

IN THE MATTER OF THE ARBITRATION BETWEEN:

Gerdau Ameristeel U.S., Inc.

-and-

**ARBITRATION OPINION
AND AWARD**

United Steel Workers, Local 7263

FMCS Case No. 12-50182-3

Arbitrator

Richard A. Beens

Appearances

For the Union:

**Keith Grover
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Minneapolis, MN 55414**

For the Employer:

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Date of Award: August 7, 2012

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between Gerdau Ameristeel U.S., Inc. (“Employer”) and United Steel Workers, Local 7263 (“USW” or “Union”). The Grievant was an employee of Gerdau and a member of USW Local 7263.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render an arbitration award. The hearing was held on June 25, 2012 in Minneapolis, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Final written briefs were submitted on August 3, 2012. The record was then closed and the matter deemed submitted.

ISSUE

The parties stipulated that the issue for determination was:

Did the Employer have just cause to terminate Grievant and, if so, what is the proper remedy?

FACTUAL BACKGROUND

Gerdau is a Brazil based company with several steel plants in the United States. Their St. Paul plant receives recycled steel, melts it down and turns it into usable products such as rebar used to strengthen concrete fabrications. Grievant, who is 67 years old, started working for Gerdau and its predecessor owners in 1967. He has worked in maintenance since 1973 or 1974. At the time of he was discharged, on August 2,

¹ Joint Exhibit 1.

2011,² Grievant was assigned to work in an area of Employer's plant known as the "bag house" which contains a vacuum apparatus to filter particulates from the plant. His only apparent duty was to count the number of trucks entering the plant.

The basic facts leading to Grievant's discharge are largely undisputed. Two similar incidents led to his termination.³ The first occurred on July 22, 2009. The resulting Employee Misconduct Notice⁴ relates the following:

"..early on the 7/22/09 night shift you left a fecal mess strewn in the hallway between the Security Office and employee restroom, and in the restroom itself. This presented a health hazard to others who may have come in contact with the mess through an unsanitary condition. You then changed into work clothes and never reported the incident..."

Initially, the Employer was unaware of who created the situation. Later, janitorial employees reported seeing Grievant washing himself in a restroom basin. He yelled at them when confronted. They were left to clean the hallway trail. Janitors reported the incident to management. Grievant was subsequently identified by the janitorial staff and only acknowledged responsibility after being confronted by the Employer.

While it appears Grievant cleaned up the restroom, he neither reported nor cleaned the 70 foot fecal trail left in the hallway. Based on the unsanitary conditions and obvious

² Joint Exhibit 3.

³ Grievant also had a 3-day suspension for violation of safety rules in 2006. However, the Employer indicated it was not considered when arriving at the decision to terminate him in 2011. Further, Section 17.3 of the CBA provides that no misconduct notice can be used in discharge hearing eighteen months after its issue, "...except in cases of gross misconduct conduct which resulted in suspension." The 2006 suspension was not deemed gross misconduct. Consequently, it will not be considered in analyzing the present grievance.

⁴ Employer Exhibit 2.

health hazard he created, Grievant received a 5-day suspension without pay and was warned that, “*Any further misconduct will result in additional discipline up to and including discharge.*”⁵ This incident was deemed to be “gross misconduct.”⁶

The employee grieved the disciplinary action through the 3rd step of the CBA process⁷ where it was denied by the Employer.⁸ The grievance remained open without further action for over two more years. It was never taken to arbitration. Consequently, the Employer informed Grievant on July 25, 2011 that it considered the matter resolved.⁹ Ironically, this occurred just three days before the second incident leading to Grievant’s termination.

At about 9:30 AM on the morning of July 28, 2011, an extremely agitated co-worker reported discovering a similar mess in the bathroom near the Melt Shop machine area. A supervisor was summoned and first observed yellow tape the co-worker had strung to preserve the scene. The co-worker stated, “...you should see the mess in the men’s room. [Grievant] left the f*****g mess! There was s**t everywhere.” The co-worker also asserted, “You know who did this and you haven’t done anything about it!”

Upon entering the bathroom the supervisor noted an overpowering fecal odor. He observed fecal matter smeared on the door and sidewall of a stall and on the front of the commode. Ultimately, the Employer’s Human Resource Manager, Phillip Heimbecker, was called to view the scene. He took photographs.¹⁰ Grievant had neither cleaned the

⁵ Employer Exhibit 2.

⁶ Employer Exhibit 5.

⁷ See Joint Exhibit 1, Section 15.3.

⁸ Employer Exhibit 5.

⁹ Employer Exhibit 4.

¹⁰ Employer Exhibit 6.

bathroom nor reported the incident to anyone.

At about 12:00 PM, Grievant was called to a meeting at Heimbecker's office. Grievant's Union steward and direct supervisor were also present. Heimbecker's investigation report states:

"Shortly after this was reported, [Grievant] reported to the nurse's station asking for anti-diarrhea medication.¹¹ An investigation ensued and [Grievant] was asked to come to the front office to discuss this. Upon questioning he admitted that he had used this bathroom and had made the mess. He could not explain why he did not clean it up.

[Grievant] was told by Phil to go clean up the mess and report back to HR once this was accomplished."¹²

A second meeting was held at about 12:30 PM the same day. It included Grievant and all the participants at the 12:00 PM meeting plus a member of the Union's Grievance Committee. The report of the second meeting states:

"[Grievant] reported that the mess had been cleaned up.¹³

[Grievant] was then told that this behavior would not be tolerated. He had a previous incident of this nature. [Grievant] was informed that he would be suspended pending termination of employment effective immediately. He was informed to punch out and go home."¹⁴

The termination letter was dated August 2, 2011. The discharge was immediately grieved

¹¹ Employer Exhibit 8.

¹² Employer Exhibit 7.

¹³ It had already been cleaned by janitorial personnel. The Employer contracts with an outside company for janitorial work and was charged extra for the cleanup.

¹⁴ Employer Exhibit 7.

with the employee demanding that he be reinstated and made whole for any losses.

Grievant rendered an explanation for his July 28, 2011 conduct during the arbitration hearing. A letter from Fairview Clinics indicates that Grievant has been diagnosed with chronic diarrhea since January 6, 2009.¹⁵ He contends this diagnosis qualifies as a disability. However, he has never notified the Employer of his purported disability nor sought any form of accommodation.

Grievant now claims no recollection of the 2009 incident.

Grievant asserted that on July 28, 2011, he started work at 7:00 AM and, a couple hours later, became nauseated and very sick with profuse sweating. Grievant indicated that he was unable to get to the bathroom as early as needed and, as a consequence, soiled himself. He further testified that the stall in question "...was very small for a man my size." Grievant asserted that he attempted to clean himself and the stall, but the cramped quarters impeded his ability to do so properly. He also testified that he didn't know he had left a mess. Grievant claims he was too ill to be cognizant of the situation he left behind. Last, he maintained that he would have cleaned it up had he been aware of the problem.

After taking a shower and changing clothes, Grievant went to "Ray the guard" and asked for anti-diarrhea pills.¹⁶ He took the pills and returned to work. He never visited the company nurse or asked to go home due to illness. Grievant only takes over-the-counter medications to control diarrhea. Aside from the two incidents at work, there is no evidence that Grievant's chronic diarrhea, "substantially limits one or more of his major

¹⁵ Union Exhibit 1.

¹⁶ Employer Exhibit 8.

life activities.”¹⁷

Just before noon, he was called to the office for a meeting with the HR Manager, Phil Heimbecker. His Union Steward, Todd Renville, and his supervisor, Les Stalker, were also present. At the meeting, Grievant acknowledged that he “...may have made a mess, because I was very sick.” He was also unaware that any co-workers were upset by his conduct until informed about it at the meeting.

APPLICABLE CONTRACT¹⁸ AND WORK RULE PROVISIONS¹⁹

Article 3 - Management’s Rights

3.1 *The Company retains the sole and exclusive right to manage the business and direct the workforce. All the rights, powers, functions and authorities of the Company which are not specifically relinquished or modified by specific provisions of the Agreement, are retained by the Company, and are exercisable with prior notification to or consultation with the Union unless otherwise specified herein including, but not limited to : the right to hire, to promote and demote, to transfer, to make and enforce rules consistent with this Agreement, to suspend, discipline or discharge for just cause and to relieve employees from duty because of lack of work or for other legitimate reasons, the right to plan, direct, and control plant operations, the right to determine its products, methods of production, its processes and procedures, and the right to introduce new or improved production methods or facilities, and to change existing production methods or facilities, provided nothing contained herein shall be use for the purpose of discrimination.*

Article 17 - Rules and Discipline

17.1 *The Company retains the right to make and revise reasonable rules and procedures governing the conduct, including attendance, of its employees in order to ensure the safe and efficient operation of its operations...*

17.2 Suspension and Discharge. *The Company agrees that an employee shall not be discharged or suspended without just cause or without the right to appeal...*

Article 18 - Safety and Health

¹⁷ See the *Americans With Disabilities Act*, 42 U.S.C. § 12102.

¹⁸ Joint Exhibit 1.

¹⁹ Employer Exhibit 1.

18.1 Objective and Obligations of Parties. *The Company and Union will cooperate in the continuing objective to eliminate accidents and health hazards. The Company shall continue to make provisions for the safety and health of its employees at the plant during the hours of their employment. The Company, the Union and the employees recognize their obligations and/or rights under existing federal and state laws with respect to safety and health matters.*

St. Paul Employee Rules of Conduct for Hourly Employees

....

B. *Violations which call for disciplinary action up to and including discharge.*

The following violations will be sufficient ground for progressive disciplinary action at any level up to and including discharge; for example, documented verbal warnings, written warning(s), suspension and ultimately discharge:

...

17. *Violation of safety rules or practices, or causing and/or contributing to the injury of another employee or engaging in any conduct which may create a health or safety hazard...*

18. *Contributing to unsanitary conditions or poor housekeeping.*

OPINION AND AWARD

It is well established in labor arbitration that, where an employer's right to discharge or suspend an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proof. Although there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a "preponderance of the evidence" standard. That standard will be applied here.

A "just cause" consists of a number of substantive and procedural elements. A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the employer relied on a reasonable rule or policy as the basis for the

disciplinary action? Second, was there prior notice to the employee, express or implied, of the relevant rule or policy and a warning about potential discipline? A third factor for analysis is whether the disciplinary investigation was thoroughly conducted. Were statements and facts fully and fairly gathered without a predetermined conclusion? Finally, did the employee engage in the actual misconduct as charged by the employer? Consideration of the final issue frequently turns on an assessment of witness credibility.

The Employers Rule of Conduct B., 17 is, of necessity, general in nature: [a] *“Violation of safety rules or practices, or causing and/or contributing to the injury of any employee or engaging in any conduct which may create a health or safety hazard”* provides the grounds for the disciplinary action in this case. A similar generalized health and safety rule is found in virtually all workplaces large enough to have written rules. No employer can reasonably visualize or commit to writing every possible health or safety hazard the might occur. Common sense is the major tool for interpreting the rule. I believe there to be universal agreement that open exposure to human fecal matter represents a health hazard. I find Employer’s Rule of Conduct B., 17 to be reasonable as applied to the facts of this case.

Grievant makes no claim that he did not understand the rule in question. He had received a five day suspension for violation of precisely the same rule in 2009. Further, he was specifically warned in 2009 that subsequent violations could lead to his discharge.²⁰

There is no dispute about the adequacy of the investigation. Grievant was readily

²⁰ Employer Exhibit 2.

identified as the perpetrator by the co-worker who discovered the bathroom mess. Photographs were taken by a supervisor.²¹ When later confronted, Grievant admitted using the bathroom and making the mess. This admission was documented by contemporaneous notes.²² Grievant's request to a plant guard for anti-diarrhea medication was also substantiated.²³ The investigation was thorough and done without a predetermined outcome.

While admitting creation of the fecal mess, Grievant offered a number of exculpatory explanations at the hearing. "The stall was small for a big guy like me." "I was very sick" "I was nauseated and sweaty." "If I'd known about the mess, I woulda cleaned it up." Further, Grievant denied any recollection of the similar incident in 2009.

Frankly, I don't find Grievant credible. Despite claiming to be "very sick," he not only didn't see the plant nurse or ask to go home, he returned to his duty station. After almost two hours back at work, Grievant was called to the noon meeting with Employer supervisors and his Union steward. None of them testified that Grievant was, or even appeared, ill. When asked then why he hadn't cleaned up the stall, he offered no explanation at that time. Failing to remember, while under oath, an almost identical incident which cost him a five-day suspension two years earlier further strains credulity.

Grievant asserts that his chronic diarrhea constitutes a disability. However, that claim was not raised before the arbitration hearing. He had neither informed the Employer of his "disability" nor requested any accommodation. Last, based on the evidence before me, his medical problem does not qualify as a "disability" under the

²¹ Employer Exhibit 6.

²² Employer Exhibit 7.

²³ Employer Exhibit 8.

ADA.²⁴

Finally, the Union argues that the janitors' awareness of the incidents is equivalent to reporting it to management and, thus, Grievant didn't violate the workplace rules. I disagree. First, the Employer contracts with an outside vendor for janitorial services. They cannot be regarded as proxies for management. Second, Grievant reported nothing to the janitors. They accidentally happened to find his leavings. Serendipitous discovery by a third party doesn't fulfill Grievant's duty to report the health hazard he created.

There is no question the Employer had just cause to discipline Grievant.

Was termination the proper remedy under the facts of this case? While an arbitrator has the power to determine whether or not an employee's conduct warrants discipline, his discretion to substitute his own judgment regarding the appropriate penalty for management's is not unlimited. Rather, if an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, he should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he must conclude the employer exceeded its managerial prerogatives and impose a lesser penalty. In reviewing the discipline imposed on an employee, an arbitrator must consider and weigh all relevant factors including employee's length of service, his work record, and the seriousness of the misconduct.

Forty two years of service to an employer would ordinarily carry great weight when reviewing a disciplinary penalty. A number of relatively minor infractions could be overlooked when viewed through the lens of 42 years of loyal service to the company.

²⁴ See *Americans With Disabilities Act*, Ibid.

Further, no employee should be disciplined because of a sudden onset of illness. However, neither of these considerations is sufficient to override the seriousness of Grievant's conduct in this case.

In this case, Grievant is being disciplined for failing to report and/or clean up the mess he made, not for being ill. The fact that he was previously suspended for precisely the same conduct also weighs heavily against Grievant. Both incidents represent egregious violations of work rules B., 17 and 18.²⁵ As previously noted, I did not find his exculpatory testimony credible. Judging from his testimony, Grievant appears to be oblivious to the seriousness of his conduct. Even the most casual observation, visual or olfactory, should have alerted Grievant to the fecal detritus left in the bathroom stall. Leaving it for others to find and clean represents a flagrant disregard for the health and safety of fellow employees and the Employer's reasonable work rules. Based on the facts before me, I see no reason to revisit the Employer's decision to terminate Grievant.

AWARD

The grievance is DENIED.

Dated: 8/7/12

/S/ Richard A. Beens

Richard A. Beens, Arbitrator

²⁵ Employer Exhibit 1.