BEFORE
ANDREW M. STRONGIN
ARBITRATOR

March 6, 2020

In the Matter of the Arbitration between-	:	
ARCELORMITTAL USA	:	
-and-	:	**Grievance No. 26-BB-001**
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION	:	Case 103

APPEARANCES:

For the Employer:
Jack Klinker
Labor Relations Representative
ArcelorMittal Indiana Harbor Labor Relations
3210 Watling Street
East Chicago, Indiana 46312

For the Union:
John D. Wilkerson
Area 26 Griever
Local 1010 USW
7047 Grand Ave
Hammond, IN 46323

This grievance protests the Company's action in discharging grievant Robert Bateman for alleged violation of the Company's Personal Conduct Rule 2.B, which prohibits "being on Company property impaired by drugs not prescribed by a licensed physician for personal use while at work," and notifies employees that violation of such rule "may be cause for discipline, up to, and including suspension preliminary to discharge." The Union claims the discharge is without proper cause in violation of Art. 5.J of the Basic Labor Agreement, and asks that grievant be reinstated and made whole for his losses.

BACKGROUND

The basic facts of this case are not in any material dispute. Grievant was hired into the Indiana Harbor Rail Operations Department in 2004. On November 10, 2018, while operating a locomotive and in the process of covering pugh ladles at the #4 Steel Producing ("4SP"), grievant failed to apply sufficient brakes, thereby allowing the train he was operating to roll and collide with a caster car. The Union questions the finding that grievant should have brought the train to a complete stop prior to turning his attention to covering the ladles, pointing to evidence that employees routinely cover ladles without bringing the train to a complete stop, and that changes were made to the established procedure after grievant's accident. The Company disagrees, claiming that the train should have been brought to a complete stop and that employees never are supposed to operate two pieces of equipment at once. Grievant, for his part, initially explained that he would have brought the train to a complete stop had he known it was required, but that was not how it was done at the time of his accident. Later, he testified that he applied a full brake and meant to bring the train to a complete stop.

Notwithstanding the contested claims regarding whether grievant was required to bring the train to a complete stop between covering the ladles, the Company concluded that the collision was the result of poor judgment by grievant, and the Union agrees that the Company had the right to send grievant for a Fitness for Work Evaluation, which included drug and alcohol testing pursuant to Art. 3.G.2 of the Basic Labor Agreement: "Employees involved in an accident will be tested only when an error in their coordination or judgment could likely have contributed to the accident."

Grievant failed the presumptive screening and his sample then was sent for confirmatory testing. Chromatography and mass spectrometry testing was performed and, of relevance here, the lab reported that grievant tested positive for amphetamines, at a level in excess of 10,000 ng/ml, where the confirmatory test cut-off is 500 ng/ml.[1]

The Company's Medical Director and Medical Review Officer ("MRO"), Dr. Ted Niemiec, testifies that in addition to considering grievant's positive drug test, he discussed with grievant the circumstances of the accident and reviewed the departmental explanation. According to Dr. Niemiec, grievant stated that he believed he set the brake properly upon positioning the engine, then turned his attention to covering a ladle, at which point he collided with the caster car. Dr. Niemiec understood that explanation to be consistent with the departmental findings. As for the drug test, Dr. Niemiec found that grievant had no prescription for the use of amphetamines, and in combination with his understanding of grievant's judgment error in operating the engine, concluded to what he describes as a reasonable degree of medical certainty that grievant was impaired at the time of the accident, noting especially that the collision resulted from a perception error in that grievant thought

[1] Subsequent inquiry by the Company resulted in a post-discharge finding that grievant's actual amphetamine level as measured in the confirmatory test was 15,099.35 ng/ml.

he was stopped, but was not. In so concluding, Dr. Niemiec recognized that nobody who dealt with grievant at the time of the accident or in its aftermath, including the paramedics who completed grievant's testing intake, observed any signs or symptoms of impairment. Dr. Niemiec discounted the absence of such findings on the ground that none of those individuals are trained to note anything more than "gross" or outward signs of impairment.

On November 21, 2018, the Company suspended grievant with the intent to discharge him for violation of Personal Conduct Rule 2.B, and following the Step II grievance meeting converted the suspension to discharge. Almost immediately, the Union asked the Company to extend grievant's medical benefits, and the Company acceded to that request. The parties dispute whether that was a firm, enforceable agreement pending final resolution of grievant's case, or whether it was a gratuity provided by the Company, subject to cancellation at any time. It is undisputed that the Company cancelled his benefits at the time grievant declined to accept a Last Chance Agreement to resolve this grievance.

At hearing, grievant's wife testifies that grievant has a complex medical history, including two cancers and gastro-intestinal problems, that she sorts his medications, and that it is possible she made a mistake and gave him one of her own pills, which are among those that could test positive as an amphetamine. For his part, grievant insists that he never knowingly took any amphetamines, and that the only stimulant he takes is caffeine pills. He acknowledges, though, that Dr. Niemiec told him caffeine pills could not explain his test result. Beyond that, grievant testifies that safety at work is very important, and he would not knowingly work impaired. He explains that he initially did not seek assistance through the Employee Assistance Program ("EAP"), because he did not think he had a drug problem, but ultimately attended seven counseling sessions, which he understood to be sufficient to save his

job. Grievant adds that the EAP counselor agreed that he did not have a drug problem in the past or at the time of the counseling.

Dr. Niemiec testifies that prescribed usage of amphetamines at a very high dosage could lead to a tested level approaching 10,000 ng/ml, but that unprescribed, accidental ingestion of amphetamines will not result in a measurement of 10,000 ng/ml, much less anything approaching grievant's actual measured level in excess of 15,000 ng/ml. Further, he testifies that, even at a level of 15,000 ng/ml, there might not be outwardly observable signs or symptoms, although the individual nevertheless could be affected by more subtle impacts on perception, divided attention, and coordination of the type that could lead to an accident like grievant's.

In so testifying, Dr. Niemiec rejects the contention that grievant's medical history, including renal and gastro-intestinal disfunction, will have any substantial impact on an individual's tested amphetamine levels. In this regard, Dr. Niemiec specifically discounted the letter received from grievant's oncologist, Dr. Lauren Ziskind, which opined that his measured level might have been a false positive. Dr. Niemiec explains that Dr. Ziskind appears to have misperceived the type of screening used for grievant's test, as she described it as a "drug toxicity screen," which was used for the initial presumptive test, as opposed to the chromatography and mass spectrometry used for the confirmatory test.

Dr. Niemiec also discounts the relevance and value of the independent hair test grievant submitted, explaining that it generally is not a useful tool for measuring amphetamine usage, and in this case specifically is not useful because it was not accompanied by sufficient indicators to permit reliable determination of the period reflected by the test.

The Company supports Dr. Niemiec's testimony with that of Dr. Jerrold Leikin, a Board-certified Medical Toxicologist. Dr. Leikin testifies that, to a reasonable degree of medical certainty, the foregoing facts establish that grievant

was at an increased risk for being involved in an accident," which is to say, "impaired." Dr. Leikin testifies that grievant's list of prescribed medications do not explain his positive test for amphetamines. On the question of grievant's failure to exhibit any outward signs of impairment at relevant times, Dr. Leikin testifies that effects of amphetamine use can be subtle, which is why drug tests are used. Dr. Leikin also discounts grievant's hair test, as it fails to reference critical factors for its evaluation, including the source of the hair, the length of the hair, or what part of the hair was tested. He adds that the urine test administered by the Company is a much better matrix than the hair test.

Finally, the Union's Grievance Committee Chair, Daryl Reed, testifies that the Company is inconsistent in its application of the drug testing procedure as between its Indiana Harbor and Riverdale plants. He testifies that Riverdale does not have an MRO like Dr. Niemiec, and that there should not be differences across the plants in the administration of the same contract language.

THE PARTIES' CONTENTIONS

The Company principally contends that the facts and circumstances of grievant's accident, together with his positive drug test result, provide proper cause for his discharge under Personal Conduct Rule 2.B, noting particularly the inherent dangers of the workplace. The Company argues that notwithstanding the Union's position, grievant admittedly knew and meant to bring the train to a complete stop, but failed to do so, causing the accident that led to his positive drug test. The Company argues that grievant had extremely high levels of non-prescribed amphetamines in his system at the time of the accident, which cannot be explained by accidental ingestion or the combination of grievant's prescribed medications. The Company argues, too, that grievant's tested level of amphetamines demonstrates

impairment while at work, and is particularly inconsistent with the sort of multi-task operation he proved unable to perform safely on the day in question. The Company rejects grievant's hair test as unpersuasive, and also notes that grievant's counseling through the EAP began eight months after the accident and in any case does not guarantee reinstatement under the Basic Labor Agreement. Finally, the Company argues that it is not required to make a showing of "knowing impairment" under Art. 3.G.5 of the Basic Labor Agreement, because it has shown that grievant violated Rule 2.B.

The Union first contends that grievant is entitled to a special remedy relating to his health care, as the Company agreed to extend his benefits pending final determination. The Union contends that the Company reneged on that promise only because grievant refused to sign a Last Chance Agreement, which is retaliatory and improper. On the merits, the Union argues that there are inherent dangers in one-man operations like grievant was performing, and changes to the procedure following grievant's accident demonstrate that the cause was not impairment, but inherent risk. As for the drug test, the Union contends that grievant's health substantially is compromised and reflects renal and gastrointestinal problems that could produce unreliable test results. The Union contends, too, that the EAP counselor confirms that grievant had no drug problem at relevant times. The Union also argues that the Company is impermissibly inconsistent in its administration of Rule 2.B as between its Indiana Harbor and Riverdale plants, and in any event that the Company must demonstrate both "knowing impairment" and a nexus between the discipline and grievant's work. The Union contends, too, that grievant simply would not have worked while impaired and could have called-off if he had any issue with working safely. Finally, the Union argues that grievant's 15 years of service and good record should mitigate against his discharge, especially because the

Company was unable to demonstrate that he was impaired and could not discount accidental ingestion.

Returning briefly to the Company's position, the Company argues that the Union's case citations are distinguishable because Dr. Niemiec considered the facts and circumstances of the accident and both he and Dr. Leikin explained that grievant's test result demonstrated impairment. The Company also argues that it made no agreement to continue grievant's benefits, but did so only as a goodwill gesture that it was privileged to end at any time.

DISCUSSION

Generally, the Company maintains the right under Art. 5.J of the Basic Labor Agreement to discipline employees for proper cause, and in this case the Company specifically determined to discharge grievant for violation of Personal Conduct Rule 2.B, which in relevant part notifies employees that, "Being on Company property impaired by drugs not prescribed by a licensed physician for personal use while at work," "may be cause for discipline, up to, and including suspension preliminary to discharge."

Here, the precipitating event for grievant's discharge was his involvement in an accident while at work. There is credible and conflicting argument from both parties as to the root cause of the accident, including evidence that at the time, operators may not strictly have been required to come to a complete stop when covering the ladles, and that the move was inherently dangerous. Grievant admits, however, that he thought he applied a full break, which suggests an understanding that he should have come to a complete stop, and the parties otherwise agree that, whatever the characterization of the move at the time in question, operators were expected to avoid accidents. Ultimately, however, the critical point

is that the parties agree that the Company had a right to send grievant for a post-accident drug test. By definition, such tests are warranted, "when an error in their coordination or judgment could likely have contributed to the accident," in order to rule-in or rule-out the contributing cause of drug/alcohol impairment.

Here, the drug test confirmed that grievant had an exceedingly high level of amphetamines in his system, in excess of 15,000 ng/ml, which is greater than 30 times the confirmatory test cut-off level of 500 ng/ml. Two doctors testify, to a reasonable degree of medical certainty, that such level causes impairment of judgment and perception. Grievant's testimony that he thought he applied a full brake, under circumstances where the accident proves that he did not, is consistent with the doctors' testimony that his judgment and perception was impaired at the time, consistent with the expected effect of the high levels of amphetamines found in his system. This medical evidence is credible, consistent, and clear, and is not contradicted by the Union's evidence.

First, the Union's suggestion that the confirmatory test might show a false positive is not supported by Dr. Ziskind's letter or other medical evidence. As Dr. Niemiec testifies, that letter appears to be based on an understanding that grievant was subjected to a "drug toxicity screen," whereas the confirmatory test was performed by chromatography and mass spectrometry, which both doctors Niemiec and Leikin testify discounts the possibility of a false positive. Further, both doctors testify that grievant's underlying condition and prescription regimen and/or use of caffeine pills would not produce the test result. Additionally, they credibly testify that the level of amphetamines measured could not result from periodic, accidental ingestion such as grievant suggests might have occurred due to a mistake by his wife. Finally, the Company has the better argument regarding the hair test: notwithstanding other difficulties with that test, there are too many unanswered

questions and unknowns for the hair test to be credited, or otherwise to rebut the testimony of Drs. Niemiec and Leikin that it is unhelpful here.

Based on the foregoing evidence that grievant was impaired while at work, the Company is within its rights in applying Personal Conduct Rule 2.B in support of his discharge. Grievant's tenure is a factor in his favor, but long service does not excuse working while impaired in an inherently dangerous environment, especially operation of a locomotive inside the plant. The Union has not shown that the Company's disciplinary response is inconsistent with its approach in other cases, or so disproportionately severe as to preclude a finding of proper cause. Although the Union argues that Rule 2.B is not consistently enforced across the Company's plants in cases such as this, and specifically that the Riverdale plant does not employ an MRO such as Dr. Niemiec, this record does not support a finding that conditions at Riverdale preclude application of the drug testing and impairment rules in place at Indiana Harbor, where an MRO is used to evaluate the evidence and the evidence shows that the Company followed the rules, as written. There is no issue here, of course, as to the sufficiency and/or administration of Riverdale's practices.

As for the EAP-related evidence, Art. 3.G.5 by its terms does not preclude the Company from taking disciplinary action against employees who violate the rules, as grievant has been shown to have done with regard to Personal Conduct Rule 2.B. The Union argues that the Company has not countered grievant's testimony regarding his experience with the EAP counselor, but grievant did not seek any rehabilitation until eight months after his discharge – at the time of his discharge, grievant denied having any problem – and it is not clear on this record that grievant completed any actual treatment program. Indeed, grievant continues to deny taking any amphetamines, despite all of the medical evidence to the contrary. All of this runs counter to the Union's claim that grievant has been forthcoming and cooperative.

As for the Union's claim that the Company promised to continue grievant's medical benefits from his termination date to the final determination of this grievance, the Union cannot show that the Company entered into any binding agreement to do so. It appears, rather, that the Company extended grievant's benefits as a gratuity, without obligation to continue doing so, in recognition of grievant's circumstances. As the Company argues, the Union offered no consideration for that agreement, and the Union is unable to point to any provision of the Basic Labor Agreement that requires the Company to hold to any such agreement. The Arbitrator is mindful of the Union's claim that the Company ended the arrangement only after grievant refused to sign a Last Chance Agreement, but again, absent any condition requiring the Company to maintain his benefits, the Company was within its rights in stopping them.

In the final analysis, grievant's long service and medical condition do not provide sufficient basis for disturbing the Company's judgment in discharging him for working while impaired. In that last regard, this is not a close case, where the medical evidence falls close to the line. Grievant's measured amphetamine level exceeded 15,000 ng/ml, half-again beyond the 10,000 ng/ml point at which the lab normally does not even bother to report the specific result. Two doctors, one an MRO, the other a toxicology expert, testify that grievant's level was exceedingly high and indicative of impairment, and that the level cannot be explained away by any of the defenses grievant offers. On this record, the Arbitrator essentially is left with grievant's denials, which are overwhelmed by medical evidence that he used amphetamines at a level that impairs an employee's judgment and perception, which appears to be precisely what occurred when he had his accident. To be sure, accidents happen without the involvement of drugs and alcohol, but the parties' testing agreement specifically exists to rule-in or out the use of drugs and alcohol as a contributing factor, and here the test, together with medical evidence, confirms that

amphetamines impaired grievant's work performance. The Company and Union share a commitment to providing a safe workplace, and this record does not permit the Arbitrator to disturb the Company's judgment, on these facts, that grievant's use of amphetamines impaired his work performance and warrants his discharge.

The Union's reliance on *Inland Steel Company and USA, Local 1010*, Award No. 960 (Vonhof 1998), does not persuade the Arbitrator to the contrary. While it is true that Arbitrator Vonhof ordered the reinstatement of an employee charged with being under the influence of drugs at work, she noted that the drug screen was not determinative, and otherwise discredited the Medical Director whose conclusion provided the basis for the discharge. She wrote, in summary: "The facts relied upon by the doctor to determine after the fact that the Grievant had been under the influence of cocaine ... do not support the conclusion of cocaine intoxication with sufficient certainty." Award at 5. Here, by contrast, Dr. Niemiec's professed understanding of the accident is consistent with the record evidence even if it diverges from the Union's best-case scenario, and both Dr. Niemiec and Dr. Leikin possess specialized knowledge in the relevant field and testify to a reasonable degree of medical certainty that non-prescribed amphetamines impaired grievant while at work.

The Union also relies on *Ispat Inland and USW Local 1010*, Award No. 1017 (Vonhof 2005), for the proposition that length of service is a factor in grievant's favor, and that grievant's conduct is far less egregious than that at issue in Award No. 1017. To be sure, there is little to compare in terms of the employees' conduct in the two cases. Nevertheless, nothing in Award No. 1017 suggests that the Basic Labor Agreement should not apply to an employee who operates a train while impaired by an exceedingly high level of non-prescribed amphetamines, whatever may be said of its application to an employee who reports to work drunk and engages in a fist fight. Both situations create unacceptable risk in a steel mill, and if grievant

did not engage in a fist fight with another employee, he did operate a train while conducting inherently dangerous work, and that is precisely the sort of risk the rules are designed to prohibit for the benefit of all concerned.

DECISION

The grievance is denied.

Andrew M. Strongin, Arbitrator

Takoma Park, Maryland