at the 4 BOF and instead entering on a red light; and 2) failing to obtain the proper clearance to travel back on the hot metal tracks from the 4 BOF to the 7 Blast Furnace. The parties presented a great deal of conflicting evidence and argument at the arbitration hearing regarding both charges.

Some aspects of the evidence are frankly confusing. For example, the parties have used the term "clearance" at various times throughout this dispute to describe the Grievant's entering the station on a red, rather than on a green light, and at other times to refer to his alleged failure to obtain clearance to return on the hot metal track. For example, Earving's statement produced seven months after the incident uses the term "clearance" solely with regard to the Grievant not having clearance to enter the 4 SP hot metal station. The statement does not even address the issue of clearance on the hot metal track. In contrast, at the arbitration hearing the parties used the word "clearance" almost exclusively to refer to the issue of whether the Grievant had clearance to return on the hot metal track.

With regard to the issue of clearance to return on the hot metal track, the rule with which the Grievant is charged requires the employee simply to announce his intention to move. The Union concedes, however, that even at the time of this incident employees were required to do more than simply announce their intentions to move. Nevertheless, the requirements of the rule or policy as enforced at that time were not explicitly described at arbitration -- the Management witnesses only testified generally that the Grievant had not met them. Perhaps the requirements could not be described more definitely because they weren't very definite. The parties stipulated in this arbitration that the procedures for seeking clearance to travel on the hot metal track at the time of this incident were looser and less formal than the new procedures instituted after this incident occurred. The parties also introduced evidence that another employee had been disciplined shortly before the Grievant, that problems in rail communication were part of that grievance as well, and suggested that there was conflict at the time between the parties about the clarity of the policy.

Under the standard of just cause, an employee may only be disciplined for a rule violation if the rule or policy itself is reasonable and clear and is made known to the employee. Otherwise the employee does not have an adequate opportunity to know what conduct is required and what conduct is likely to result in discipline, so that the employee may conform his or her behavior to the rule or policy. The lack of clarity in the policy here is a significant barrier for the Company to overcome in meeting its burden of establishing that the Grievant's actions violated the policy and therefore that there was just cause for the Employer to discipline the Grievant for a violation of the policy.

There is sufficient evidence in the record to demonstrate that the Grievant and his locomotive met up with Employee Bateman, who was also operating a locomotive, at a

switching area near the 4 SP, just after the Grievant left the Pugh ladles. The Grievant presented evidence during the grievance procedure and at arbitration that Bateman was present at the turnaround near the 4 BOF on that day and that they understood each other's location and the order of moves they would make. Bateman's testimony confirms this. The GPS records support the Grievant's and Bateman's testimony about where they met and how Bateman would proceed first on the hot metal track and then the Grievant would use the tracks after him.

The Arbitrator concludes from the evidence that some communication, described as "conversational," between Locomotive Operators and Rail Command was expected at the time, so that the Rail Command Center would know where Operators were and could safely direct their moves. It is highly unlikely that Bateman and the Grievant both would have made arrangements for one waiting for the other at the turnaround, and changing switches and alternately moving their equipment, all without any communication with Rail Command. In fact Bateman said that he talked to Rail Command twice during his trip. He also testified that he overheard Rail Command talk to the Grievant as well. He was not disciplined for moving his equipment without clearance that day, a fact which lends credibility to his version of the events.

The Company argues, however, that Bateman's testimony should not be considered at all, because it was not presented during the grievance procedure. The parties have a procedure which requires the development of important facts and arguments prior to arbitration, and in many cases, important evidence of this nature, raised so late in the process, would not be given much if any weight. Bateman provided several convincing arguments about why he did not come forward earlier, including his serious medical problems, the death of his father and his dislike for the Grievant. More importantly, however, the Company's primary Witness on this issue, Earving, never presented testimony or any other kind of evidence on this issue during any

investigation in which the Union was involved, or during the grievance meetings either. His important testimony on this issue was first presented at arbitration too. Therefore, because each party has requested the Arbitrator to consider evidence regarding important facts presented for the first time at arbitration by eyewitnesses, the Arbitrator concludes that the parties have waived -- with regard to this issue and this grievance -- strict adherence to the contractual requirements regarding presentation of this evidence during the grievance procedure. In addition, since the Company has the burden of proof and was permitted to present Earving's testimony for the first time at arbitration, the demands of due process for ensuring a fair hearing permit the Union a reasonable opportunity to rebut this new testimony, including presenting Bateman's testimony.

Furthermore, Management had the opportunity to interview Bateman much earlier in the process. The Grievant identified him during the second step meeting of the grievance procedure as being present during the incident that day. This grievance meeting was held shortly after the incident occurred. The Grievant likely would have identified Bateman sooner, if the Grievant had been interviewed in any thorough investigation of the incident, other than one or two brief telephone calls that took place right after the incident. No information was presented about Management's investigation, other than belated reports of these brief telephone calls, during which it appears that the primary concern was the Grievant's error in entering the hot metal station on a red light. A thorough investigation of the clearance to return issue would have included, at a minimum, an interview of the Grievant conducted after the incident occurred -- by Management personnel not immediately involved in the incident, as were Earving and Whited. When immediate supervisors who are actually involved in an incident conduct an investigation in the heat of the moment, the result may be an investigation with incomplete and unreliable results. The supervisors here should have been interviewed as part of the investigation, if they

had immediate information about the incident. Very likely an interview of the Grievant would have led to an interview of Bateman, and it is likely that that would have led to a review of the audiotapes of conversations between Rail Command and both Operators regarding the incident.

The Arbitrator has considered the evidence, provided by several Management Witnesses, that the Grievant did not directly state during the grievance procedure that he had clearance from Earving to proceed back to the 7 Blast Furnace. The Employer argues that no further investigation was necessary, including any review of the audiotapes. In order to meet the requirements of just cause, however, the Employer must conduct a thorough investigation before discipline is imposed. Although additional facts may be developed during the grievance procedure, the grievance procedure occurs only after the employee has been terminated, and cannot be relied upon as a substitute for an impartial investigation. The parties here have not traditionally used the grievance procedure in this way. By the time of the grievance procedure here, for example, the Grievant already had been terminated, and the Union and the Grievant may well have been most focused on providing information other than his own claims that could support and corroborate the Grievant's position that he had clearance -- information, for example, that could be provided by Bateman or through reviewing the tapes. A thorough, impartial investigation would have focused on a more comprehensive view of the fundamental facts of the incident, including what occurred, in a step by step sequence, when each locomotive was moved, who was present, who said what to whom with regard to the movements, and when the statements were made, along with any other important relevant facts.

The Company argues that the Union did not raise the adequacy of the investigation before the arbitration hearing. However, during the grievance procedure the Union clearly disputed the Company's claim that the Grievant moved on the hot metal track without clearance, and

requested additional information that the Company had not considered in its brief investigation. The tapes might have resolved the factual questions, especially when paired with the GPS records, and it is not clear why the Company did not provide them at that point in time. One of the primary purposes of recording such conversations is to make them available in investigations over incidents like this one. Developing such facts is especially important when an employee's job is on the line.

The Arbitrator does not conclude, after listening to the Witnesses, that the failure to conduct a more thorough investigation in this case necessarily supports a finding that the Management officials involved in this dispute were "out to get" the Grievant. Nor is it clear that the clearance issue was piled on top of the red light violation just in order to ensure the Grievant's termination, as the Union argues. It is just as likely that the Management officials concluded very quickly that they understood clearly what had happened and decided that there was no need for any further investigation. However, incidents may not be as simple and clear as they seem in the moment, and a more comprehensive impartial investigation prevents a "rush to judgment," particularly when an employee's career with the Company is being terminated.

The Union argues that both the Grievant and Bateman had general clearance to complete their moves on the hot metal track, as long as they watched out for each other. Perhaps a more thorough investigation, including a review of the audiotapes, would have shown something else. However, the Company bears the burden to provide convincing evidence on all of the important facts necessary to sustain the charge that the Grievant moved without proper clearance. Therefore the Company must establish in this case that there was in effect a clear rule or policy requiring the employee to obtain some particular type of permission to move on the track, that the Grievant knew of this policy and that he did not comply with it. There is not sufficient

convincing evidence on this record to establish that the Grievant did not have clearance to move that day, given the evidence presented at arbitration and the loose procedures in effect at the time.

As for the second charge, the Company has charged the Grievant with moving full Pugh ladles on rail cars into the hot metal station on a red light, even though he was supposed to move them only on a green light. The Grievant has consistently stated that he mistakenly moved the Pugh ladle cars on a red light, thinking that he was moving them on the green light. He testified that as soon as he realized his mistake, he became frightened about the danger, blocked the Pugh ladle cars and left the area.

Earving's written statement, provided seven months after the incident, suggests that he concluded that the Grievant had deliberately continued to move the Pugh ladles into the hot metal station, after discovering that the light was red and not green. This appears to be the basis for his conclusion that the Grievant engaged in a willful and deliberate violation of the safety rule. The Grievant testified at arbitration that he was done moving the cars into place in the hot metal station before he realized that the light was red.

Thus there is a significant difference in the record over exactly what happened that day. The Union argues that this incident should have been treated as a "near miss" incident, and thoroughly investigated. However, that was not done in this case. Neither the Grievant, the employees at the 4 SP station, nor any other employee was interviewed about exactly what occurred that day. No one went to the site to examine the Grievant's claim about the steam conditions that day, even though the 4SP station employees reported that they did not see the Grievant's cars pass in front of them.

It is not clear what motivation the Grievant would have for moving the cars deliberately in an unsafe manner. He testified without contradiction that when moving the Pugh ladle cars into the hot metal station he was required to ride on the Pugh ladle car itself and remotely control the locomotive. Riding the Pugh ladle car placed him in significant physical danger if the cars had collided sharply, in a way that would spill molten iron. Under these circumstances it is difficult to conclude that the motivations suggested by Management -- anger at having to leave his hunch, or a desire to do things "his way" -- could possibly be worth the Grievant risking such extreme physical danger. Nor is there evidence that the Grievant had engaged in other risky or botheaded behavior in the past that would make such a motivation more believable.

It appears that Management's conclusions regarding the Grievant's actions that day were based on a brief telephone conversation immediately following the incident. There is sufficient evidence to conclude that the Grievant did enter the hot metal station on a red light. Without any further evidence that might have emerged from a more thorough investigation, however, the Arbitrator cannot conclude that the Grievant deliberately violated the safety rule and purposely went through a red light when entering the hot metal station, and then continued to push the cars south into the station after realizing that the light was red. In addition, there was no evidence that he was speeding, or violating any other safety rules at this time. Perhaps a more thorough investigation would have shown something different. While the circumstances may not have met the Company's criteria for a "near miss" incident, it would have been reasonable to conduct more investigation into any conditions that may have contributed to this serious mistake. As discussed above, whatever investigation was conducted led to the Grievant's termination. On this record, there are too many unresolved questions for the Arbitrator to conclude that the

mistake resulted from a deliberate or wanton disregard on the part of the Grievant for the safety of himself or others or for Company property on the day in question.

Although a thorough investigation would likely have resulted in a clearer factual picture here, the Arbitrator concludes, however, that the Grievant's own admissions regarding the incident are sufficient for the Company to conclude that he committed an act of negligence meriting discipline when he came into the hot metal delivery area on a red light. The Grievant is required to exercise a high level of caution and care when performing an operation of this sort, where the consequences of carelessness or inattention may result in serious injury to himself or to other employees, and/or significant damage to the Company's property. If the conditions were unusually steamy that day then the Grievant had an extra responsibility to make sure that the light was green, or to call the station employees for confirmation. Furthermore, Management reasonably expected him to contact a supervisor immediately upon recognizing the mistake, for many good reasons, including eliminating any unsafe conditions that may have contributed to his mistake. Therefore, the Arbitrator concludes that Management did not make a mistake in concluding that significant discipline is appropriate for the Grievant entering the hot metal station on a red light.

The only remaining question is whether termination was the appropriate penalty. The Grievant was discharged for violating two major safety rules, and there is not sufficient evidence to support one of the two charges, regarding the lack of clearance on the hot metal track. In addition, there is not sufficient evidence to establish that the Grievant willfully and deliberately violated safety precautions regarding moving on a red light into the hot metal station, as his supervisor concluded. Absent these two factors, it is not clear that Management would have imposed termination on the Grievant.

This is true even considering the Grievant's past disciplinary record. His prior discipline under the same rule does demonstrate problems regarding negligence or inattention to his duties on three occasions. However, that record does not demonstrate a significant pattern of carelessness with regard to safety procedures, as only one incident can be viewed as a safety violation rather than a performance problem, i.e. running over a switch. There was sufficient evidence to establish that running over a switch is a mistake that many Locomotive Operators make at least once at some point in their careers. In addition, all of the Grievant's former discipline occurred over a few months in 2008, two and a half years before the incident at issue here. Based upon all of the evidence, the Company has not established that this record is so serious as to support just cause for termination.

Nevertheless these prior violations of the rule against carelessness and negligence – as well as the potential serious consequences of the Grievant's mistake here – were legitimate concerns for the Company to consider in assessing the proper level of discipline. The termination will therefore be reduced to a 10-day suspension. To the extent that this discipline may be more severe than the regular next step of progressive discipline, it is justified by the serious nature of the mistake made by the Grievant.

This remedy does not conflict with the other arbitration awards submitted in this dispute. In some of the arbitration awards relied upon by the Company here, the employees had a longer or more serious history of safety violations leading to termination. In other cases presented by the Company from the railroad industry, employees violated rules that they clearly should have understood would result in termination for a first offense. No evidence was introduced demonstrating that the rules at issue here fall into this category at Arcelor Mittal.

AWARD

The grievance is sustained in part. The termination is reduced to a 10-day suspension and the Grievant shall be reinstated with back pay and made whole for all losses, for the balance of the period since his termination. The Arbitrator shall retain jurisdiction over the remedy portion of the Award only.



Jeanne M. Vonhof
Labor Arbitrator

Decided this 25th day of June, 2012.