BEFORE
ANDREW M. STRONGIN
ARBITRATOR

July 6, 2021

In the Matter of the Arbitration between-	:	
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CLEVELAND-CLIFFS STEEL LLC,	:	Case 121
INDIANA HARBOR	:	
	:	
-and-	:	**Grievance No. CT-20-05**
	:	
UNITED STEEL, PAPER AND FORESTRY, RUBBER,	:	
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL	:	
AND SERVICE WORKERS INTERNATIONAL UNION	:	

APPEARANCES:

For the Employer:

Christopher W. Kimbrough
Sr. Representative, Labor Relations
Cleveland-Cliffs Steel LLC – Indiana Harbor
3210 Watling Street, Office 3-1-87
East Chicago, Indiana 46312

For the Union:

Jacob Cole
Dist. 7, Sub-Dist. 5 Staff Representative
1301 Texas Street
2nd Floor, Room 206
Gary, Indiana 46402

This grievance protests the February 5, 2020, termination of grievant Douglas Webb, a Crane Operator working in the West Coating and Finishing Department of the Company's Burns Harbor facility, for falsifying a urine specimen during post-accident drug testing, and then testing positive for the presence of marijuana metabolites upon the testing of a second sample, which contributed materially to the Company's conclusion that grievant knowingly worked while impaired. The Company maintains that either offense, singly or together, provides just cause for grievant's discharge under Art. 5.E.3.d(3) of the 2018 Basic Labor Agreement ("BLA"). The parties stipulate that this case raises the initial question whether the Company had the right under the 2018 BLA to send grievant for the post-accident drug testing at issue. If so, then the Union does not challenge the Company's allegations that grievant falsified a specimen sample, then tested positive for marijuana, and knowingly worked while impaired on the day in question. The Union raises the further question whether grievant nevertheless had the right to an opportunity for rehabilitation under Art. 3.G.5 of the 2018 BLA.

As of January 2014, grievant had been working for the Company for about seven and one-half years. Prior to the incident in question, grievant had no prior accidents, near-misses, or close-calls as a Crane Operator. On January 14, 2014, grievant was operating the South Coil Storage Crane, an overhead bridge crane, to lift coils off trucks for storage. The coils weigh approximately 15-20 tons each. As an overhead bridge crane, the Crane Operator works in a cab affixed to the crane bridge, which can move or "bridge" in a north/south direction along what is described as a single-lane passline. Suspended from the bridge is a C-Hook, which can be raised and lowered, rotated 360-degrees, and moved or "trolleyed" east or west along the bridge to permit the Crane Operator to hook coils on truckbeds, lift

them, and then move them to storage fields located on the east and west sides of the passline.

The standard protocol for performance of this crane work is set forth in a document entitled, "Removing Coils From Trucks in Coil Storage Field." In operation, the driver enters the field after passing a sign that reads, "Danger: Drivers must exit cab and be clear of truck before coils are loaded or unloaded." The driver then enters the passline, parks in the appropriate location and turns off the engine. Under the heading, "Positioning Hook," the Operator is warned in Sec. 2.1 to "Make sure driver has exited vehicle and stands at front corner of cab or in driver shanty." The directive then describes the procedure for hooking the coil. In a section entitled, "Lifting Load," the Operator is directed how to lift the load. In Sec. 3.2, the Operator is directed to "Move the coil to desired location," and Sec. 3.2b specifies: "*Ensure truck driver is in a safe location before lifting coil.*"

Then-West Coating and Finishing Division Manager Bob Vander Zee testifies that these coil unloading operations are routine, performed as often as 500 times per week. He testifies that Operators must verify the driver's location before lifting a coil and must not operate the hook around the truck cab. He emphasizes that although the C-Hook must be lowered below the top-height of the trucks to place the coils on the ground, the hook should be raised above the top-height of the truck when crossing the passline to ensure the safety of the driver and to prevent damage to the vehicle. He testifies, too, that the hook should not be moved around trucks unless the Operator knows where the driver is located, stating that there typically is no signal between the Operator and the driver.

According to grievant, the standard procedure – or at least his standard procedure – following each coil placement is to return the C-Hook to what he describes as the "center" or "home" position, directly in front of the Crane cab at the

Operator's eye level. Thus, if a coil is placed in the East field, the C-Hook must be removed from the coil, lifted and moved over the passline, and directed to the west side of the bridge. Grievant acknowledges that the hook should be raised high enough – and can be raised high enough – to avoid striking a vehicle in the passline. Grievant adds that, once a move is completed, if he sees the driver on the ground near the truck, he typically will use a hand signal to indicate the driver is clear to reenter the truck and leave the passline. If he sees the driver enter the shanty, grievant says that he typically will sound his horn to alert the driver that he is free to depart.

The incident in question happened after grievant removed a coil from a truck and placed it in the East field. Grievant is the only eyewitness to testify. He says that he watched the driver exit his vehicle and proceed to the shanty, after which he lifted the coil, placed it in the East field, and as he returned the hook to center by trolleying it from east to west over the passline, the truck drove off and struck the hook, damaging an articulated, retractable tarpaulin cover at the rear of the trailer. Grievant testifies that he performed the move pursuant to his normal practice and never saw the driver return to the truck cab. He insists that he never would have unloaded a coil with the driver in the cab, and that the accident never would have happened if the driver had not moved the truck prematurely. Grievant immediately reported the accident to his supervisor, Shift Manager Rod Siple, who directed him to safeguard the crane and report to the office. Grievant did so, at which point he was directed to submit to a Fitness to Work ("FTW") test, including drug and alcohol testing.

The Company's account of the incident is provided by Vander Zee, Siple being unavailable to testify. Vander Zee states that Siple reported to him – as he did at the Step 3 hearing, where he was subject to examination by the Union –

that he reported to the scene of the accident shortly after grievant reported it, noted his observations, and then conferred with Vander Zee, who testifies to his understanding that as the truck began to drive away, it struck the hook, which was hanging too low over the passline, damaging the truck's cover. Vander Zee could not testify whether the hook was moving at the time of the accident, noting that the driver apparently stated that he drove off only when grievant stopped moving the hook, but asserts that either way, the hook should not have been below the top of the truck. He states that grievant should either have raised the hook above the height of the truck before passing over the top of the truck, or he should have moved the hook ahead or behind the truck to some safe location where he could have crossed over the passline without incident.

Art. 3.G.2 of the 2018 BLA allows the Company to subject bargaining unit employees to drug and alcohol testing in certain prescribed circumstances, including the following: "Employees involved in an accident will be tested only when an error in their coordination or judgment could likely have contributed to the accident."

Vander Zee acknowledges this standard for post-accident testing and testifies that he directed Siple to send grievant for such testing because grievant's movement of the hook across the passline beneath the top-height of the truck was a risky move, not standard, demonstrating an error in coordination or judgment, contributing to the accident. In reaching that conclusion, Vander Zee acknowledges that, other than learning of the driver's report, the Company did not interview the driver of the truck next in line in the passline or any employee on the ground in the vicinity. Vander Zee acknowledges that, on the form supporting the decision to direct grievant to FTW testing, there is a section soliciting the supervisor's assessment of the employee's "Coordination, judgment, and mannerisms (departure

from employee's normal behavior)." Siple checked "Risk taking," but did not check "Error in coordination" or "Poor judgment." Neither did Siple check any box relating to observed impairment, such as confusion, disorientation, gait, etc.

As noted, the Union does not contest the Company's allegations that grievant falsified a specimen sample; then tested positive for marijuana; and knowingly worked while impaired on the day in question. On those bases, which Vander Zee testifies would be grounds for discharge singly or together, the Company determined to discharge grievant. The grievance and this proceeding followed.[1]

At hearing, Vander Zee and grievant disagree as to whether grievant exhibited any remorse relating to this accident. Grievant, for his part, insists that he was brought nearly to tears by the Company's presentation at Step 2, as he felt the Company maligned his character. He insists that he values his job and desires reinstatement. Grievant also testifies that he voluntarily entered rehabilitation through the Company's EAP provider and no longer uses marijuana, which the Company counters with the assertion that grievant has refused to share any documentation of his attendance or completion of any such program.

The parties' principal contentions may be summarized as follows:

The Company contends that sufficient cause supports grievant's discharge, as his risky behavior against a record of no prior incidents warranted the referral to drug testing, and his falsification of a urine sample and subsequent positive test demonstrates that he knowingly worked while impaired. The Company

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[1] The Union contends that the Company failed timely to provide the Union with the Minutes of the Step Two meeting, arguing that the grievance must be sustained on that basis. The Union admits, however, that the parties were lax with such time limits, as a result of which the Union notified the Company – after this case – that it intended to enforce time limits in the future. In light of the evidence that time limits were not enforced at relevant times, and absent evidence that the Company's delay in providing the Minutes strictly precluded the Union from moving the case forward, the Company's delay is not a sufficient basis for granting the grievance.

emphasizes that grievant's falsification of the sample, especially, should preclude any reinstatement, because the Company cannot trust grievant to work in such a dangerous environment given his premeditated conduct in carrying a false sample in the event of testing.

The Union contends that the accident did not provide adequate cause to send grievant for testing pursuant to Art. 3.G.2, noting especially the Company's failure to establish the cause of the accident or to interview any witnesses. The Union argues, too, that risk-taking is not the contractual standard for drug testing and does not rise to the level of an error in coordination or judgment. The Union emphasizes that there is no showing here that grievant violated any operating or safety rule or committed any unsafe act. Accordingly, the Union insists that the facts and circumstances of the drug test cannot be considered. In any event, the Union argues that grievant should have been provided an opportunity for rehabilitation notwithstanding the circumstances and results of that testing.

The principal question at issue is whether the Company has established that grievant committed an error in coordination or judgment that could likely have contributed to the January 14 accident. The Union is correct that not every accident provides cause for post-accident drug testing. Post-accident testing is permitted under Art. 3.G.2 "only when an error in their coordination or judgment could likely have contributed to the accident." For the reasons that follow, the Arbitrator finds that the Company has met its burden of proof and that it was justified, therefore, in sending grievant for post-accident drug testing.

Although the Company's investigation could have been more thorough, it was sufficient to demonstrate, without contradiction, that grievant violated two basic safety protocols in relation to this accident. Evidently, grievant failed to ensure that the driver remained outside his vehicle during the crane operation, and failed to

ensure that the hook was above truck height. Grievant attempts to deflect responsibility for the accident to the truck driver, whom he says re-entered his truck and moved it prematurely, causing the accident by driving into the low-hanging hook. That may be so, but that explanation ignores grievant's primary responsibility for safe operation of the crane, independent of the truck driver's responsibilities.

The record supports the Company's inference that grievant's two violations of safety protocol amount to judgment errors. The BLA does not define "judgment error" for purposes of post-accident testing, and the Arbitrator therefore interprets the term consistent with its customary usage, *i.e.*, poor decision making. As the record shows, grievant was operating under normal conditions at the time of the accident, under which conditions cranes routinely operate without incident or accident, as often as 500 times each week. There is no indication of any unusual circumstance, such as time pressure or visibility obstruction, to interfere with what should be normal, safe crane operation. Grievant may have believed he was operating safely pursuant to protocol, but circumstances show that he was not sufficiently attentive to the operating conditions. Grievant, perhaps best positioned to explain what occurred, essentially admits that the driver reentered his truck without grievant noticing, and that he positioned the hook too low over the passline to provide clearance for the truck when it moved. Grievant may be correct on this record that the immediate cause of the accident was the truck driver's premature departure from the passline, but grievant ignores his own precipitating decisions and cannot point to any good reason or excuse for his failure to adhere to the two safety protocols at issue, whether due to inattentiveness or otherwise. Ultimately, there is nothing to explain why grievant failed to ensure the driver was out of his vehicle and that the hook was high enough to avoid contact with the truck, and the Arbitrator

finds reasonable the Company's attribution of those two departures from protocol to poor judgment by grievant during his crane operation.

Further, although the Company never reached the point of conducting a full investigation into the accident causation, it reasonably concludes on this record that grievant's judgment errors likely contributed to the accident. The simple fact is that the accident would not have occurred if grievant had met his responsibilities under the safety protocol. As grievant states, the truck moved prematurely and struck the hook, but that just underscores grievant's failure, first, to ensure the driver remained outside the vehicle and that the hook was positioned above truck height.

Neither is the Arbitrator persuaded to the contrary by the Union's showing that grievant's Shift Manager, Siple, initially attributed the accident to "risk taking," rather than "poor judgment," without noting any other observations of impairment. A Shift Manager's notations on the Fitness to Work Checklist, or lack thereof, are a relevant consideration, but not necessarily controlling. Siple was not available to testify, but the Company evidently sent grievant for a post-accident drug test precisely because it believed that action to be warranted. It is not reasonable on this record to presume that Siple intended or understood that by checking "risk taking" rather than "poor judgment" on that form, Siple meant to concede that the Company lacked justification under the BLA to send grievant for post-accident drug testing. Vander Zee, as noted, testifies that the Company specifically meant to send grievant for post-accident testing due to its concern that grievant's inexplicable risk taking suggested poor judgment.

Based on the foregoing findings there is no challenge to the Company's determinations that grievant falsified a specimen sample, then tested positive for marijuana, and knowingly worked while impaired on the day in question. It remains

only to consider whether, despite this record, grievant nevertheless was entitled to rehabilitation in lieu of discipline by virtue of Art. 3.G.5 of the BLA.

By its terms, Art. 3.G.5 provides as follows: "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 working ... while knowingly impaired." Critically, this provision applies to all testing under the BLA, not just post-accident testing. Although the provision expresses a general rule of rehabilitation in lieu of discipline for those employees "found through testing to have abused ... drugs," it contains a clear exception for those working while knowingly impaired. As the provision states, the Company's limited agreement to offer rehabilitation in lieu of discipline to certain employees "does not affect" the Company's right to discipline employees who work while knowingly impaired.

At hearing, when the Company expressed the intention to rely on grievant's medical records to demonstrate that grievant worked while knowingly impaired, grievant refused voluntarily to waive his privacy rights regarding those records. A discussion ensued, including over the potential impact of that refusal on grievant's request for reinstatement under Art. 3.G. The parties agreed to respect grievant's decision and consequently agreed that if the Company was found to have cause to send grievant for post-accident testing under Art. 3.G.2, there would be no challenge to the Company's intended proof that grievant "knowingly worked while impaired on the day in question." Based on that submission agreement, having found that the Company was justified in sending grievant for post-accident testing, the Arbitrator is constrained to find that grievant worked while knowingly impaired on the day in question. Therefore, by the plain terms of Art. 3.G.5, grievant's limited rehabilitation right "does not affect" the Company's right to discipline him.

In the final analysis, the Company was within its rights in referring grievant for post-accident drug testing on January 14, 2020, and then terminating his employment upon discovery that he falsified a first urine specimen and then tested positive for the presence of marijuana metabolites upon the testing of a second specimen, under circumstances where there is no challenge to the Company's contention that at the time of the accident grievant was working while knowingly impaired.

DECISION

The grievance is denied.

Andrew M. Strongin, Arbitrator

Takoma Park, Maryland