IN THE MATTER OF THE ARBITRATION)
)
Between)
)
ARCELORMITTAL USA)
INDIANA HARBOR)
)
and)
)
UNITED STEELWORKERS,)
LOCAL 1010)

OPINION AND AWARD

RONALD F. TALARICO, ESQ.
ARBITRATOR

Grievance No.: 28-BB-0006

GRIEVANT

James M. McCue

ISSUE

Discharge for
Positive Drug Test

HEARING

January 31, 2020
East Chicago, Indiana

APPEARANCES

For the Employer
Christopher M. Melnyczenko
Lead Representative
Labor Relations
ArcelorMittal USA

For the Union
Matt Beckman
Vice Chair Grievance Comm.
United Steelworkers

ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esq., was mutually selected by the to hear and determine the issues herein. An evidentiary hearing was held on January 31, 2020 in East Chicago, Indiana at which time the parties were afforded a full and complete opportunity to introduce any evidence they deemed appropriate in support of their respective positions and in rebuttal to the position of the other, to examine and cross examine witnesses and to make such arguments that they so desired. The record was closed at the conclusion of the hearing. No jurisdictional issues were raised.

PERTINENT CONTRACT PROVISIONS

ARTICLE THREE – HEALTH, SAFETY AND THE ENVIRONMENT

. . .

Section G. The Right to a Reasonable Policy on Alcoholism and Drug Abuse

1. Alcoholism and drug abuse are recognized by the parties to be treatable medical conditions. The Company and the Union agree to establish an Employee Assistance Program (EAP), administered and funded by the Company, to facilitate the rehabilitation of Employees afflicted with alcoholism or drug abuse. The EAP will utilize professional and Employee peer counselors and will operate under conditions of strict confidentiality.

2. The Company may require an Employee to submit to a medical evaluation performed by qualified personnel, which may include a drug or alcohol test, only where there is reasonable cause, based on objective evidence, to believe that the Employee is legally intoxicated or impaired by drugs on the job. Employees

involved in an accident will be tested only when an error in their coordination or judgement could likely have contributed to the accident. In addition any Employee who incurs an extended leave of absence (except Union leave) of greater than ninety (90) days may be required to submit to a drug and alcohol test as a part of a return to work physical.

3. Employees will not be required to submit to drug or alcohol testing for any other reason, unless such testing is required by law.

4. Drug and alcohol tests will utilize scientifically accepted methods for evaluating impairment. When a biological sample is taken, a portion will be retained for retesting should the Employee dispute the initial results.

5. Employees who are found through testing to have abused alcohol or drugs will be offered rehabilitation in lieu of discipline. However, this provision does not affect the right of the Company to discipline Employees for violation of plant rules or for working or attempting to work while knowingly impaired.

ARTICLE FIVE – WORKPLACE PROCEDURES

. . .

Section I. Adjustment of Grievances

. . .

4. General Provisions

. . .

k. An Employee who is summoned to meet with a supervisor or any other representative of the Company for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by his/her Griever and if the

Griever is not then available, the meeting shall be deferred.

Section J. Management Rights

The management of the plants and the direction of the working forces, including the right to hire, transfer and suspend or discharge for proper cause, and the right to relieve employees from duty, is vested exclusively in the Company.

In the exercise of its prerogatives as set forth above, the Company shall not deprive an Employee of any rights under any agreement with the Union.

* * * * *

PERSONAL CONDUCT RULES

1. Management requires the cooperation of its employees in its efforts to make every employee familiar with all Plant safety and operating rules, in order that accidents may be prevented and effective performance promoted.

2. The following offenses are among those which may be cause for discipline, up to, and including suspension preliminary to discharge.

. . .

B. Being on Company property impaired by drugs not prescribed by a licensed physician for personal use while at work; being in possession of, or use of, such drugs while on Company property, or bringing such drugs onto Company property.

C. Any employee suspected of being impaired by drugs may be required to submit to a drug screening test to determine their fitness to work. Any employee failing to submit to such test will be considered to be impaired by drugs.

D. Reporting for work in a state of being intoxicated or "Unsafe to Perform Duties" by

intoxicating beverages; being in possession of, while on Company property, or bringing onto Company property, intoxicating beverages and/or including non-alcoholic beer and/or wine.

E. Any employee suspected of being intoxicated or "Unsafe to Perform Duties" by intoxicating beverages may be required to submit to a breathalyzer test to determine their fitness to work. Any employee failing to submit to such test will be considered to be intoxicated.

BACKGROUND

The Employer is ArcelorMittal USA with Plant facilities located in East Chicago, Indiana. The Union, United Steelworkers, Local 1010, is the exclusive collective bargaining representative for all production and maintenance employees at the Plant. The Employer and Union have been parties to a series of collective bargaining agreements over the years the most recent of which is effective September 1, 2015.

The Grievant, James M. McCue, was hired by the Company on October 31, 1988 and at all times pertinent to the within matter was an incumbent Electrician in the Three Cold Strip Department. On July 5, 2019 Grievant was stopped at the South Gate for a random vehicle inspection. During the inspection one unopened bottle of Mondelo beer was readily observed in the rear passenger compartment of his vehicle by Security Guard Lisa Coppinger. The bottle was sitting on top of a bunch of grocery bags. Coppinger contacted dispatch and requested an ERO come to the South Gate for the presence of alcohol.

Lt. William Fuoss arrived at the gate and observed the unopened bottle of beer in Grievant's vehicle. He informed Grievant that he would have to go for a Fitness to Work test. Lt. Fuoss then read the Before Clinic Statement to Grievant who acknowledged he understood

what was read to him. When they arrived at the Clinic, Lt. Fuoss read the At Clinic Statement to Grievant who again indicated he understood what was read to him. Grievant was then turned over to the medics at the Clinic.

Grievant was administered a breathalyzer test which he passed. However, he failed the presumptive drug screening that was conducted as part of the Fitness to Work evaluation. As a result, Grievant was requested to provide a urine sample for confirmatory testing. At first he was unable to give a sample for what was determined to be a "shy bladder". However, after drinking 33 ounces of water in approximately 40 minutes, Grievant was able to provide a urine sample. That sample was sent to Quest Diagnostics, a third party lab, for confirmatory testing. The third party analysis subsequently found Grievant to have marijuana metabolites in his urine at a level in excess of 300 ng/mL.

Based upon evaluation by the Employer's Medical Review Officer, Dr. Ted R. Niemiec, which included an interview with Grievant, a review of the test results, and a review of the overall circumstances, the determination was made that Grievant was impaired by drugs while at work.

On July 9, 2019 Grievant was notified by letter that he was suspended for five (5) days subject to discharge for violation of the Company's Personal Conduct Rules 2. (B) and 2. (D). The letter also indicated that either offense is cause for suspension pending discharge. Grievant was further advised that pursuant to Article Five of the collective bargaining agreement he was not entitled to Justice & Dignity for this offense.

Grievant's suspension was converted to discharge effective July 11, 2019. A timely grievance was filed protesting the Company's Intent to Discharge Letter.

ISSUE

Whether the Employer had just cause to terminate the Grievant? If not, what should be the appropriate remedy?

POSITION OF THE EMPLOYER

Mr. Arbitrator, the case we heard today was the result of an unfortunate situation. The Grievant, James McCue, deliberately violated the trust a Company has the right to expect from its employees. He violated this trust when he disregarded well-known plant rules and brought alcohol on Company property, and he violated this trust when he showed up for work impaired by drugs. As I said earlier, this employee works in a steel mill as an Electrician – an unforgiving environment that carries the utmost safety implications for all employees – any mistake can have dire consequences. The Company has a reasonable expectation that employees follow the rules, and show up for work in a fit, able, and sober condition. Through the evidence and testimony today, the Company proved that the Grievant, James McCue, was discharged for cause.

In the Evraz Rocky Mountain Steel case, it was pointed out that in a very dangerous steel environment where safety is of a paramount concern and employees working with such dangerous and explosive hot metal, must do so with the clearest of heads, rather than some drug induced stupor. The point is that just cause for termination based upon the nature of the work and the infraction committed by the Grievant is abundantly clear and well recognized by law and arbitral authority.

Lt. Fuoss and Cpt. Smith testified they witnessed how Grievant brought alcohol on to Company property in the early morning of July 5, 2019. Company Policy (SES-76) was followed when Grievant was sent to the Clinic for a Fitness to Work evaluation, which included a drug and alcohol test. When Grievant brought alcohol onto Company property and violated

clear, established rules, he not only exhibited poor judgment, but he provided objective evidence necessary for the Company to request he submit to a Fitness to Work evaluation. This is done, in part, to ensure the safety of all employees. It is what a prudent employer would do.

As was said by Arbitrator Leo Weiss in the Warehouse Distribution Centers case, Arbitrators are not requiring employers to have sufficient evidence to support a criminal indictment before they compel as employee to undergo a drug test. Nor do they seek evidence beyond a reasonable doubt. They do not even look for preponderance of the evidence to show that the employee is guilty of the charge against him. All they want to know is that the Employer has some rational grounds for testing the employees, not whim or caprice, not unfounded suspicion or discriminatory motive, not ancient superstitions or old wives' tales. In short, the review should be based on whether the Employer was acting like a reasonable man seeking to protect his business.

The Company's long standing policy – often not grieved at all – is that when alcohol is found in a vehicle, an employee is sent for a Fitness to Work evaluation. Those Fitness to Work evaluations have always been inclusive of both alcohol and drug testing. It is not new or unusual. Article 3, Section G. 2 – which has been debated at length today – clearly allows for testing when there is reasonable cause based on objective evidence. That language, as written, says that when an employee is believed to be legally intoxicated or impaired by drugs on the job, it allows the Company to require an employee to submit to a medical evaluation – it does not say what that medical evaluation must be limited to. That "or" as used is an inclusive disjunction – it is equivalent to one or the other, or both. By further way of guidance, I turn your attention to Article 3, Section F. 4, which states the Company will not require any employee to submit to any

medical test or answer any medical history question that is not related to the employee's ability to perform his/her job. This test was clearly related to his ability to safely perform his job.

We next heard testimony about how the Grievant failed his Fitness to Work evaluation when the presumption drug test came back positive. We heard about how, when the confirmatory drug results came back, it reflected a level of marijuana metabolite in his system of greater than 300 ng.mL. – much higher than the 15 ng/mL reading required to report a positive finding. We heard from the Company's Medical Director/Medical Review Officer, Dr. Ted Niemiec, who reviewed the facts and circumstances of this case, and determined that Grievant showed up impaired at work on July 5, 2019. We heard from Dr. Leikin, an expert in his field, whose opinion should be afforded great weight. He and Dr. Niemiec are experts who are trained and qualified to determine impairment.

The Company's Medical Review Officer – Dr. Ted Niemiec – properly reviewed all the facts and circumstances in this case before arriving at the conclusion that the Grievant was impaired. When he followed up with Quest Diagnostics, he learned that the level of marijuana metabolite in Grievant's system was actually between 500-600 ng/mL. As we heard through testimony today, this is an extremely high level. Also as we heard, Dr. Niemiec followed up with the Grievant, in an attempt to offer mitigation if the Grievant could provide a legitimate medical explanation, like a prescription, to explain the level of marijuana metabolite in his system. Unfortunately though, the Grievant was not able to provide any legitimate medical explanation.

The Union also bases part of its argument on the allegation that the MRO's conversation with the Grievant was in violation of Article 5, Section I, 4 (k) – which says:

> "An Employee who is summoned to meet with a supervisor or any other representative of the Company for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by his/her Griever and if the Griever is not then available, the meeting shall be deferred."

However, that challenge was misguided. As is obvious, Dr. Niemiec did not contact the employee for the purpose of discussing disciplinary action, and he testified as such. On the contrary, Dr. Niemiec contacted the Grievant to offer an opportunity to mitigate his conclusion of impairment. To be clear, and as you heard Dr. Niemiec testify today – even if he had not spoken to the Grievant, he would have still issued a finding of impairment in this case. There has been no prejudice to the Grievant as a result of that conversation.

Arbitrator Talarico, as you noted in your decision from J.A. Jones Company, the importance of a Medical Review Officer cannot be over emphasized in any drug screening program and especially one where a cut off of 20ng for marijuana is utilized, as was done in that case. As you said, an Medical Review Officer is a licensed physician who understands and is aware of the effect of drugs and alcohol. Medical Review Officers are needed to review positive test results to ensure the results are accurate and to interview the person tested in order to rule out medication and other factors which might create false positive results.

Mr. Arbitrator, the Union has asked that you put this employee back to work and make him whole. Granting that remedy would not be proper given the circumstances in this case.

Instead, there is only one logical, reasonable conclusion – the Grievant violated Company rules when he brought alcohol onto Company property, and when he came onto Company property impaired. As such, he was properly discharged. Mr. Arbitrator, the Company is asking that you deny the grievance before us today. Thank you.

POSITION OF THE UNION

Grievant, Mr. McCue, is a 30 plus year employee with Inland Steel, Ispat Inland, and now ArcelorMittal. Mr. McCue has no citable disciplinary history and is the victim of the companies' violation of its negotiated obligations under the Basic Labor Agreement and its attempt to monitor workers off duty conduct that has no relationship to their operation.

It is true that during a random inspection at the Plant gate one unopened bottle of beer was discovered in his back seat along with an array of plastic bags, a basketball, etc. At the time of the inspection Grievant had no knowledge that the one unopened can of beer was in his vehicle. His conduct was neither reckless nor negligent.

The Company has accused Grievant of violating Company Rule 2. D. reporting for work in a state of being intoxicated or unsafe to perform duties by intoxicating beverages, being in possess of, while on Company property or bringing onto Company property, intoxicating beverages and/or including non-alcoholic beer and/or wine. The Union has argued that the only portion of the rule he may have violated was unknowingly bringing onto Company property one unopened bottle of beer. But that by itself is not enough to trigger a Fitness to Work evaluation. Article 3, Section G. 2. Clearly defines that the parties agreed to. "The Company may require an employee to submit to a medical evaluation performed by qualified personnel, which may include an alcohol **or** drug test, **only** where there is reasonable cause, based on objective evidence, to believe that the employee is legally intoxicated **or** impaired by drugs on the job."

Article 3, Section G. 3. specifically states that "employees will not be required to submit to a drug or alcohol test **for any other reason** unless such testing is required by law. The Union argued today that the Company had no right to send Mr. McCue to the clinic for a Fitness for

Work evaluation. The Company introduced into the record the Fitness to Work checklist filled out by a Plant guard which only indicates one unopened bottle of beer, nothing else!

Arbitrator Vonhof ruled in grievance number 26-y-014 on page 12 and I quote "The Company rules are not the only standard issue here, however. The parties have negotiated language contained in the collective bargaining agreement that limits when the Company may require an employee to submit to a drug or alcohol test to only those situations where there is reasonable cause, based on objective evidence, to believe that the employee is legally intoxicated or impaired by drugs on the job. Therefore the Company bears the burden of proving in this case that on the date in question there was objective evidence sufficient to support a belief that Grievant was legally intoxicated or impaired by drugs on the job" is a single unknown unopened bottle of beer in the backseat of Grievant's car reasonable cause based on objective evidence that Grievant was legally intoxicated or impaired by drugs? If you find today Mr. Arbitrator that one, unknown at the time of the random inspection, bottle of beer was objective evidence that the Grievant was legally intoxicated we argue that it would be only for an alcohol test only.

The appropriate discipline if you believe Grievant knew or should have known of the one unopened bottle of beer in his car can be found in **award #899**. Footnote 2 where Union Relations Manager, Cayia, testified he had informed Company officials that they should impose a three-day discipline for a first offense when employees are caught with alcohol on Company property. There was also testimony from Company and Union witnesses alike that the typical penalty for a first offense possession of alcohol is a one to three day suspension.

Grievant is also alleged to have violated Company Rule 2. B. "Being on Company Property Impaired by Drugs . . .". The timeline of events were that Mr. McCue spent over three (3) hours in the company of either Plant security or medical professionals at the clinic and there

are no indications in Plant Protection Officers Report, the Fitness to Work checklist or the Hospital Report-Employee Assessment that were all completed before the drug screen was administered would lead any reasonable person to suspect Mr. McCue was impaired by drugs.

Grievant reluctantly took the urine screen because he was, one could argue, threatened that if he did not he would be considered under the influence of every drug legal or illegal by the medical professional at the Company clinic.

The Company has argued here today that levels of THC-COOH indicate impairment by itself. The Union disagrees. THC-COOH is basically just the body's response to THC exposure and does not induce any psychoactive effects whatsoever. Therefore, it does not equate to impairment which is the standard the parties have agreed to in Article 3., Section G. Arbitrator Helen M. Witt in grievance no. 769 states on page 7:

> **"While there may be arbitration cases that find that a positive drug test showing high levels of the metabolites of cannabis are indicative of impairment, the great weight of scientific literature on the subject disagrees. There is substantial support for the fact that a drug screen for cannabis will show whether cannabis was used, but it does not show when or how much was used. And it cannot show whether the individual who used it was under the influence or impaired when the test was administered because metabolites are the by-product of metabolism. Therefore, the theory that a positive test equates to impairment is not generally recognized a sound."**

I reiterate that the factual timeline presented today clearly shows that Grievant was in the Company of those entrusted with the security of the Plant and qualified medical professionals for over three (3) hours and there is no reference in any documentation or in any testimony today that Grievant was considered to be impaired by drugs or intoxicated.

Medical Review Officer (MRO) Dr. Ted R. Niemiec confirmed the Urine Specimen Validity test was accurate. The Union argues that is where the MRO responsibilities ended. The

MRO has responsibility to verify the testing process and determine if the person being assessed has a valid prescription for any non-negative test results. There was no medical reason for the MRO to interview Grievant. According to Federal Law, No Prescriptions May Be Written for Schedule 1 Substances. The Union argues that Dr. Niemiec was acting as a Company representative when he interviewed Grievant with the intent to establish impairment hence discipline. He then shared his findings of that investigation with labor relations which has lead us here today. The Union argues that Dr. Niemiec was required by Article 5, Section I (k) to contact Mr. McCue's Griever and insure his/her participation in any investigation that could lead to discipline. He did not! In USW Case No. 44, the USW argued on page 2 that "Prior language in this provision had previously required that an employee make such a request, but that language was subsequently removed from the contract." Now, the right to have a griever present is not dependent upon a request by an employee but is an absolute – requested or not." The Company argued in the same case on page 4. "It is the Company's position that the specific language of Article 5, Section I. 4. (k) refers to for the purpose of discussing possible disciplinary action for the right to have a Griever present to be triggered. The language refers to investigative meetings with employees where the content of the discussion may lead to discipline of that employee." That is exactly what Dr. Niemiec did!

After hearing the testimony and reviewing the documentation presented today, the Union asks that you grant the grievance and make Mr. McCue whole for all wages, benefits and job rights lost.

FINDINGS AND DISCUSSION

Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority, other contractual benefits and reputation are at stake. Because of the seriousness of this penalty, the burden is on the Employer to prove guilt of wrongdoing. Quantum of proof is essentially the quantity of proof required to convince a trier of fact to resolve or adopt a specific fact or issue in favor of one of the advocates. Arbitrators have, over the years, developed tendencies to apply varying standards of proof according to the particular issue disputed. In the words of Arbitrator Benjamin Aaron, on some occasion in the faraway past, an arbitrator referred to the discharge of an employee as "economic capital punishment". Unfortunately, that phrase stuck and is now one of the most time honored entries in the "Arbitrator's Handy Compendium of Cliches". However, the criminal law analogy is of dubious applicability, and those who are prone to indiscriminately apply it in the arbitration of discharge cases overlook the fact that the employer and employee do not stand in the relationship of prosecutor and defendant. The basic dispute is still between the two principals to the collective bargaining agreement. In general, arbitrators use the "preponderance of the evidence" rule or some similar standard in deciding fact issues before them, including issues presented by ordinary discipline and discharge cases such as within.

The Grievant was notified by letter dated July 9, 2019 that he was suspended for five (5) days subject to discharge for violation of the Company's Personal Conduct Rules 2. B. and 2. D. Those rules were unilaterally promulgated by the Employer pursuant to the authority granted to it in Article Five J. of the collective bargaining agreement – Management Rights. Rule 2. B. prohibits being on Company property **"impaired"** by drugs not prescribed by a licensed

physician. Rule 2. D. prohibits reporting for work in a state of being intoxicated or bringing on to Company property intoxicating beverages.

On July 5, 2019 Grievant was subjected to a random vehicle inspection during which one unopened bottle of Mondello beer was readily observed in the rear passenger compartment of his vehicle. It is important to note that this was strictly a randomly conducted inspection and there was nothing about the Grievant's manner of driving or behavior that in any way caused the guard to inspect his vehicle. The Grievant was then informed he would have to submit to a Fitness to Work test and was accompanied by Lt. William Fuoss to the Plant Clinic. Lt. Fuoss and other Plant personnel were in close proximity to Grievant for over three (3) hours not only observing his demeanor but questioning him about his rights. Not one employee at any time indicated that Grievant exhibited any of the typical signs of intoxication, e.g. glassy eyes, slurred speech, the smell of alcohol on his breath, an unsteady gait, etc. Nor did any of these employees observe any physical traits such as stumbling, awkward gestures or mannerisms, etc., as would typically be exhibited by an "impaired" individual.

Pursuant to Company Policy when alcoholic beverages are found in the possession of an employee a breathalyzer test is given. That makes imminent sense and Grievant passed that test. As such, the evidence is clear that Grievant was not intoxicated on July 5, 2019 while on Company property.

However, the gravamen of the within matter hinges upon the steps the Company took next by directing that Grievant also submit to a preliminary drug screening test. Company Personal Conduct Rule No. 2. B. clearly and unequivocally prohibits an employee being on Company property **impaired** by drugs. It should be noted at this juncture that a universally accepted arbitral principle is that unilaterally promulgated rules and policies of an Employer

cannot be in conflict with or exceed the parameters of express provisions of the collective bargaining agreement. In this case Article 3. G. of the collective bargaining agreement provides that the Company may require an employee to submit to medical evaluation performed by qualified personnel which may include a drug or alcohol test, **"only where there is reasonable cause, based on objective evidence, to believe that the employee is legally intoxicated or impaired by drugs on the job."**

The narrow issue presented within is whether there was, in fact, reasonable cause, based on objective evidence, to believe that the Grievant was either legally intoxicated or impaired by drugs while on the job. Based upon the discussion provided above, it is clear that there was absolutely no indicia whatsoever that the Grievant was legally intoxicated on the day in question -- which was prompted by nothing more than the discovery of one unopened bottle of beer. Therefore, this case comes down to whether there was reasonable cause, based on objective evidence, to believe that the Grievant was **impaired** by drugs on the job. Note that both the collective bargaining agreement as well as the Personal Conduct Rules both similarly require that the Grievant be **"impaired"** and not just have the presence of illegal drugs in his system at the time the drug screening test was conducted.

There exists a significant split of authority and philosophy among arbitrators as to the propriety of assessing discipline based solely on testing positive for illegal drugs, as was done within. The issue concerns the need for an "impairment" or "under the influence" showing where discipline is based solely upon having some drugs in a person's system as shown by testing, as distinguished from having been detected using, possessing or distributing drugs on the job or on Company property.

In considering this question, it must be accepted that every Employer has a legitimate and understandably strong interest in maintaining a safe and efficient workplace. But it must also be accepted that every employee has a legitimate and understandably strong interest in not being restricted by the Employer as to choice of activities and life style while off the job and Company property. It is not too surprising then that the clash of the Employer's safety/efficiency interests and the employee's freedom of choice interests have produced disagreement and division among arbitrators.

In general, every Employer has an obligation to provide a safe work environment for it's employees. The manner and method by which it does so it, to a large extent, a function of the nature of it's business. The dangers that surround or can be caused by employees who have sedentary functions such as bookkeeping, accounting, retail, etc., are vastly different from the dangers that surround or could be precipitated by employees working in a dangerous environment such as exist at ArcelorMittal. Accordingly, in the latter type situations, the Employer has a much greater concern regarding perception and motor skills impairment and, accordingly, a much greater obligation concerning safety on the job.

While most experts will testify that all illegal drugs do have some negative impact on an employee's motor skills, perception, etc., scientific technology is insufficient to identify the degree of impairment based on the disclosed content of the drug in the employee's system. Therefore, in the within situation, the Employer has obviously made the assumption that the high level of an illegal drug in Grievant's system causes impairment and, for the sake of safety, is prohibited. However, under all of the within circumstances, I find that assumption to be inherently faulty.

As I stated above regarding the issue of whether Grievant was "intoxicated", there were no indicia or objective evidence whatsoever of any "impairment" of the Grievant. He spent considerable time (more than three (3) hours total) in the presence of security guards, lab personnel, etc. and exhibited no outward manifestations that a reasonable person might consider to constitute some degree of physical or mental impairment.

Some industries have promulgated rules totally banning the use of illegal drug altogether, by its employees, i.e. so that there would be no allowable presence of drugs in an employee's system. However, such a strict standard was not adopted herein. Moreover, merely having some drugs in the Grievant's system while at work is not so inherently improper that the Grievant would have known it to be prohibited. Some adequate manner of notice to employees that they may be subjected to a drug test, which may result in discipline, for merely having some amount of drugs in their system while at work, despite the fact that their ingestion of illegal drugs took place away from the work site and while off duty, is a necessity to satisfy the requirements of just cause. No such notice was ever given within. The Company clearly advertised Plant Rules against being impaired while at work, but no such advertisement was given against merely having drugs in one's system.

I cite with total agreement the decision by Arbitrator Helen M. Witt in Ormet Primary Aluminum Corporation and United Steelworkers of America, Local Union 5724. I would note that Arbitrator Witt is a highly experienced and distinguished steel industry arbitrator. In that case an employee burned his eye at work and went to the hospital for treatment but was also required to submit to a drug test. In that case, just as within, the overriding issue was whether there was just cause for the Grievant's termination. Arbitrator Witt found as follows:

> **"The Company's position throughout these proceedings was that a positive test was the same as being under the influence and was therefore a violation of Plant Rules. While there may be arbitration cases that find that a positive drug test showing high levels of metabolites of cannabis are indicative of impairment, the great weight of scientific literature on the subject disagrees. There is substantial support for the fact that a drug screen for cannabis will show whether cannabis was used, but it does not show when or how much was used and it cannot show whether the individual who used it was under the influence or was impaired when the test was administered because metabolites are the byproducts of metabolism. Tests do not measure current concentrations of marijuana in the blood stream as blood alcohol tests do. Therefore, the theory that a positive test equates to impairment is not generally recognized as sound."**

The Employer's Medical Review Officer, Dr. Ted Niemiec, had no additional indicia nor objective evidence of impairment other than what has been set forth above in discussing intoxication and impairment. As best I can discern, the Employer's conclusion of impairment is based upon the following: the fact that Grievant inadvertently brought one unopened bottle of beer onto Plant property exhibits "poor judgment" which consequently is considered the "objective evidence" necessary to conduct not just a breathalyzer test but also a drug screen. I find that to be totally specious reasoning. It is more likely than not that Dr. Niemiec based his conclusion of impairment strictly upon the levels of marijuana metabolites found in the Grievant's system. However, such a conclusion, under standards which do not prohibit the mere presence of drugs in an employee's system and which clearly and unambiguously require actual objective evidence of impairment, cannot stand. As Arbitrator Thomas M. Phelan explained in Maple Meadow Mining, 90 LA 873

> **". . . to allow a positive result alone to be grounds for a discharge would amount to the regulation of conduct which is not within the Employer's discretion to regulate. The focus must be on what the conduct does to the Employee's ability to**

perform his or her job, or on what adverse impact there has been upon the Employer."

The Employer further argues that the word **"or"** separating the words "intoxicated" and "impaired" set forth in Article 3, Section G. 2. of the collective bargaining agreement is used as an "inclusive disjunction". That means the Fitness to Work evaluation may include both alcohol **and** drug testing where probable cause exists for just intoxication as exists within. While I totally disagree with that interpretation of the operative language it is not necessary to debate the proper interpretation at this juncture because of my ruling that "impairment" cannot be based strictly upon a positive test result, as was done within.

Furthermore, any argument by the Union that Article 5, Section I. 4. K. was violated is misplaced. Grievant clearly was contacted by the MRO to seek possible mitigation of the drug results and not to investigate possible discipline.

It must also be remembered that Grievant has never previously been charged, or even suspected of, drug abuse. Nor, were there any behavioral observations suggesting suspicion for the presence of drugs, nor any indicia whatsoever of any chronic drug usage. As such, the charge that Grievant violated Personal Conduct Rule 2. B. by being "impaired" while on Company property on July 5, 2019 must fail.

Finally, we are left with the issue that the Grievant did, in fact, have one unopened bottle of beer in his vehicle in violation of Personal Conduct Rule 2.D. Whether Grievant was aware of its presence in his car, or how it got there, or what he was doing the night before, is irrelevant. Employees must exercise care and be held accountable for what is in a vehicle they are bringing upon Company property. However, Grievant is a 30+ year employee with no citable disciplinary history and under such circumstances the mere presence of one unopened bottle of beer found in

his car clearly cannot form the basis for a penalty as severe as discharge. Under such circumstances, I believe a five (5) day disciplinary suspension, without pay, would be reasonable under all of the attendant circumstances.

AWARD

The grievance is sustained in part. Grievant shall immediately be reinstated to his former position. His termination shall be reduced to a five (5) day suspension without pay, and he shall be made whole for all other lost wages and benefits. Grievant's record shall be expunged/adjusted to reflect this Award.

The Company shall be entitled to a set-off for any interim earnings and/or unemployment compensation benefits received by Grievant.

Jurisdiction shall be retained in order to ensure compliance with this Award.

Date: Feb. 10, 2020
Pittsburgh, PA

Ronald F. Talarico, Esq.
Arbitrator