

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
UNITED STEELWORKERS, AFL-CIO-CLC, LOCAL 128

and

PDM BRIDGE, LLC

Case 5
No. 67934
A-6325

(M.R. grievance)

Appearances:

Marvin Finendale, International Representative, United Steelworkers International Union, 3108 Cumming Ave., Superior, Wisconsin, 54880, for the labor organization.

Jackson Lewis LLP, by **Atty. Benjamin D. Sharkey**, 841 Prudential Drive, Jacksonville, Florida, 32202, for the employer.

ARBITRATION AWARD

United Steelworkers, AFL-CIO-CLC, Local 128 and PDM Bridge, LLC, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union made a request, in which the employer concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to discipline. The Commission designated Stuart D. Levitan as the impartial arbitrator. Hearing in the matter was held at the company facility in Eau Claire, Wisconsin, on June 25, 2008, with a transcript being available to the parties by July 10. The parties exchanged written arguments and replies, the last being received on September 10, 2008.

ISSUE

Did the employer violate the collective bargaining agreement when it terminated M.R.?
If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE V - RIGHTS AND RESPONSIBILITIES

The Company retains the exclusive right and responsibility to manage the business and plant and to direct the working forces, subject to the provisions of this Agreement. Among the rights exclusively retained by the Company include, but are not limited to: the exclusive right to ... discharge for cause ... to enforce and change reasonable shop rules.

...

ARTICLE XII - DISCHARGE

Nothing in this Agreement shall prevent the Company's right to discharge employees for cause.

OTHER RELEVANT PROVISIONS

As part of its General Work Rules, the company has established a list of actions "which shall be cause for progressive discipline" and a list of actions "which shall be cause for immediate discharge," as follows:

A. ACTIONS WHICH SHALL BE CAUSE FOR PROGRESSIVE DISCIPLINE:

...

13. Employees are not permitted to do personal work of any type within work areas and/or during working time, subject to management approval.

...

B. ACTIONS WHICH SHALL BE CAUSE FOR IMMEDIATE DISCHARGE:

1. Misstatements, information omission in application forms or other Company records, or the making of untrue statements to the Company.
2. Making false claims against the Company.
3. Restricting production or intentional slowdown.

4. Punching another employee's attendance or job cards or having attendance or job cards punched by another employee.
5. Stealing or attempting to steal from the Company or from other employees. Scrap items have value; they may not be taken from the premises without expressed Company permission. Unauthorized borrowing of Company or another employee's property is forbidden.
6. Insubordination, and/or failing or refusing to carry out instructions and orders or to perform assigned work, or suggesting to or directing another employee to engage in such conduct.
7. Provoking a fight on Company premises.
8. Placing fellow employees in apprehension of harm.
9. Reporting to work or working while under the influence of intoxicating beverages, reporting for work or working without being free of mind altering drugs not prescribed by a physician, or having possession of either intoxicating beverages or drugs while performing services for the Company, subject to the provisions of PDM Bridge, Inc.'s Drug and Alcohol Programs.
10. Sabotage, causing reckless or willful damage to, destruction of, or misuse of Company property or property belonging to another employee.
11. Immoral or illegal conduct on Company premises or while performing services for the Company.
12. Leaving Company premises during working hours without punching out through the time reporting system (this includes break times).
13. Disparagement of the Company, its management, or its products, whether on or off company premises ("Disparagement" is to lower in esteem, degrade, discredit, show disrespect for or belittle something).
14. Discrimination against, harassment of, or creating an intimidating work environment for other employees because of their sex, ethnic origin, race, religion, age, handicap, or other basis.
15. Permitting unauthorized visitors on the premises.
16. Possession of knives, guns, or other dangerous weapons on the premises.

17. Refusing to permit inspection of employee lunch boxes, packages and bundles.
18. Not returning to work after a physician has determined you are healthy enough to return to work.

BACKGROUND

PDM Bridge, LLC is a steel fabricator producing steel components for bridges. It has been in business, in various corporate identities, for over one hundred years. Philip Hoilien is the plant manager for its Eau Claire plant; a 33-year employee of the company, he has been plant manager for more than 15 years. M. R., the grievant, worked for the company for over 37 years, mostly in maintenance. He worked as a lead bridge worker laying out bridges, as an operator, and, for about the past twelve years prior to 2008, as a special fabricator. As of January, 2008, he was working on the third shift, from 10:00 p.m. to 6:10 a.m.¹ This grievance concerns the company's disciplinary termination of M.R., for allegedly stealing or attempting to steal approximately 15 pounds of scrap steel, worth a few dollars.

The company allows employees to purchase steel that it does not need in its inventory for future use. Prior to modifying and/or removing the steel, employees are to check with a supervisor or a designated individual in the Materials department to make sure the steel is available. If it is, the employee then determines the value of the steel based on its size (weighing lighter items on a scale in the warehouse in the building to the east of the Main Shop, or calculating heavier items based their dimensions). The employee is then to pay for it, ultimately getting a receipt from an employee in Accounting, after which the employee can remove the item from the company premises. Employees are not to modify and/or remove steel without permission and before paying for it.

Until about 2003 or so, the company allowed supervisors to receive payment and deposit in a fund for coffee or other items. Since then, the company has followed a more formal process of payment and accounting.

In 1991, when the plant was organized as Phoenix Steel Inc., M.R. received the following letter from the then-maintenance supervisor:

Dear M.:

Approximately one month ago, you and all other Maintenance employees were notified that all scrap that is contained in the barrel located in the Tool Room (containing aluminum, brass, etc.) was no longer to be taken by employees. This scrap was removed by you, after notification that such actions were prohibited. Therefore, this is notification that you have violated work rule #35:

¹ The grievant testified first that he worked from 10:00 p.m. to 6:10 a.m. that morning, later stating he "was working 11:00 to 7:00." It is not necessary to resolve this discrepancy to evaluate the grievance.

Stealing or an attempt to steal from the Company or from other employees. Scrap items have value; they may not be taken from the premises without express Company permission. Unauthorized borrowing of Company or another employees (sic) property is forbidden.

A notation on the letter indicates it was subsequently “changed to a verbal warning.” The text of Phoenix Steel work rule #35 is essentially identical to that of PDM Bridge work rule #5.

In June, 2000, M.R.’s supervisor observed some ladder jacks in the back of M.R.’s pickup truck. During the ensuing investigation, M.R. said that another co-worker (not a supervisor) knew they were there. The company determined that was not sufficient authorization, and imposed a two-week disciplinary suspension. The company and the union agreed this discipline would not set precedent for future situations. In issuing the discipline, Hoilien explicitly reminded M.R. not to work on company material or remove company material from the premises without permission.

In May, 2007, while at work in pay status, M.R. was fabricating a light bracket for his trailer when supervisor Phil Bares observed him and asked what he was doing. M.R. lied and said he was working on a piece of steel for the company blast furnace. Bares, who was familiar with the blast furnace, looked at the item trying to figure out where the item M.R. was working on went. After a long silence, M.R. offered that he was not in fact working on an item for the blast furnace, but rather was working on lights for his trailer. Upon recommendation of the company Human Resources Department, Bares issued M.R. a written warning for doing personal work on company time.

Subsequent to May, 2007 and prior to January 2008, probably in about September, 2007, Bares observed M.R. with pieces of metal in his hand, working on a project. Bares reminded M.R. that he needed to tell a supervisor before taking any of the company’s steel.

On January 3, 2008, due to concerns about employees having firearms in their vehicles in the company parking lot, the company posted the following notice:

Notice
Work Rules – Section B

All employees should be familiar with all work rules, and particularly the work rules noted in Section B. (Actions Which Shall be Cause for Immediate Discharge)

Currently there are 18 written work rules that are in Section B of the company General Work Rules. They are all necessary for the Company’s and the Employee’s well being.

An incident that appeared to be very innocent occurred when one employee transferred a rifle from one vehicle to another today. Please note the work rule below:

Rule #16: Possession of knives, guns, or other dangerous weapons on the premises.

In the future, violation of this work rule will be dealt with by means of immediate termination.

For the safety and security of all employees, please take all needed precautions to assure that items listed in work rule 16 are not brought on the premises of PDM Bridge. (The parking lots of PDM Bridge are a part of the premises).

Thank you in advance to everyone for your cooperation.

After his shift ended on the morning of January 9, 2008, M.R. took a piece of company steel, drilled holes in it, mounted it with bolts, and attached a personally owned winch which he had brought to work a night or two before. He did not ask his immediate supervisor – who worked the day shift -- for permission to take the steel and convert it to his personal use, or so notify him that he was doing so. Nor did he ask, or notify, the general foreman, who works from 5:00 a.m. to about 4:00 or 5:00 p.m. At about 8:30 a.m., after he had finished working on the item, M.R. brought his van around to near the lunchroom door, and proceeded to load the item into his van. At the time he removed the steel and winch from the shop, M.R. had not weighed the steel or made any provisions for paying for it.

At about that time, PDM General Manager Philip Hoilien happened to look out his office window and notice M.R. driving his van toward the lunchroom door area. Because he had come to suspect M.R. of the unauthorized removal of material in the past, he decided to investigate what M.R. was doing. Hoilien exited the building and walked towards M.R.'s van, when he saw M.R. exiting the lunchroom door carrying the PDM steel with his winch attached. As M.R. was loading the item into his van, which had its engine running, Hoilien asked M.R. whether he had talked to anybody about removing the steel and paid for it; M.R. answered both questions in the negative, saying he planned to pay for the item and offering to do so. Hoilien then wrote out an Employee Warning Notice, stating "employee observed removing steel from PDM for ATV mount, into employee's vehicle by Main Shop. Steel had not been paid for by employee. Time: 8:30 a.m." Hoilien gave the notice, which placed M.R. on suspension with further action dependent on the results of his investigation, to M.R. on Jan. 9.

As part of his investigation, Hoilien asked M.R.'s immediate supervisor, Facilities Maintenance Manager Phil Bares, and General Foreman Dale Peterson whether M.R. had notified them or asked their permission to use PDM steel to make a mount for his ATV winch. Both said he had not. The union does not claim that M.R. asked anyone's permission to work on, purchase, or remove any PDM Bridge steel, on January 9, 2008, prior to his encounter in the parking lot with Hoilien.

Following his encounter with Hoilien, M.R. went into the office area and sought to pay accounting department employee Becky Bauer for the item. She was busy and told him to come back later. On January 10, M.R. came back, told Bauer he had taken fifty pounds worth of scrap, and paid her \$5.28. M.R. never weighed the scrap, but identified a weight (50 pounds) he believed well exceeded the actual number.

On January 14, 2008, Hoilien wrote M.R. as follows:

Dear M.R.:

Confirming the phone conversation of January 11th, PDM Bridge, LLC is terminating your employment due to violation of work rule 5, in section B, of the Company General Work Rules effective January 11, 2008.

As stated in the investigation, employee was observed removing steel from the Main Shop and into his van parked next to the Main Shop lunch room on January 9th, at about 8:30 a.m.

Employee was not authorized to remove this steel from the premises, and had not contacted his supervisor, or any company representative of his intent to purchase the steel prior to the incident. This conduct is stealing and is strictly forbidden in the work rule noted above.

Enclosed is information explaining your rights under COBRA to continue your health and dental insurance.

Also on that date, United Steelworkers Local 2138 filed a grievance, stating that "M. had no intention of stealing scrap metal, and made an attempt to pay before leaving that day." As remedy, the union sought the grievant's reinstatement, and that he be made whole.

On January 18, 2008, Hoilien gave the following Step Two response:

The grievance is denied for the following reasons:

1. M. was observed taking steel from the Main Shop of PDM Bridge, LLC and placing it in his vehicle on January 9th at approx. 8:30 a.m.
2. M. had not obtained expressed permission from any company representative to take that steel from the plant prior to the incident.
3. M. admitted that he had not obtained expressed permission from any company representative to take that steel from the plant prior to the incident.

4. This is a direct violation of work rule #5 of Section B of the Work Rules.
5. Company's position remains the same, employee is terminated for just cause.

On February 11, 2008, Hoilien gave the following Step Three response:

1. M. was observed taking steel from the Main Shop of PDM Bridge, LLC and placing it in his vehicle on January 9th at approx. 8:30 a.m.
2. M. had not obtained expressed permission from any company representative to work on, or take that steel from the plant prior to the incident.
3. M. admitted that he had not obtained expressed permission from any company representative to work on or take that steel from the plant prior to the incident.
4. M. made no attempt to inform any company representative of his work on, use of, or removal of steel from the shop and lunch room area on or before he was carrying the steel to his vehicle. He was observed being within a few feet of his vehicle with the vehicle door opened and he was ready to place the steel in his van when he was confronted by the Plant Manager, Phil Hoilien. It was not until that time that he said that he was planning to contact someone about making payment for the steel.
5. Company's position remains that the employee is terminated for theft, which is just cause for termination.
6. This is a direct violation of work rule #5 of Section B of the Work Rules.

On April 14, 2008, the union filed a timely Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission, further requesting the Commission provide a list of seven commissioners and/or staff members. From the list so provided, the parties selected the undersigned, who conducted a hearing as noted in the jurisdictional paragraph above.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

The company has the burden of proof that R. stole or attempted to steal a piece of scrap metal. They did not do so. The metal R. had was still on company premises, and R. offered to pay for the item and did in fact do so prior to his termination. R.'s testimony as corroborated by the plant manager's states that R. intended to pay for the steel. He went to the person he normally pays for the steel and did so. Another employee testified that he purchased steel and paid for it either to the foreman or the clerical employee in the office, and further testified that if he was short of money he sometimes paid for the steel on a later day.

R. worked the night shift in January 2008, and if he wanted to steal anything he could have utilized the cover of darkness. If R. wanted to steal something he could have used numerous doors closer to his vehicle. R. waited for daylight, drove his vehicle to a door near the lunch room in plain sight and loaded his steel. He paid for the item.

This does not make sense. Why would someone intending on stealing anything do so in broad daylight and in a location everyone can see. If R. intended to steal he simply had to go through a doorway closer to his vehicle in the dark.

Read R.'s testimony and the testimony of the other union witness carefully. R. did not intend to steal anything, and should be reinstated with full seniority and be made whole for all lost time, wages and benefits.

In support of its position that the grievance should be denied, the employer asserts and avers as follows:

PDM Bridge exercised its rights in accordance with the collective bargaining agreement and terminated R. for just cause.

R. was well aware that he could not attempt to steal or remove company property without permission, and the consequence for doing so. He had been caught stealing scrap metal in 1991 and in 2000 was again caught removing company property. Each time he was instructed in writing not to violate the rule against theft/attempted theft. His verbal warning in 1991 and suspension in 2000 for violating the same work rule at issue here is relevant.

R.'s testimony that he intended to pay for the scrap before leaving the premises is not credible for several reasons. His actions are utterly inconsistent with his words. While he claims he intended to pay for the steel before leaving the premises, he had already taken the scrap and worked on it without permission from a supervisor. Despite knowing the steel was light enough to be weighed on the scale, he never weighed the steel and had no intention of doing so.

As R. testified, when he pulled his van around and loaded the steel in, he had already done everything he needed to do to go home, and had already had two opportunities to pay for the steel before being caught by Hoilien. R's conduct -- having already changed his clothes and shoes, and loaded the steel into his van with the engine running -- does not support the claim that he intended to return inside yet again to pay for the steel.

With his actions that morning inconsistent with paying for the steel before leaving, R. is left with only his word that he intended to do so. However, as this was not the first time R. has lied to avoid discipline, his word is not credible. Eight months prior to this incident, R. had lied to his supervisor when he was caught doing personal work while on company time. If R. would lie to avoid a written warning, he unquestionably would lie to avoid termination.

Following a thorough investigation, the plant manager determined that R. had been attempting to steal scrap steel. R. had a history of warnings and had been suspended for this very offense; he had been disciplined for stealing company time and lying to his supervisor to avoid discipline; due to the plant manager's suspicions that he was removing scrap steel, R. was explicitly reminded of the relevant work rule; on the morning in question, R. had used company equipment to cut and modify a piece of company steel, all without permission; he failed to weigh the steel before working on it and removing it from the building, even though it was light enough to be weighed on the scale; he failed to pay for the steel or request permission to remove it from the building before doing so; his actions were inconsistent with an intent to pay for the steel, and when confronted and asked if he had paid for the steel or had permission to remove it, R. admitted that he did not and had "screwed up." None of these facts are seriously in dispute.

The record supports the company's decision to terminate R. for cause for attempting to steal scrap steel. The collective bargaining agreement expressly provides for a work rule that authorizes immediate discharge for attempted theft. R. was well aware of the work rule and the penalty for violating it. Given his history and conduct, the company had just cause to terminate R. The discharge should be affirmed and the company awarded fees and costs for having to respond to this frivolous grievance.

In response, the union posits further as follows:

The company brief tries to muddy the issue by citing past happenings, even though the general manager testified he did not base the decision to terminate on M.R.'s past record.

The general manager also testified that M.R. and the metal were still on company premises. The rule he is accused of breaking refers to property being removed from company premises. The general manager also testified M.R. offered to pay for the item, which he in fact did.

If M.R. had intended to steal he simply had to go through a doorway closer to his vehicle in the dark. Why would someone intending on stealing anything do so in broad daylight where everyone can see? That does not make sense.

M.R. did not intend to steal anything, he paid for the steel, and he was on company premises not off of it. He should be reinstated with full seniority and be made whole for all lost time, wages and benefits.

In response, the company posits further as follows:

The union argument glosses over the facts and fails to understand the meaning of attempted theft and completely disregards the company's assessment of M.R.'s historical character and his conduct that day. Given his history of prior attempts to steal from the company, his dishonesty when facing disciplinary action in the past and his conduct that was consistent with attempted theft, the company had just cause to terminate the grievant for attempting to steal company property.

By the time he was caught loading steel into his van, M.R. had already converted the steel to his private use without permission from his supervisor or paying for it. Despite knowing that a 15-pound piece of steel was light enough to be weighed on the scale, he never did so and had no intention of doing so. When he pulled his van around and loaded the steel, he had already done everything he needed to do before going home for the day, including clocking out and changing his clothes and shoes. He had already bypassed two opportunities to pay for the steel before being caught with the steel in his van and the motor running. The grievant's argument that he never left the premises with the steel is unavailing because the company only needs to demonstrate that he attempted to steal the property.

The union's argument that this was all a misunderstanding is without merit, in that the grievant's actions are completely contrary to his words, and the company was justified in choosing not to believe him. M.R. admitted he lied to

his direct supervisor eight months earlier in an attempt to avoid being disciplined, and he has a history of attempting to steal.

The union's argument that M.R. wasn't attempting to steal because he acted during the daytime rather than under cloak of darkness is also without merit. Just because a criminal has a poor plan does not diminish the underlying facts

and circumstances of the crime. The fact that M.R. grew comfortable removing steel and decided to do so during the day in no way changes the substantial steps he took towards attempting to steal company property.

The collective bargaining agreement expressly permits the company to create the work rule that authorizes immediate termination for an employee who attempts to steal from the company. M.R. was aware of the rule and the consequences for its violation. Given his history and conduct, the company had just cause to terminate him. Because this grievance is frivolous, the company asks that in addition to affirming the discharge, the arbitrator also award it attorneys' fees and costs.

DISCUSSION

The collective bargaining agreement between the parties empowers the company "to discharge employees for cause." In order for there to be cause for any discipline, especially discharge, an employer must establish the following: that the employer had the authority to prohibit certain conduct; that it was reasonable for the employer to prohibit such conduct; that the employee was aware that certain conduct was prohibited; that the employee was aware of the potential discipline for engaging in prohibited conduct; that the employee committed the prohibited conduct, and that the discipline is proportionate to the offense.

An employer, especially an employer that traffics in fungible goods, clearly has the right to discharge an employee for stealing or attempting to steal company property. Given his discipline in 1991 and 2000, and the counseling he received in 2007, the grievant clearly had direct, personal knowledge of the applicable work rule and the potential discipline for its violation.

The union has not challenged the employer's right to discharge employees for stealing or attempting to steal company material, including scrap. Nor has it challenged the discharge as being disproportionate to the value of the steel the grievant supposedly stole. Instead, it challenges the underlying allegation, contending that the grievant neither stole nor attempted to steal.

In support of its position, the union makes three essential points. The first is that the grievant had not left the parking lot at the time of his encounter with Hoilien, and thus couldn't

have stolen anything because he was still on company premises. The second is that if he had wanted to steal, he could have done so under cover of darkness, using a doorway closer to his vehicle. Finally, the union notes that the grievant did in fact pay for the steel before he was discharged.

Unfortunately for the grievant, none of these arguments is persuasive. Given that the work rule also prohibits “*attempting* to steal,” the fact that the grievant had not yet left the company premises is of little import, if I conclude that he was in fact doing just that. The argument that “this action didn’t make sense, so therefore it didn’t happen,” is also unpersuasive; lots of people do things that don’t make sense, even commit crimes in a careless and thoughtless manner – that’s one reason our jails and prisons are so overcrowded. Finally, paying for the scrap *after* the encounter with Hoilien hardly establishes that the grievant would have paid for the scrap if it *hadn’t been* for that encounter.

It is always difficult for a fact-finder to establish what was in another person’s mind. Testimony is not always conclusive, because it can obviously be so self-serving. And, as the employer pointedly notes, the grievant had previously lied to a supervisor concerning unauthorized activity at work; an employee who lies to avoid minor discipline certainly cannot be counted on to tell the truth when termination is at issue.

The undisputed evidence establishes that the grievant did nothing to follow the company’s policies, and everything to avoid them. To wit:

- Contrary to stated policy, he did not seek permission prior to working on the scrap for a personal project;
- Contrary to stated policy, he did not weigh the scrap before working on it and permanently altering its weight;
- Contrary to stated policy, he did not pay for the steel or even contact the person he should have paid before working on it and removing it from the plant;
- When he was stopped by Hoilien, the grievant was loading the scrap, with his winch attached, into his van; the van was running, and the grievant had already checked out and changed into his street clothes.

In short, the grievant took *no* steps consistent with paying for the steel, and *several* steps consistent with stealing it. Notwithstanding the grievant’s protestations and denials, the conclusion is inescapable that he was attempting to steal the scrap.

As the company notes, the union “griever” (the Steelworker’s term for steward), testified that it had terminated other employees immediately for theft, and that employees are supposed to get permission prior to converting company material to private use. And while the griever testified that employees have worked on steel without permission and prior to determining its value, he also testified he had never taken company steel off premises without either paying for it or making arrangements to pay for it. Given the undeniable external realities noted above – namely, that the grievant took no steps to pay for the steel, and several

steps consistent with not paying for it – the grievant’s testimony that it was all a misunderstanding is not persuasive.

It is more than unfortunate that a long career ends over the attempted theft of a few dollars’ worth of scrap steel. However, given the employer’s clear authority to discharge for attempted theft, and its policy of doing so, I do not feel my authority as arbitrator extends to reducing the discipline once the offense has been proved. As it has been said, “(i)n most work places, regardless of the specific industry, theft from the employer will lead to discharge with no intervening corrective discipline.” – THE HUMAN SERVICES CENTER OF FOREST, ONEIDA AND VILAS COUNTIES, NO. 66823 MA-13647 (Nielsen, 8/27/07). Arbitrators “usually do not require progressive discipline when the issue is theft, as the behavior involved is incompatible with employer-employee trust.” MARSHALL JOINT SCHOOL DISTRICT, MA-13294 (Bauman, 10/31/06). As noted, the union has not challenged the validity or reasonableness of the work rule which states that “stealing or attempting to steal from the Company” is one of the “action which *shall* be cause for immediate discharge” (*emphasis added*).

While the union has not argued for lesser discipline on the grounds that the amount allegedly at issue was very small, arbitrators have held that theft of nominal amounts can result in severe punishment. SCHOOL DISTRICT OF NEW RICHMOND, MA-10675 (Crowley, 1999), noting that in STATE OF MINNESOTA, 95 LA 995 (Gallagher, 1990) the theft of about \$10.00 was held to justify the discharge of a twenty-two year employe. Similarly, an arbitrator denied the grievance and sustained the discharge of 19-year mechanic who was caught removing company tin snips without authorization, stating, “(g)enerally, a company has the right to reasonably enforce rules that will enhance theft control in its facilities. Without the ability to enforce theft control workrules, companies would be powerless to manage the serious universal problem of theft in the workplace.” SHELL OIL Co., 90 LA 112, 116 (Massey, 1988).

I am convinced the grievant was attempting to steal the scrap steel, and was therefore properly discharged. I disagree with the employer, however, as to its contention that this grievance was frivolous, and that it was thus entitled to attorney’s fees and costs. I find nothing in the collective bargaining agreement which authorizes such an award, nor anything in the common law of arbitration that would justify it. Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin, this 14th day of January, 2009.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

SDL/gjc

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