Arbitration Award

Lehigh Specialty Melting Inc.

and

United Steelworkers Local 1537-3

126 LA (BNA) 1422

July 31, 2009

Joseph P. Fagan Sr., Arbitrator

Contract Provisions

Section 12. Suspension and Discharge

12.01 An employee shall not be peremptorily discharged or suspended for a period exceeding five (5) work days, but in all instances in which Management shall conclude that an employee's conduct may justify discharge or suspension exceeding (5) days, he shall first be suspended for an initial period of not more than five (5) work days by a written notice, a copy of which shall simultaneously be sent to the Unit President.

12.02 Within five (5) work days after such hearing, the Plant Manager or his/her designated representative shall advise the union and the employee in writing whether the suspension shall be extended, reduced, revoked or converted into a discharge.

General Conduct Rules

The following actions and conduct by employees are prohibited at the plant and any employee involved in such actions or conduct is subject to disciplinary action up to, and including discharge:

15. Negligent or careless acts which result in personal injury or damage to company property.

Background

The grievant, S__ was first employed by Lehigh Specialty in 2004. He, like a number of other employees some of whom appeared as witnesses, had been employed prior to 2004 at this same location by Standard Steel.

On 8/16/07 S__ was given a letter or notice from G__—Mgr. Human Resources relating to five on the job accidents S__ had in his less than three years employment by Lehigh—

three in 2005 and two in 2007, the most recent being 7/31/07. Three of the five were "foreign object in eye"—all lost time. The other two were "burn" also lost time and "leg contusion" which did not involve lost time.

In the 8/16/07 letter language from General Conduct Rule #15 (incorrectly referred to as Rule 14), was cited and S__ was advised that he "had by far the highest incidence of work related injury of any employee of the company despite warnings". S__ was also put on notice that "effective immediately, your on the job performance will be carefully scrutinized. Unless there is drastic improvement in your safety practices, your employment will be terminated."

On 11/14/08, after two additional lost time accidents (7/2/08 and 9/23/08) S__ was given a notice of suspension with intention to terminate. According to this letter the company had been advised by this date that medical treatment for the 9/23 injury had been completed.

The suspension did result in termination and S__ and the union filed a grievance on 11/24/08 claiming he had been "wrongly discharged".

Company Contention

The company has emphasized the nature of the operation where Grievant S__ was employed pointing out the numerous safely hazards in a Melt Shop and the critical nature of not tolerating careless work habits. They point out that in the relatively short period of employment (4 years) with Lehigh, S__ had seven (7) industrial accidents of which six (6) were lost time. He was given adequate notice of the requirement that he must improve by Human Resources Mgr. G__ in August 2007. This was after S__'s fifth (5) industrial accident. That "last chance" notice was a written statement which S__ and a union representative signed and made specific reference to General Conduct Rule #15.

At the hearing the company pointed out that S__'s seven (7) industrial accidents totaled 40% of all of the accidents in the 60 employee Plant in that four (4) year period. Mgr. of Operations C__ in reviewing each of the separate accident reports pointed out that S__ had signed all of them.

As to the union comment, during the hearing, regarding lack of safety meetings and failure of some employees to report accidents, the company did elicit the response from union witnesses that the union had not complained regarding the lack of meetings and the company did encourage the reporting of all accidents.

In their Post Hearing Brief the company pointed out that even after the 8/16/07 Memo from C__, which they termed a "last chance warning letter", S__ had another injury (7/2/08) and was given an additional chance but again, within two and one half months he had a second accident since signing the "last chance" warning.

The company did not disagree with the union argument that S__ worked in a dangerous area, the Melt Shop, but countered it by pointing to union testimony that the vast majority of the 60 employees worked in that same area.

In addition to the record proving that S__ is a "chronically unsafe worker" the company pointed out from his demeanor during the hearing, it was obvious he failed to listen or learn or take corrective action.

Considering S__'s work record, even after receiving a last chance warning letter and not grieving, the company claims no good purpose would be served by reinstating him. It is clear he is unable or refuses to improve and his unsafe work practices can no longer be tolerated.

The company requests the grievance be dismissed and the discharge upheld.

Union Contention

In their opening statement the union claimed that working with hot metal in the Melt Shop was hazardous and was a workplace where numerous accidents occur. They stated that S__, unlike some other employees, reported all of his injuries and therefore any comparison as to numbers of accidents was unfair. In this regard they quoted company witness C__ as admitting he did not know of every injury was reported. In regard to the grievant's time off they pointed out some of it was under the Family Medical Leave Act and protected by law.

The union questioned the company's interest in Plant safety with testimony regarding the lack of safety meetings. S__ claimed he had, in the past, been commended for safe work methods and that he signed the accident reports under threat. union witnesses claimed they didn't receive or didn't recall previously seeing copies of the General Conduct Rules related to S__'s 8/16/07 warning and eventual 2008 discharge.

union Pres. H__ said in reference to S__ either I__ (V.P. & Gen. Mgr.) or G__ (Mgr. Human Resources) said "guy has a bad attendance record"—no mention of negligent or careless acts.

Grievance Comm. Chairman T__ claimed that in discussing S__'s termination reference was made to his having "too many accidents" not "careless acts".

Witness H__ who is a Furnace Helper, as was the grievant, claimed that in doing immersion tests "you can wear all the equipment and take all the precautions and still something can happen".

In their *Post Hearing Brief* the union made a number of comments relating to testimony at the hearing.

It was their contention that repeated company reference to the Rule 14 of the General Conduct Rules throughout the grievance procedure rather than Rule 15 and then a change to the intended Rule 15 at the hearing was improper. (Rule 14 relates to drug usage.)

The union also argued that the company's introduction, at the hearing, of records of S__'s work absences and health issues which were unrelated to the job injuries should have no bearing on the reason for his discharge.

The union's final argument was related to their contention as to the company's "real" reason for terminating the grievant. In their opinion the 7/2/08 and 9/23/08 hernia or groin injuries were related and should be considered as only one injury.

The company then waited two months to discharge S__ . In the Post hearing Brief they put forth reason for the delay is based on S__'s failure to return to work after being released, without restrictions, on 11/13/08 by the company doctor. At the same date S__'s personal physician, who was treating him for a pulmonary illness, provided a written request that he should be excused from work until cleared.

The union contends the company failed to prove the grievant was careless or negligent and the true reason for his suspension and discharge was his failure to return to work after release by the company doctor even though he had a valid reason for not returning at that time.

Both parties submitted decisions involving other company-union arbitrations in support of their positions.

Opinion and Decision

The company submitted substantial documentation regarding S__'s attendance record since his employment by Lehigh Specialty, including time lost due to job injuries, as well as various other absences. It would be an understatement to say that his record of absence was poor.

On the other hand the reason for his "warning" on 8/16/07 quoting Rule 15 was "Negligent or careless acts which result in personal injury… .". (underlining mine) That notice also pointed out that he was supplied "with all the proper safety gear, personal protective equipment …" The final admonition was "unless there is a drastic improvement in your safety practices , your employment will be terminated" (underlining mine) and that his "on the job performance will be carefully scrutinized ". (underlining mine)

The subsequent letter of suspension and termination (11/14/08) not issued until 7 weeks after his last injury on 9/23/08, simply referred to the prior notice and the fact that S__ had two additional lost time accidents. The company refers to the 8/26/07 notice as a "last chance" notice though neither that notice itself or the 11/14/08 letter of termination use

that terminology. While the 8/16 notice was strongly worded it is not a "last chance agreement" as signed by the union as that term is normally used or worded.

While the Arbitrator is willing to consider other factors in an employee's work record to either mitigate or justify the extent of a disciplinary penalty, the specific the reason as given for the discipline itself should be substantiated by the record.

In the "Loss Control Reports" entered by the company for the 7/2/08 and 9/23/08 lost time accidents, in both cases supervision stated that safety equipment was in use, naming the equipment; the employee was observed in performing the job and an unsafe condition did not contribute to the incident.

In fact all five of S__'s injuries, prior to the 8/16/07 notice, supervision stated that safety equipment was in use, the employee was observed in the operation and there was no unsafe condition.

I am aware that all such supervisor reports are not completely accurate but we are deciding here whether a termination is justified for "negligent or careless acts" and a "failure to improve safety practices." The company's own records do not provide adequate proof of either negligent or careless acts or unsafe practices.

It is certainly true that the grievant's record of job injury and lost time accidents, in relation to all other employees at this facility, cannot be explained by any mathematical probability that I'm aware of. On the other hand to terminate for negligence, carelessness or safety practices without one incidence being reported cannot be justified.

The timing of the termination in relation to the date of the lost time injuries on which the carelessness, negligence or unsafe act is based also raises the issue of cause and effect.

While one can find some similarities in the *Ipavec* decision [*Jefferson Smurfit v. CCA*, 98 LA (BNA) 357] submitted by the company there are also substantial differences. The grievant had been suspended previously. He also had received a written warning for a safety rule violation.

From the wording of the decision we find that the Arbitrator concluded there were; "repeated acts of carelessness"; "proclivity for unsafe conduct"; and "evidence conclusively establish the grievant knew how to do the job but was careless in doing so".

While there obviously on the job accidents in the current case no conclusive evidence or description of unsafe acts was presented.

It was obvious from events at the hearing why the company might seek to terminate S__ but my role is limited to determining if discharge was justified in relation to the misconduct charged and the evidence in relation to that claim.

It is my decision that the grievant S__ is to be reinstated.

By my decision in this case I am not in any way implying that an employee cannot be suspended and/or terminated for a record of absenteeism or on the job accidents above and beyond which should reasonably be accepted for any employee. In doing so the warnings or notices should be consistent with the actual reason with, of course, facts to substantiate the reason stated.

— Award —

In this case a simple reinstatement with compensation for lost wages with no other qualifications would constitute unjust enrichment. This is based on the grievant's immediate past record for absence from scheduled work as well as his comments and overall attitude during the hearing which left open the question of any change in this record. For these reasons his reinstatement from December 6, 2008 is to only include reimbursement totaling 65% of the wages he otherwise could have earned to the date of reinstatement. This is based on S__'s record of absence of approximately 35% during 2008 up the date of his 7/2/08 lost time injury. The 12/6/08 date is based on the return to work report from UPMC (union 10). In addition the amount of any monies received in the form of unemployment compensation or wages earned elsewhere are to be deducted from this reimbursement.

Because of the nature of this case and the award I am retaining jurisdiction in regard to the award for thirty (30) days.