**IN THE MATTER OF ARBITRATION BETWEEN:**

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| **Shell Oil Lubricants, River Rouge Plant** | **)** |
| | **)** |
| **and** | **) FMCS #13-50352-6** |
| | **)** |
| **USW, Local 2-389** | **)** |
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**APPEARANCES**

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**ARBITRATOR:**

Patricia Thomas Bittel

Issues: Termination of William Easley

## BACKGROUND

On September 28, 2012, Plant Manager Emily Lunt was walking through the plant with the current Interim Plant Manager Terri Dean when they saw Terminal Operator William Easley on top of a tanker working without being tied off. This was deemed to be in violation of Life Saving Rule #6: "Protect Yourself Against a Fall When Working at Height." As a result, Easley was terminated.

The termination was grieved, and the grievance was fully processed through the grievance procedure to arbitration. No challenge was lodged to the Arbitrator's jurisdiction, and the parties stipulated to the following issue: *Whether the Company had just cause to terminate the Grievant? If not, what shall the remedy be?*

## DISCUSSION

Grievant Easley had eight years of good service with the Company at the time this case arose. He admits he was not tied off on the day in question and that this was in violation of Life Saving Rule #6.

The thrust of the Union's argument is that termination is just too severe a penalty in this case. It notes neither the Life Saving Rules nor the zero tolerance approach to their enforcement was negotiated with the Union. It draws the Arbitrator's attention to four cases where employees who committed similar offenses were spared termination and reinstated with a lesser penalty. In the Union's view, the appropriate approach to the situation calls for progressive discipline.

The Company points out that when it rolled out its Life Saving Rules, it was made quite clear to employees that "If you choose to violate a lifesaving rule, you choose not to work for Shell." It maintains that two contractors were prohibited from entry to the River Rouge Plant based on violation of these Rules, and managers at other facilities have been terminated for non-compliance. In its view, institution of the Life Saving Rules and termination as the consequence of breach is not a subject for arbitration because the Company's right to do these things is clearly expressed in the Management Rights Clause. Sympathy cannot be the basis of determining just cause in this case, it

contends, arguing the Arbitrator should not second guess the Company's efforts to safeguard the safety of its employees.

It is to Grievant's credit that he has been completely honest and forthcoming about the incident leading to his termination.

> [T]here was a spill in the crash box, so I went to get an oil-absorbent pad to come back and wipe that spot up and made a stupid mistake of losing focus talking to a driver, and basically that's when I went to the crash box and wiped it up and found out that I didn't hook up. (TR 36)

Q. Was the truck over six feet, sir?
A. Yes.
Q. Should you have been connected to the anchor point?
A. Yes.
Q. So not being connected to the anchor point, you violated Life-Saving Rule No. 6; is that correct?
A. Yes. (TR 37)

The Union bases its advocacy of a progressive disciplinary approach on several factors: the Union was excluded from the investigation; employees discharged under the Life-Saving Rules have been reinstated at arbitration; in the past, operators routinely worked without being hooked in; the Company has a policy of progressive discipline; Grievant's mistake was a completely unintentional lapse; he was a second generation Shell employee with eight years' service and was considered extremely reliable.

Excluding the Union from an investigation constitutes a procedural flaw, and if prejudicial to the case, this can defeat just cause. However, no prejudice is found to have resulted from such an error in this case; there is no indication that the facts surfaced by the investigation or the resulting arguments were affected.

In each of the arbitration cases cited by the Union, there were mitigating circumstances which the Company failed to take into consideration. In the case decided by Rita Siegel, Grievant Davis was out on medical leave for the three months prior to implementation of the Life-Saving Rules, and the Arbitrator found his training on the Rules to be limited. Further, there was ambiguity as to when preparation for work became actual work for the purposes of the Rules. Most important to the reinstatement was the response of supervision to Davis' conduct; it ratified the conduct and cured the defect. In the instant matter, there is no ambiguity as to whether or not the Rules applied

or whether Grievant had received adequate training on the Rules. Management in no way ratified Grievant Easley's failure to tie off.

Grievant Hall in Case No. 51090-3 was a 24-year employee with no discipline, yet the Company failed to take his long service into consideration. In addition, the Arbitrator found Hall's testimony -- that he believed he was free from the height rule when traversing the pipe rack array -- to be credible. The discipline was accordingly found too harsh. By contrast, in the instant matter, Grievant Easley's service is far shorter and he knew he had to tie off as soon as possible when on top of a tanker.

There was a prior incident in May of 2011 when Grievant failed to tie off and was not disciplined. In that instance, he had to walk around the crash box on top of the tanker to get to the lanyard, and was on his way to hook in when he was observed. (TR 67) In the instance here concerned, he was not attempting to reach the lanyard; he'd forgotten about it and was already cleaning up the spill. (TR 37) Grievant was not confused as a result of the May 2011 incident; he fully understood in September of 2012 that his failure to tie off was in violation of the Rules.

In the case decided by Arbitrator John Perone, Grievant Ochoa was a twenty year employee who was terminated for failure to wear fall protection. The Arbitrator found it questionable whether the Company's policy was in place at the time of the offense. He also noted that neither the supervisor nor the auditor intervened when they saw him on top of the truck. None these factors exist in the case of Grievant Easley.

Certainly, the Union is correct in noting that practices that were once condoned are no longer tolerated. Industrial practices are not and should not be frozen in time. Change is inevitable. In the world of safety practices, management carries both the obligation and the prerogative to make efforts towards improvement. Testimony showed that over the years, different equipment for tying off was tried, and various problems prompted several changes. Likewise, the imposition of Life-Saving Rules constituted a serious effort to make the workplace safer.

At the end of the day, the responsibility falls to the Company to make the workplace safe. The Company was within its rights to institute rules and tighten practices in an effort to meet this responsibility. Plant Supervisor Greg Lockwood testified that the Life-Saving Rules were based on instances where Company employees had actually died, and were devised to avoid future fatalities:

> The reason we have these life-saving rules is there were people in Shell or contractors working for Shell that were killed because they didn't follow one of these rules, so the company felt that these were very, very important and needed to take a stand on them and make these the life-saving rules, what we call life-saving rules.
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> We had several programs, Golden Rules, all kinds of different safety programs, Goal Zero, and this became another step in that road to Goal Zero is coming up with 12 rules that caused death within the company in some fashion. (TR 151)

The severity of the designated penalty for violation of Life-Saving Rules, termination, is prompted by the degree of risk taken when a Rule is violated: there can be no more severe consequence than death. In consideration of the fact that the Rules are based on actual employee deaths, the departure of the Life-Saving Rules from mandated progressive discipline is reasonable.

The Arbitrator understands that Grievant's rule violation was completely unintended. Nonetheless, industrial accidents are almost universally unintended. The brief moment of distraction, the overlooked checklist item, the fleeting lapse of awareness – these can lead directly to catastrophe. It is this eventuality that the Company seeks so stringently to avoid.

The question raised is whether the Rules were reasonably administered in this instance. Grievant Easley was viewed as a valued employee and dependable worker. In the Union's assessment, mitigating circumstances warrant retreat from automatic discharge. The Arbitrator agrees that failure to consider significant mitigating circumstances can defeat just cause.

However, the mitigating circumstances in this case are not strong enough to invalidate the Company's decision. Grievant Easley does not have even half the years of service that Grievants Hall and Ochoa had accumulated as mitigating circumstances in their cases. There was no confusion about the Rules nor did management look the other way. At the time Grievant Easley was seen on top of a tanker, not tied in, he was cleaning up an oil spill, meaning he was in the immediate vicinity of, and was applying some degree of bodily pressure onto a particularly slick and slippery substance. Under these circumstances, it cannot be said that the Company lacked just cause for termination.

## AWARD

The termination of Will Easley was for just cause. The grievance is denied.

Respectfully Submitted,

Patricia Thomas Bittel,
Arbitrator

Dated: Jan. 16, 2013