BEFORE
ANDREW M. STRONGIN
ARBITRATOR

March 6, 2020

In the Matter of the Arbitration between-	:	
ARCELORMITTAL USA	:	
-and-	:	**Grievance No. 26-BB-002**
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION	:	Case 104

APPEARANCES:

For the Employer:
Christopher M. Melnyczenko
Labor Relations Lead Representative
ArcelorMittal Indiana Harbor Labor Relations
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East Chicago, Indiana 46312

For the Union:
John D. Wilkerson
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Local 1010 USW
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This grievance protests the Company's action in discharging grievant Timothy Taylor 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 he be reinstated and made whole for his losses.

BACKGROUND

The basic facts of this case are not in any material dispute. Grievant was hired on May 14, 2018, and was working in the Indiana Harbor East Rail Department when, on January 23, 2019, he was assigned to operate a locomotive to shove a series of pugh ladles into the #4 Steel Producing ("4SP"). An eight-month employee at the time, grievant had not been asked to make such a move previously and was unsure how to perform it safely. Pursuant to his training, he chose to stand where he could maintain a sight-line in the direction of a pedestrian crossing, but he was unsure where to stop and asked for assistance. Of note, the parties agree the move was a dangerous one, in an area where individuals have been struck by locomotives. Without receiving any answer to his call for assistance, he chose to move ahead at a very slow rate of speed, overshooting the mark and causing minor damage to the locomotive, but fortunately no injuries to any individuals.

Subsequent investigation by the Company led to a finding that the accident resulted from poor judgment by grievant, in that he should not have pushed the ladles into 4SP without receiving the assistance he requested. The Union disagrees with that assessment, presenting evidence that the move is inherently

unsafe, difficult, and rarely required, and that the area is a noisy one. The Union agrees nonetheless that the Company had sufficient cause to send grievant for 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's initial, "presumptive" urine test proved positive, and per policy the sample was subject to confirmatory testing. Meanwhile, grievant was driven back to the plant, where the Company searched his locker once grievant was able to locate it with some difficulty, and then his personal vehicle, but found no marijuana in either place. Grievant was directed to await a ride home, but grievant disregarded that instruction and drove himself home, claiming he needed his vehicle for personal transportation, albeit he testifies that the Company disregarded his offer to demonstrate to the satisfaction of the police that he was not impaired before leaving.

Thereafter, on January 28, the lab reported that the confirmatory test proved positive for marijuana metabolites, measured at 115 ng/ml, well above the 15 ng/ml cut-off.

There is some dispute over *when* grievant last used marijuana prior to the accident in question, but he admits that he used it sporadically. The Company adduces evidence that he initially admitted while on the way to the testing site that he had smoked "yesterday," but thereafter – including at hearing – grievant claimed that he last smoked on January 19, four days prior to the accident.

At hearing, Dr. Ted Niemiec, the Company's Medical Director and Medical Review Officer ("MRO"), testifies that for a sporadic user to test at 115 ng/ml, as grievant did, the use would have to be "within the day." Thus, Dr. Niemiec dismissed as medically implausible grievant's claim that his last use was on January 19, concluding "to a reasonable degree of medical certainty" that grievant's use was

consistent with what he understood grievant to have admitted while on the way to the testing facility, *i.e.*, that he last used "yesterday," and therefore was impaired at the time of the accident. Scientifically speaking, Dr. Niemiec testifies that it is practically impossible, regardless of body mass, for a sporadic user to test at 115 ng/ml without having used within the day. Further, Dr. Niemiec notes the absence of reports that grievant exhibited "gross" or outward signs or symptoms of impairment, but explains that, medically speaking, an individual can remain impaired without exhibiting such signs or feeling any euphoric effects. Together with his understanding that the accident resulted from poor judgment and that grievant had difficulty locating his locker and then insisted on driving himself home rather than to accept the ride offered by the Company, Dr. Niemiec concluded that grievant was impaired at the time of the accident.

Additional evidence demonstrates that grievant treated for a time with the Company's Employee Assistance Program ("EAP"), but did not complete the treatment. Grievant explains at hearing that he was unable to continue attending the EAP due to his financial circumstances and corresponding lack of time.

At hearing, the Company supported Dr. Niemiec's testimony with that of Dr. Jerrold Leikin, a Board-certified Medical Toxicologist offered as an expert. 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 when he reported for work, which is to say, "impaired." Specifically on the question of grievant's failure to exhibit any outward signs of impairment at relevant times, Dr. Leikin testifies that field sobriety tests are notoriously unreliable indicators of marijuana use, which is the rationale for urine testing. As did Dr. Niemiec, Dr. Leikin testifies that marijuana impairment lasts for up to 24 hours after use, long after the euphoric effects are gone, and that grievant's test result of 115 ng/ml

indicates marijuana use within 24 hours of the test, meaning he was impaired at the time of the accident.

Ultimately, the Company decided to terminate grievant's employment on the basis of grievant's poor judgment in relation to the accident and the positive drug test result, which together with medical evidence demonstrated to the Company that grievant was impaired while working. The instant grievance and this proceeding followed.

THE PARTIES' CONTENTIONS

The Company argues that although no single factor is determinative, the case nevertheless is straightforward, in that grievant, a short-term employee, used poor judgment in moving the train without awaiting assistance, and then proved to be impaired at the time as shown by the drug test and medical evidence. The Company argues that grievant's conduct is egregious, especially in light of the dangerous environment in which he works. The Company notes also that grievant failed to complete his EAP treatment, and therefore cannot show that he is entitled to reinstatement.

The Union argues that grievant attempted to work safely, but was set up for failure due to the difficulty and rarity of the move, and also argues that the Company has not demonstrated that grievant was "knowingly impaired" while working, which it claims is the standard of Art. 3.G.5 of the Basic Labor Agreement. The Union challenges the testimony of Dr. Niemiec, arguing that he never spoke to grievant on the day of the accident and did not understand the difficulty of the movement in question. Further, the Union argues that the Shift Supervisor did not testify, and that there is no evidence that grievant exhibited any signs or symptoms

of impairment. Relying on precedent, the Union argues that there is not just cause for grievant's termination, and he must be made whole for his losses.

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."

In support of grievant's discharge, the facts demonstrate that grievant was involved in an accident that warranted the Company's action in sending him for a drug and alcohol test pursuant to Art. 3.G.2. That test proved positive for marijuana metabolites at a level of 115 ng/ml, well above the confirmatory cut-off level of 15 ng/ml. Both Drs. Niemiec and Leikin testify without contradiction that, scientifically speaking and to a reasonable degree of medical certainty, that level of metabolites demonstrated that grievant was impaired at the time of the accident, in that he remained, as Dr. Leikin credibly testified, at an increased risk of being involved in an accident. Both doctors base their conclusion on testimony that grievant, who admits to being a sporadic user of marijuana, used marijuana within 24 hours of his test, and therefore was impaired while at work even if he did not still feel the euphoric effects of the drug. Although the Union maintains that grievant last used the drug four days prior to the accident, there is no evidence to contradict the doctors' testimony that grievant's account is medically implausible, and

consistent with their understanding that he actually last used the drug the day prior to the accident.

The Company further supports grievant's discharge on the basis of his role in the accident underlying his drug test. Although the Union argues that grievant's assignment was a difficult one that he did not know how to perform safely, and that he tried to work safely, the record supports the Company's conclusion that grievant exhibited poor judgment by proceeding with the movement without having received the help he knew to request. It is fortunate that grievant caused no personal injury in an area where employees previously have been struck by locomotives, but that fortuity provides no defense to his poor judgment in proceeding under circumstances that he himself believed required assistance.

There is further evidence of questionable conduct by grievant after testing, in terms of his inability to locate his locker and his subsequent decision to drive home instead of accepting a ride. While the Arbitrator is not persuaded that those incidents lend much weight to the Company's case, at best they are neutral, in that neither provides any basis for discounting the validity of the drug test result or the Company's finding that grievant exhibited poor judgment in connection with the accident.

There also is evidence that grievant was provided an opportunity to seek treatment through the Company's EAP, but he did not complete his program. Grievant offers reasons for his failure to complete his treatment, but those reasons do not excuse his conduct in reporting for work while impaired, and he cannot demonstrate any arguable entitlement under the Basic Labor Agreement to rehabilitation in lieu of discharge where, as here, he failed to complete his program.

The Union argues on grievant's behalf that the Company has not shown that grievant worked "while knowingly impaired," as stated in Art. 3.G.5. Even if true that grievant was not knowingly impaired – a conclusion the Arbitrator does not

reach – that would not provide sufficient basis for disturbing grievant's discharge. As the Company argues, Art. 3.G.5 establishes its right to "discipline Employees for violation of plant rules ***or*** for working ... while knowingly impaired." (Emphasis added.) Based on the record as a whole, the Company makes a persuasive case that grievant was impaired while on Company property due to his use of marijuana, which provides cause under Rule 2.B for discipline up to and including discharge. Having shown a violation of plant rules, the Company had no further obligation to show that grievant worked while knowingly impaired.

As for the level of discipline, grievant was a short-term employee and his offense is a grave one, noting especially that he was responsible for moving a locomotive through a steel plant, in an area where pedestrians have been struck. The Company has an obvious interest and obligation to provide a safe workplace, and the Union likewise is committed to supporting a safe workplace consistent with contractual requirements. The decision to discharge a short-term employee found to have been impaired while at work, without any showing by the Union that such discharge action is inconsistent with any more lenient approach taken with respect to any similarly situated employee, is reasonable and will not be disturbed.

Finally, the Union's case citations do not persuade the Arbitrator to a contrary result. In particular, the Arbitrator notes the decision in *Inland Steel Company and USA, Local 1010*, Award No. 960 (Vonhof 1998), but its facts differ too greatly to provide any guidance here. 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, two doctors with specialized knowledge in the relevant field testified to a reasonable degree of medical certainty that grievant was impaired while at work, and there is insufficient basis in the record for discrediting that testimony.

The decision in *International Steel Group and USW Local 9481*, In re: Robert Common (Dilts 2004), also is not helpful here. In that case, the arbitrator found that the Company's rules unambiguously required progressive discipline for employees who "simply reported impaired," as compared to summary termination for those who "bring or use alcohol" on Company property. Since the grievant in that case "simply reported impaired," and did not bring or use alcohol on Company property, the arbitrator found that the Company rule did not permit his termination. Unlike the record before Arbitrator Dilts, there is no discrepancy in work rules in this case such as would require the imposition of progressive discipline in grievant's case.

Finally, this case is not controlled by the Award in *Ormet Primary Aluminum Corp. and USWA, Local 5724*, Grievance No. 769 (Witt 2003). Critically, in *Ormet*, Arbitrator Witt relied on testimony from the employer's Medical Director that, "in his medical opinion he could not say, based on the urine test results alone, that Grievant was impaired while he was working ... because the test shows only metabolites of marijuana indicating use of the drug at some prior time," and that, "an employee under the influence will have altered reactions to things around him." Award at 3. Further, Arbitrator Witt concluded that, "there may be arbitration cases that find that a positive drug test showing high levels of the metabolites of cannabis are indicative of impairment, [but] the great weight of scientific literature on the subject disagrees." Award at 6. This Arbitrator is constrained to decide this case on the record before him, without regard to the very different record before Arbitrator Witt. Here, the Company's Medical Director, Dr. Niemiec, and an expert, Dr. Leikin, testified that the test results, considered in context of grievant's claim that

he was a sporadic user and the nature of his accident, showed use within 24 hours and that he was impaired while at work. Further, they testified that drug testing is used precisely because observational evidence of impairment, found lacking by Arbitrator Witt, is notoriously unhelpful in marijuana cases. Further, there is no scientific literature in this record to discount the testimony of either Dr. Niemiec or Dr. Leikin, such as would align the facts of this case with those before Arbitrator Witt. Thus, although it is undisputed that grievant's use was off-premises, the evidence is that he reported while impaired, providing the necessary nexus for the Company to regulate the use.

DECISION

The grievance is denied.

Andrew M. Strongin, Arbitrator

Takoma Park, Maryland