BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 43

and

LLOYD TRANSPORTATION

Case 4
No. 57566
A-5766

Appearances:

Harvey, Pennington, Cabot, Griffith & Renneisen, Ltd., by **Attorney Christopher J. Murphy**, 11 Penn Center, 29th Floor, 1835 Market Street, Philadelphia, PA 19103-2989, appearing on behalf of Lloyd Transportation.

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan**, P. O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Local 43.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Union Local No. 43 (hereinafter referred to as the Union) and Lloyd Transportation, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator of a dispute over the termination of employes J*C* and B*D*. A hearing was scheduled for February 24, 1999, at the Company's offices. Prior to that hearing, the Company sought a ruling on hearing procedures to protect the anonymity of employes who were to testify on the Company's behalf. The stated rationale for the protective measures was the other employes' fear of reprisals by the grievants, though not by the Union. A conference call was held with counsel for the parties, and in the course of that call counsel for the Union raised objections to the Company's citation of various grounds for termination which were raised for the first time after the initial decision to discharge the two workers, and asked that they be excluded from the record of this hearing. The hearing was rescheduled for April 16th and a briefing schedule was established on the Motions. The parties submitted briefs, the last of which was received on March 17th. On March 24th, the arbitrator faxed the parties a ruling on the Motions, finding that the Employer was not precluded from presenting evidence on all of the charges of misconduct, and ruling that witnesses could be heard in the absence of the grievants, but that the evidence would be summarized in a redacted form and made available to the grievants and counsel for the Union before any cross-examination. The arbitrator also ruled that any such evidence would be treated as hearsay.

Hearings were held on April 16th, July 6th and July 7th at the Company's offices in Bristol, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A site visit was conducted at the end of the day on the 7th. The parties submitted post-hearing briefs, which were exchanged through the undersigned on November 11, 1999, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The issues before the arbitrator are:

1. Was the grievant J*C* discharged for just cause? If not, what is the appropriate remedy?

2. Was the grievant B*D* discharged for just cause? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 4. ABSENCE

Alcohol and Drug Use

A. Leave of Absence – Alcohol and Drug Use

An employee shall be permitted to take a leave of absence for the purpose of undergoing treatment, pursuant to an approved program for alcohol or drug use. The leave of absence must be requested prior to the commission of any act subject to disciplinary action.

The Employer shall give between thirty (30) and sixty (60) days prior written notice to an employee of the Employer's intention to request a test for drug use during a DOT physical examination. The employee may, within five (5) days of receipt of such written notice make a written request for a leave of absence.

Such leaves of absence shall be granted on a one-time basis and shall be for a maximum of sixty (60) days, unless extended by mutual agreement of the parties. While on such leave, the employee shall not receive any of the benefits provided by this Agreement, except the continued accrual of seniority, nor does this provision amend or alter the disciplinary provisions.

Employees requesting to return to work from a leave of absence for alcohol or drug use may be required to be tested by the Employer. An employee who refuses to take the test shall be admitting guilt and his employment shall be terminated and he shall have no recourse under this Agreement.

B. The provisions of this Section shall not apply to probationary employees.

C. Random Alcohol/Drug Testing Policy

Rule #1:

(1) Where an employee is notified by the Employer to submit to Random Testing under Department of Transportation ("DOT") guidelines, the employee shall be compensated for actual time spent at the collection site not to exceed one (1) hour. In cases where actual time spent exceed one (1) hour through no fault of the employee, such situation shall be subject to the grievance procedure.

(2) It is also recognized that the Employer shall have the right to establish controls to monitor time spent at the collection site.

(3) The procedures identified in this Rule #1 shall apply when the Employer notified the employee to submit to random testing either prior to the start of a shift or tour of duty; or after the employee completes a tour of duty or ends a shift.

Rule #2:

(1) Where an employee is notified by the Employer to submit to Random Testing under DOT Guidelines during periods other than those identified in Rule #1, then all time spent shall be compensable to the employee including travel time to and from the collection site.

(2) Compensable time under this Rule #2 shall also include time spent where the employee is required to submit to Random Testing during periods the employee is in on duty status.

Rule #3:

Where the Employer utilizes the terminal as the collection site, the employees shall not be entitled to compensation for the time spent submitting to Random Testing.

Rule # 4:

(1) The parties recognize there are terminals located in areas where there are no accessible collection sites. In those areas, the employee shall be compensated in accordance with Rule #1 where such collection site is not at a distance further than where the regular DOT physical examination is performed.

(2) In instances where the Employer does not provide a collection site under the provisions of this Rule #4, then the employees shall be compensated for the travel time in excess of the location where the normal DOT physical examination is performed, in addition to personal automobile mileage for the distance in excess of the location where the normal DOT physical examination is performed.

D. Return to Employment after a Positive Test in a DOT Recurrent Examination

(1) Any employee testing positive for drugs in a DOT recurrent physical examination, thereby subjecting the employee to discipline, shall be granted reinstatement on a one (1) time basis if the employee successfully completes a program of evaluation and, if necessary, treatment as approved by the applicable Health and Welfare fund. Any cost of rehabilitation, over and above that paid for by the applicable Health and Welfare fund, must be borne by the employee. This provision shall apply to random and post-accident urine drug testing if and when they become applicable.

(2) Employees electing the evaluation/rehabilitation process must notify the Employer within ten (10) days of being notified by the Employer of a positive urine drug test. The employee must begin the evaluation/rehabilitation process within fifteen (15) days after notifying the Employer. The employee must request reinstatement promptly after successful completion of the rehabilitation program. Evaluation and rehabilitation, if necessary, will require a minimum of ten (10) days before the employee may request reinstatement. An employee who chooses to protest the discharge must timely file a protest. After the discharge is sustained, the employee must notify the Employer within ten (10) days of the date of the decision, if he wishes to enter the evaluation/rehabilitation process.

(3) While undergoing treatment, the employee shall not receive any of the benefits provided by this Agreement, except continued accrual of seniority.

(4) Upon being reinstated, the employee will be subject to three (3) additional tests for drugs without prior notice, with two (2) tests to occur within six (6) months of the employee's return to employment, and third (3rd) test to occur within six (6) to twelve (12) months after the employee's return to employment. A positive test result or refusal to submit to testing shall result in discharge without the receipt of prior warning letter.

This policy shall be complied with by all parties in a cooperative manner in order to ensure the orderly implementation and compliance with 391.109, as it now exists or as it may be amended by the Federal Government.

. . .

ARTICLE 10. DISCHARGE OR SUSPENSION

The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Union. To be valid, warning letters must be sent to the employee and the Union within ten (10) days of known violation. Except, that no warning notice need be given to an employee before he is suspended if the cause of such discharge or suspension is dishonestly or drunkenness, which may be verified by a sobriety test (refusal to take a sobriety test shall establish a presumption of drunkenness); or taking, being under the influence of, addiction to, or possession of controlled substances and/or drugs, either while on duty or on Employer property; recklessness resulting in serious accident while on duty, or carrying of unauthorized passengers, or falsification of employment applications or DOT required driver certification documents. The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice. Discharge must be by proper written notice to the employee and the Union. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that injustice has been done (sic) an employee, he shall be reinstated.

BACKGROUND

The Company is an affiliate of Quality Carriers, Inc. and Montgomery Tank Lines, Inc. It operates a trucking business in southeastern Wisconsin, hauling liquid freight. The Union is the exclusive bargaining representative for the Company's employes. The grievants, J*C* and B*D*, were employed as truck washers until they were discharged for positive results on "random" drug tests in mid-August of 1998. J*C* had three years with the Company at that time, and B*D* had worked there for eight months.

On August 12, 1998, the grievants and one other employe were directed to submit to drug tests at a local clinic. At the time the Company Chairman, Jeff Lloyd, told them their names had been drawn out of a hat. The results came back two days later, showing that B*D* had tested positive for cocaine and J*C* had tested positive for marijuana. Both of them were discharged for failing the drug tests. The Union challenged the discharge decisions, alleging that the procedure used was not random, but was instead a sham aimed at these two employes. The Union also pointed out that a positive drug test does not constitute grounds for termination under the contract. Instead, the Company would be required to allow them to participate in rehabilitation and, if they were successful, reinstate them. The grievants did complete their rehabilitation programs, but the Company did not reinstate them. Instead, on September 14th it sent another termination letter, based on allegations of drug use on Company premises and on work time. On November 4th, J*C* was discharged for a third time, on charges of siphoning gas from Company vehicles. The grievances were all consolidated. Prior to the arbitration hearing, the Company disclaimed any reliance on the random drug tests as a basis for termination.

Before the hearing, the Company moved to have some testimony taken confidentially from witnesses who feared retaliation from the grievants. The arbitrator approved the request, with conditions. At hearing, the Company presented the testimony of James Gumm, seven confidential employe witnesses, Company President Jack Lloyd, Vice-President Jeff Lloyd and Payroll and Insurance Manager Dennis Dunn. The Company also called Union Business Agent Jerry Jacobs and both grievants, adversely.

James Gumm testified that he had worked for the Company for nine years, and was the second shift supervisor at the time of his forced resignation. He said he had used cocaine while he was an employe, and that he had used the drug with both grievants at work, on work time, in the supply room. Gumm had initially denied having a drug problem when Jeff Lloyd asked him about it in August of 1998. However, by the time he was called to Milwaukee to meet with Lloyd and the Company's attorney, he was losing his family because of his drug use, and he decided to come clean with Lloyd. He admitted his drug use and that of the grievants, and resigned his job.

In summary, the confidential employe witnesses testified on direct examination as follows:

> J*C*, Gumm and another employee used cocaine every payday between New Years Day of 1998 and May of 1998. The employees generally used the drugs in the wash rack bathroom or in the tote room in the early evening hours, after the office staff had gone home.
>
> In the spring of 1998, J*C* used cocaine with a recently retired employee named Dimas in the parts room, using a small rectangular mirror, a straw and a razor blade. Sometimes they would use rolled-up currency rather than a straw.

J*C* sold cocaine to other employees, claiming that Gumm was his source. In the spring and summer of 1998, Gumm was seen distributing baggies containing white powder to Dimas and J*C* near his car by the yard's smoking area.

J*C* and B*D* regularly used cocaine in the bathroom of the wash rack office on Fridays, snorting the drug off magazines or shiny cardboard. J*C* openly spoke of selling the drug, explaining that he cut it with Vitamin E to make it go farther. In this way, he was able to get his drugs for free. J*C* wrapped small quantities of the drug in shiny paper ripped from a calendar in the office. Larger quantities were kept in baggies.

J*C* named Gumm as his supplier, and he specifically identified an employee named Jerry in the body shop as a client. On one occasion in the mid-summer of 1998, J*C* said he was going to sell some drugs to this man, took a baggie containing a quarter-sized ball of white powder with him, and returned with a quantity of cash.

J*C* was also in the habit of smoking marijuana on Company premises, near the receiving tank. For his part, in addition to regularly using cocaine, B*D* sold marijuana to another employee in the wash rack office in the winter of 1997-98. He also asked that employee several times if he wanted to buy cocaine, though he did not pressure him to do so. Theses offers were made in the course of general discussions between B*D* and J*C* about obtaining drugs. J*C* was more aggressive than B*D* in trying to sell cocaine, and sold cocaine to this employee six or seven times. The employee had previously done lines of cocaine with B*D* and J*C*. This drug use usually occurred at 5:00 or 6:00 p.m. in the bathroom of the wash rack, with the cocaine placed on top of the toilet paper canister. The cocaine was identified as belonging to J*C*.

On cross-examination 1/, one confidential witness admitted using drugs on Company time and Company property and said he had told Jeff Lloyd this several days before the arbitration hearing commenced. He testified that he had seen J*C* and B*D* using drugs at the Company. He had previously told Jerry Jacobs that he had not done drugs and was not aware of any drug problem at the Company related to J*C* and B*D*. He had not been disciplined, nor had he been tested for drugs since he started work. One confidential witness said he had never actually seen anyone siphoning gas from Company vehicles, but that he had heard rumors about it and had seen J*C*'s car parked on both sides of a truck that had gas tanks on both sides. When the siphoning problem came to light, he commented to others that it was pretty obvious who was doing it, referring to J*C*.

1/ The narrative of the cross-examination does not necessarily group the testimony of each witness on a sentence by sentence basis.

Dennis Dunn testified that he is the Company's Payroll and Insurance Manager. On Saturday, August 8, 1998, he was in the dispatch office at mid-morning when he observed J*C* walking slowly across the yard. J*C* entered the drivers' room and Dunn told him he didn't seem to moving too well. J*C* replied that he had had a short night, and only got home at 4:00 a.m. Dunn replied that it was going to be a long day. Later in the day, J*C* suffered a sprain of the back and the left shoulder. Dunn checked J*C*'s time card and saw that he checked into work at 6:50 a.m. He reported the conversation to the Company's workers' compensation insurance carrier. He could not recall whether he also reported it to Jeff Lloyd.

Jack Lloyd testified that he is the Company's President and that he participated in the meeting during which J*C* was told he was being discharged for failing a random drug test. Jack Lloyd denied telling J*C* during that meeting he was glad he had tested positive for marijuana instead of cocaine, and denied that J*C* told him he had smoked marijuana with James Gumm. Jack Lloyd conceded that, even though he and Jeff Lloyd characterized the drug tests as random, they were in fact based on suspicion of J*C* and B*D* and were targeted at them.

Jeff Lloyd testified that he is the Company's Chairman of the Board and Vice-President in charge of all day-to-day operations. In addition to the Company, he holds an interest in other businesses, including Custom Finishes. Custom Finishes is a heavy equipment refurbishing center located on the same grounds as Lloyd Transportation.

Lloyd testified that it was his decision to send J*C* and B*D* for a drug test. On August 10th, Dunn mentioned to him that J*C* said he was out late the night before his on the job injury. That same day, he received an anonymous call from someone, saying that it was ironic that Gumm, B*D* and J*C* were all absent on the same day. When he checked, he saw that all three were off sick. This made him suspicious that there might be a drug or alcohol issue with the three men, and he discussed the problem with his father, Jack Lloyd. Jeff Lloyd then determined to confront Gumm, and to send J*C* and B*D* for drug tests.

On the morning of the 12th, he had B*D* and J*C* tested. He told them their names had been pulled out of a hat for a random test, and he also sent another employe for testing to make it appear random. That same day, he confronted Gumm and asked him if his absence had anything to do with any larger problems, and also if he was involved in any improper conduct with B*D* and J*C*. Gumm denied that there was any problem, and Lloyd warned him that there would be severe consequences if they had to speak again. When B*D*'s test came back positive for cocaine and J*C*'s were positive for marijuana, Lloyd met with both men and gave them letters terminating their employment. Both men told Lloyd they wanted to go through rehabilitation as provided in the labor contract. Lloyd testified that he knew they had the right to do so, and that he would be obliged to reinstate them if they successfully completed rehabilitation.

According to Lloyd, his conversation with Gumm left him concerned that there might be a serious problem at the Company. He spoke with several employes on an off-the-record

basis, and they confirmed that there was drug use on the premises. Lloyd contacted his attorney, who advised him to conduct a full investigation into the matter. He spoke again with employes, but no one would agree to go on the record because they feared retaliation from J*C* and B*D*.

On August 25th, Lloyd met with J*C* for an off-the-record conversation at an area restaurant. J*C* confirmed that there was drug usage on the Company property, and that he, B*D*, Gumm and a retired employe named "Employe M" were involved. He told Lloyd that Gumm was bringing drugs in, cutting and weighing them out in the supply room and selling them.

Lloyd arranged for a room at the Grand Hotel in Milwaukee on September 4th, and had his attorney fly in and meet him there. They summoned Gumm and another employe for questioning. Gumm was questioned for about forty-five minutes, and he became very emotional. He admitted using drugs on Company property with J*C* and B*D*. At the end of the interview, he was allowed to resign and was told he could collect unemployment compensation. Another employe was interviewed after Gumm, and that employe told Lloyd that he had used drugs on Company property, that Gumm was the leader in selling drugs on company property, and that J*C* had also sold drugs on Company property. In the course of his interview, this second employe did not admit to selling any drugs on Company property, and he said that his personal drug use had ended some six months earlier.

Lloyd contacted Jerry Jacobs and arranged to meet with him. They met on September 8th, and Lloyd told him that there was a drug problem at the Company and that he needed assistance in dealing with it. In the course of the conversation, Lloyd dismissed the idea of more extensive drug testing, telling Jacobs that it might leave him without much of a work force. Nothing was resolved at this meeting.

On September 14th, Lloyd sent both grievants letters terminating them for violating Article 10 of the contract: ". . . taking, being under the influence of, addiction to, or possession of controlled substances and/or drugs, either while on duty or on employer property . . ." In the letters, he advised them that they would not be reinstated upon completion of the rehabilitation programs for the previous discharge. Lloyd explained at the arbitration hearing that he limited the discharges to the grievants because he had no evidence of any other current employes either selling drugs or currently using drugs.

When the grievants challenged the discharge letters, Lloyd told Jacobs that he had a great deal of evidence, including security videotapes of the grievants using drugs on company property. This latter claim was untrue, and when the Union demanded to see the videotapes, Lloyd did not respond to the request. Instead, he wrote to Jacobs and urged him to speak with the other employes on a confidential basis to confirm the Company's charges. He did this in hopes that the Union would decide not to pursue the grievances. Jacobs executed a

confidentiality agreement, and spoke with Company employes near the end of October. He did not relay the results of his conversations to Lloyd, nor did he make any suggestion that the Union believed the Company was retaliating against the grievants.

At about the same time that Jacobs was having his confidential meetings with employes, Jeff Lloyd met with Gerry Billen, who was a supervisor at Custom Finishes. Billen had requested the meeting. He admitted a drug problem and said that, in order to buy drugs from J*C*, he cashed a paycheck belonging to another employe of Custom Finishes. Billen told Lloyd that J*C* gave him the check, and told him he'd taken it from the office of Custom Finishes' president. J*C* told him to go cash the check and bring the money back. Billen did so, and J*C* gave him cocaine in return for the money. Billen said that he had used cocaine with J*C* on the premises of Lloyd Transportation in August of 1998. He also mentioned B*D* as having used drugs on one occasion. According to Lloyd, Billen agreed that, in return for a promise not to have him prosecuted, he would execute a written statement confirming what he had told Lloyd, would reimburse Custom Finishes, and would agree to testify against J*C* and B*D*'. Billen executed a statement for Lloyd on November 24th, and was terminated from Custom Finishes on November 25th. Even though he had agreed to appear and testify at the arbitration, Billen disappeared in mid-May.

After speaking with Billen, Lloyd received a telephone call from a mutual acquaintance asking him to reinstate J*C*. He called J*C* to explain why he would not be reinstated. He told J*C* that he believed he had siphoned gasoline from Company vehicles, and had stolen a microwave oven and an air conditioner, and had taken a check from Custom Finishes. J*C* denied stealing the microwave and the air conditioner, but admitted he had siphoned some gas. He explained that his wife only gave him a certain amount of money and that he was spending the money on drugs and didn't have money for gas. After this conversation, Lloyd fired J*C* for a third time.

Lloyd distinguished the treatment of the grievants from that of an employe named "Employe Z". "Employe Z" was hired as a mechanic. He had three drug tests. The first two came back showing the sample had been diluted, and the third was positive for marijuana. "Employe Z" was fired, but his foreman pled his case and Lloyd agreed to take him back if he completed a treatment program, passed a drug screen and agreed to frequent random testing. After his first two weeks of rehabilitation, Lloyd allowed him to start working again, and acknowledged that he wasn't sure that "Employe Z" actually completed the program and he never asked for any certificate of completion. He subsequently had severe attendance problems, and in November of 1998 asked for a leave for additional rehabilitation to deal with an alcohol problem. Lloyd was not sure if "Employe Z" had completed that program either, but he did pass a drug and alcohol screening before he returned to work. "Employe Z" was never subjected to random drug testing again after the first failed test.

Lloyd denied that there was any retaliation against J*C* or B*D* for OSHA complaints or Union activity, and noted that the OSHA retaliation claim was raised for the first time in late December of 1998, and was later dismissed by the agency. He conceded that B*D* had

been a very good employe, and characterized J*C* as an employe who had often been on the brink of discharge for misconduct, though he was not at the time of the drug tests.

Union Secretary-Treasurer Jerry Jacobs testified that he believed the Company used James Gumm to set-up both B*D* and J*C* for discharge as retaliation for filing OSHA complaints and for their involvement with the Union. Both men had been the moving force behind the OSHA complaint. Moreover, Jeff Lloyd had made statements about how being a Union steward was a good way to lose your job, and that B*D* had been the steward when he was fired. Jacobs said he did not realize that the anti-Union statement was made in a meeting of wash rack employes, and had not pursued an unfair labor practice charge because he felt it would be impossible to prove what he thought was a one-on-one conversation. Jacobs expressed the opinion that other employes with drug involvement had been given more favorable treatment than the grievants, including "Employe Z", who was hired despite a positive drug screen and had numerous drug and alcohol problems, as well as attendance issues, thereafter. Jacobs believed that the employes who testified against the grievants were subject to coercion by the Company. They seemed fearful when they spoke with him about the case in his confidential interviews.

Jacobs noted that Jeff Lloyd had changed his position and his rationale for these discharges several times. He initially claimed that these were random drug tests, but they were not triggered by the computer and they involved wash rack employes, who had never been subject to random testing. When told that employes had to be reinstated if they requested an opportunity for rehabilitation, Lloyd said they could come back if they completed the program. Later he switched positions and said they were the problem and they would never come back. At the same time, Lloyd conceded that if he tested everyone and fired those who tested positive, he wouldn't have enough employes left to do the work. Lloyd claimed that he had videotapes of the grievant using drugs, then could not produce those tapes when Jacobs demanded to see them.

B*D* testified that drug use was not necessarily widespread at the Company, but that he had seen James Gumm, "Employe Z" and "Employe X" using drugs at work. He denied that he had ever used or sold drugs on Company property, and said he had used drugs only once during his employment with the Company. That was two nights before his drug test, when Gumm appeared at his house just before midnight. While he worked at the Company, Gumm had often tried to persuade him to use drugs, and when he refused would assign him to bad jobs. The night of the 10th, Gumm came to his home with someone named Gus. He begged B*D* to talk with him, explaining that he was having trouble in his marriage and other personal problems. He let Gumm come in, and when Gumm put some cocaine on the table he made the mistake of using it with him. He did so because Gumm was a supervisor and he wanted to curry favor with him. The following day he felt terrible and did not go to work. When he did return the next day, Gumm told him that Jack Lloyd wanted to see him, and he was sent for a drug test.

B*D* said he was aware that other employes had testified in the arbitration hearing that he used drugs on Company property, and that employes had said the same thing about him to Jerry Jacobs and to OSHA inspectors. He expressed the opinion that they were being pressured by Jeff Lloyd, who had once boasted in front of employes that "if I don't want you around, you won't be here" and had commented that being a Union steward was a good way to lose your job. Lloyd wanted him fired because he had gone to OSHA with safety complaints. He conceded that OSHA had investigated and dismissed his retaliation claim, but opined that the agency had done a poor job.

B*D* testified that he had contacted OSHA about safety issues at the Company in May of 1998 and had acted as the steward for an OSHA walk-through inspection about a month after that. He said the talk around the shop was that he and J*C* were behind the inspection, and noted that a fine was levied against the Company just one or two days before he was drug tested.

After he failed the drug test, B*D* participated in the treatment program. About a week before he completed the program, Jeff Lloyd told him that if he completed the program and brought in a clean drug test he would be reinstated. Several days later, he received the second discharge notice.

B*D* testified that he had been unemployed from the time of his discharge until December of 1998, when he secured employment at a video store. He conceded that he had not included information on his criminal record on his application for employment at the video store, nor had he mentioned his employment at Lloyd Transportation. He said he had not read the application carefully, and had omitted Lloyd because the matter was in litigation.

J*C* denied ever using drugs on Company property, or ever telling Jeff Lloyd that he had done so. J*C* testified that he had spoken with Jeff Lloyd on August 18th, when he was initially discharged, and again on November 4th, when Lloyd accused him of stealing gasoline. He did not recall any meeting with Lloyd at a restaurant in late August and did not believe that he spoke with him at all from mid-August until early November.

J*C* stated that he had injured himself at work at about 2:00 p.m. on Saturday, August 8th when he fell off a paint tote. He went to a doctor on the 9th and was given some Vicodan, and then saw the Company doctor on the 10th, 11th and 12th. When he went in on the 12th, he was told that he had to take a drug test. He asked the nurse if it was random or a post-accident test, and she said it was random. He was concerned because at about 9:30 on the evening of the 11th, Jim Gumm had stopped at his house. This was unusual, since he and Gumm did not socialize with one another. Gumm asked how he was feeling, and he said he wasn't feeling very well. Gumm asked what drugs he'd been given for the pain. J*C* told him Vicodan, and Gumm asked if he could have some of it, then offered to smoke some marijuana with him. He and Gumm shared a joint, and Gumm left after 20 minutes or so.

On the morning of the 18th, Gumm called him at home and told him to come in for a meeting with Lloyds about his drug test. He didn't say anything to Gumm about their sharing a joint right before the test because Gumm was a member of management. J*C* met with the Lloyds that day, and was told he was being terminated for a positive drug test. He told them that he had the right to be reinstated if he completed rehabilitation, and they both seemed shocked by this. His impression was that they had not realized the labor agreement required reinstatement. Jack Lloyd told him he was relieved that it was marijuana and not cocaine, and that if he completed rehabilitation he could have his job back. He then told them that he had smoked marijuana with Gumm the night before the test. Both Lloyds seemed somewhat surprised to hear this, but neither of them reacted strongly.

After he and B*D* were both discharged, they discussed what had happened and realized that Gumm must have set them up to fail a drug test. J*C* speculated that the reason was his constant complaints about safety conditions and his involvement in calling in OSHA. According to J*C*, there were serious ongoing safety violations that Lloyd promised would be fixed, but would do nothing about. He was injured by chemicals several times, and there were obvious defects in some equipment. When OSHA was initially contacted, Lloyd found out almost immediately and Gumm told J*C* that he and B*D* were suspected of having made the report. Gumm told him that Lloyd had vowed to get the persons who had called OSHA, and that the Union didn't matter. Sometime shortly after the discharges, J*C* told Jerry Jacobs about the set-up, but he didn't know if Jacobs shared that information with the Lloyds.

J*C* acknowledged that he had a substantial criminal record and had been adjudged a habitual offender. Jeff Lloyd had once told him he preferred to hire criminals, and J*C* speculated that this was because there were so many illegal conditions at the Company that a criminal was unlikely to report. J*C* expressed the opinion that the employes who gave statements against him were afraid of losing their jobs, and that some others had been bought off by promotions and loans. He noted that one employe had received a loan of $2,000, while he had known Jeff Lloyd for 20 years before getting even a $500 loan from him. J*C* named five other employes, including Gumm, who had used drugs at work in his presence. B*D* was not one of them.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Employer

The Employer takes the position that there is clear and convincing evidence that the grievants engaged in the possession, use and sale of drugs on Company property and that this amply justified their discharge. At the outset, the Company asserts that the arbitrator should revisit his initial determination that the testimony taken anonymously from employe witnesses who feared retaliation from the grievants would be treated as hearsay. The arbitrator was

correct in initially adopting this approach, since it was premised on the idea that the grievants would not know who testified against them. However, it became clear that the Union breached its promise to keep the information confidential and that the grievants knew, in detail, who had testified and what had been said. Thus, they effectively did have the right to confront their accusers and assist in the preparation of cross-examination, exactly as if they had been present in the room during the testimony. Given the Union's evident bad faith, the arbitrator should dismiss these grievances, as a means of enforcing his prior rulings. Even if the arbitrator elects not to dismiss the grievances, he should, at a minimum, decide that the testimony of the anonymous witnesses should be given its full weight in this proceeding.

Once past the unusual procedural aspects of this case, the case is a fairly routine question of credibility. Witness after witness testified that the grievants used and sold drugs on Company premises during work hours, while the grievants alone denied that this occurred. The fact that no member of the bargaining unit could be found to support these two employes should lead to the reasonable inference that other employes, if called, would have testified against them. Moreover, the Union's failure to call any employe witnesses other than the grievants should lead the arbitrator to wholly discount the Union's various claims during the hearing that the Company used threats and coercion, and that there were conflicts in the statements of employe witnesses. If threats were uttered or conflicting statements were given, why would the Union not present employes to back up those claims? The obvious answer is that the charges are pure fantasy, designed to mislead the arbitrator.

In resolving the credibility question, the arbitrator must give weight to the testimony of Gumm and the anonymous witnesses, because none of them had anything to gain by testifying against the grievants. The only persons with anything to gain through untrue testimony were J*C* and B*D*, and they clearly did lie on the stand. Their testimony invites the arbitrator to accept one of two wildly improbable scenarios – either that the Company actually fired them because of an OSHA complaint or that the Company conspired with Gumm to entrap them into using drugs right before the drug tests were administered. With respect to the OSHA claim, the Company did not even know of the complaint until three months after the discharges. Moreover, OSHA itself investigated the claims of retaliation and dismissed them as having no merit. The arbitrator should acknowledge OSHA's primary expertise in this area, and defer to its finding. Looking at the substance of this claim, it is highly improbable that the Company could have engaged in the long term pattern of safety violations and threats of retaliation without a grievance ever being filed. Yet no grievance was filed. The conduct alleged flagrantly violates the National Labor Relations Act. Yet no charge was filed. These allegations surfaced only when the grievants realized that they needed a defense to their otherwise unassailable discharges.

The entrapment theory is even more ridiculous. The grievants' theory is that the Company had Gumm go to their homes on the night of August 10th to entice them into using drugs, and that they did so only because he was so persistent. The Company then sprung a random drug test on them. This theory, which first came to light in April of 1999, does not hold together. In order to believe it, the arbitrator must conclude that Gumm participated in a

scheme that cost him his own job and further complicated his already roiled personal life. In short, the arbitrator must believe that Gumm was wholly irrational. The entrapment theory simply has no basis in fact. Instead the arbitrator should find that the "defenses" raised by the grievants, read in light of their criminal histories and other ethical failings, further erode their own credibility in this proceeding.

Arrayed against the bizarre conspiracy theories of the grievants is the clear and consistent testimony of numerous co-workers who attested to their criminal activities on the Employer's premises. These witnesses all told of drug use taking place after management employes had left for the day. They testified in detail about the mechanics of obtaining the drugs, how they were cut, where they were used, how they were used and the prices that were charged. The details and nuances of this testimony give it a uniform believability that the arbitrator cannot ignore.

The Union's criticisms of the Company's initial approach to these cases has some basis, but it is ultimately immaterial. Jeff Lloyd may have been ill-advised in his original claim that the drug tests were random, and in overstating the Company's evidence, but he thereafter acted with great prudence. Granting that the initial discharges for failing drug tests were conditional in nature, the removal of the grievants from the work force freed other employes to tell the truth about their conduct. Once provided this information, the Company investigated further, and in interviews in Milwaukee with Gumm and employe "A" on September 4, 1998, confirmed the grievants' gross misconduct. He also confirmed drug use by others, but exercised compassion by declining to punish those whose drug use ended voluntarily before the Company's investigation. Lloyd then involved the Union, making employes available on a confidential basis for interviews with Jerry Jacobs so that the Local could be fully advised of the facts before it undertook a defense of these two. Taken in its entirety, the Company's actions have been measured, reasonable and even merciful. Since the evidence clearly establishes activity that is intentional, criminal, unsafe and wholly inconsistent with continued employment, the arbitrator should sustain the Company's decision and deny these grievances in their entirety.

The Position of the Union

The Union takes the position that there was not just cause for discharge, and asks that the grievants be reinstated and made whole for their losses. The Company's case relies almost exclusively on the testimony of its "confidential" witnesses, co-workers who were not willing to confront the grievants with their accusations. This testimony is highly suspect. Because the grievants were not allowed to be present for this testimony, it can be given little weight, even if it was otherwise persuasive. However, the confidential informants in this case are not trained detectives whose experience in investigations might give them some additional measure of credibility. These are day-to-day employes of the Company, men who are subject to pressures from above and who may have undisclosed conflicts with the grievants. Their motives cannot be known, but that does not mean that the arbitrator should conclude that they

do not have any motive to lie. It was the Company's insistence on confidential testimony that denied the Union a full opportunity to explore these witnesses' backgrounds and motivations, and the Company should not be given the benefit of the doubt when the arbitrator considers the possibility that these witnesses had reasons to lie. Witness "D" is an example of this, in that he gave directly contradictory statements to the Company, the Union Business Agent and the arbitrator. His motives cannot be explored, but he is clearly a liar. Moreover, his statement was never even known to the Company when it decided to discharge the grievants, and thus, it should be disregarded in its entirety. Likewise, the written statement of Jerry Billen, who claims to have used drugs with the grievants, cannot be considered since he did not testify in any fashion. Even under the Company's version of events, Billen gave a statement in return for a promise not to have him arrested on an unrelated theft charge. No weight can be given to such a document.

Discounting the testimony of the confidential witnesses and the missing witnesses, the Company's case hinges on the testimony of James Gumm. Gumm is the admitted leader in drug use and drug sales on the Company's property. His testimony cannot be given weight, if only because he has so many compelling reasons to lie. At the time he originally made these charges, he was under enormous stress — losing his job, getting divorced and suffering through the death of his daughter. As with Billen, the Company was in a position to refer him to the District Attorney for prosecution on numerous criminal charges if he did not go along. The Company was also in the position to provide him with desperately needed unemployment compensation benefits if he did go along. The reasonable inference is that he went along. While the Company presented a number of witnesses against the grievants, those witnesses, taken individually and as a whole, lack credibility. In a case requiring, at a minimum, clear and convincing evidence, the lack of credible accusers is fatal to the Company's actions.

Even if the arbitrator concluded that there was some credible evidence that the grievants had used drugs on Company premises and Company time, the penalty of discharge is not appropriate, given the treatment of other, similarly situated employes. Three other employes, including two of the Company's confidential witnesses, were known to have used drugs on Company premises. They were not disciplined, much less discharged. One employe was told to go through a rehab program, but was not required to actually complete it. The Company retained him despite his having missed a third of his scheduled shifts during one period, owing to alcohol and drug abuse. The grievants, neither of whom had similar records, were summarily discharged.

The Company claims that it distinguished between "current" and "past" drug use in choosing to discharge the grievants. This distinction makes little sense, but even if it did, it is difficult to understand how it was applied. J*C* was on an injury leave during the Company's investigation, and could not have been "currently" using drugs on Company premises when he was tested. The Company also claims a distinction between "use" and "sale." The written policy, which is what gives employes notice of what is expected, makes no such distinctions. It prohibits employes from "taking, being under the influence, addiction to, or possession of while on duty, LSD, marijuana, or heroin, or possession of controlled substances and or drugs,

either while on duty or on Employer property . . ." The penalty for drug use has never before been discharge. The rule does not distinguish between "past" drug use and "current" drug use on Company premises, and the rule does not distinguish between "use" and "sale." If the Company wishes to start drawing the types of distinctions it claims were made here, it must first provide employes with clear and unequivocal notice of the new rules. Having failed to do so, it cannot change the rules after the fact merely because it wishes to target these two employes. For all of the these reasons, the Union urges that the arbitrator sustain the grievances, reinstate these two employes and make them whole for their losses.

DISCUSSION

The Posture of the Case – Scope of the Award

This case comes to decision with several very unusual aspects to its history. In mid-August, the grievants were nominally discharged for failing a random drug test. The Employer essentially concedes that the given reasons were inadequate grounds for termination in the first instance. The drug tests were not random – they were aimed specifically at these two employes, because management had noted that they and Gumm missed work on the same day and an anonymous remark suggested that the three absences were in some way linked. Moreover, employes who fail one drug test are given an opportunity to participate in rehabilitation and, if successful, are reinstated. Thus, the drug test as a basis for discharge is not valid, a point which the Company concedes.

After the Union challenged the initial discharge notices, management sent a second notice on September 14th, advising the grievants that they were being discharged for possessing and using drugs on Company premises. These charges flowed from additional investigation into a possible drug problem at the Company, including the September 4th interview with Gumm. J*C* was discharged a third time on November 24th, for allegedly stealing a paycheck from another of the Company's operations and siphoning gas from a Company vehicle. These charges flowed from additional investigation and from an alleged admission J*C* made in a conversation with Jeff Lloyd.

Prior to the first day of hearing, the Union submitted what amounted a Motion In Limine to prevent the Company from presenting evidence about the charges brought after the initial discharge notices. The arbitrator denied the Motion:

> This situation is distinct from some of those cited in the Union's brief. Unlike MAZZA CHEESE CO., 84 LA 947 (LACUGNA, 1985) this is not a case where the Employer imposes a suspension under one rule and then changes its mind and recasts the same action as a more serious offense warranting discharge. Nor is this a case where, as in GIANT EAGLE MARKET CO. 101 LA 581 (ZOBRAK, 1993), the additional charges are raised for the first time at the arbitration hearing. This case is admittedly more similar to those described

in the Awards in AT&T, 102 LA 931 (KANNER, 1994) and HOSPITAL CENTRAL SERVICES, 109 LA 785 (D'ELETTO, 1997). The arbitrators' conclusions were doubtless warranted by the facts before them in those specific cases, but I do not read them as establishing a generally applicable rule that an employer may not respond to serious misconduct discovered after a discharge.

An arbitrator will generally be very skeptical of anything that appears to be "piling on" by making a discharge decision on one basis and then scouring the employe's history for other evidence of wrongdoing that can be thrown into the record in case the actual reason for discharge fails. Often this tactic involves an effort to persuade the arbitrator that the cumulative weight of all of the alleged wrongdoing should lead to upholding a discharge, even if no single incident would suffice. Clearly this is improper, as it essentially seeks to retroactively create a progressive discipline case. Even where the subsequent allegations involve substantial misconduct and would, standing alone, justify termination, an arbitrator will naturally suspect that the employer would not have made a discharge decision but for its desire to shore up the initial case. This suspicion will be particularly acute where the Employer cannot explain why it conducted its separate investigation other than as a means of augmenting the original case, or where there is a substantial lapse of time between the initial discharge and the leveling of the new charges. Having made these observations, however, it is not correct that in every case the employer is obligated to ignore adverse information that comes to its attention after a discharge decision.

In this case, the Company claims that it discovered, after discharging them for positive drug tests, substantial and credible evidence that the grievants and a supervisor were in the habit of using cocaine on the job. There are three possible approaches to this information. First, it can be ignored. The Company has not chosen that course of action, and there is no persuasive authority for the proposition that they must pretend that the information does not exist. Being discharged on one basis is not a grant of immunity for distinct misconduct. The second possible course of action is that chosen by the Company in this case — the issuance of a separate termination notice. This is arguably the most appropriate course from a procedural point of view, since it gives rise to a separate right to grieve and does not inter-mix the issues before a single decision maker unless the parties so choose. 1/ The third possible course of action is to proceed on the initial discharge and to offer the after-acquired evidence of misconduct at the arbitration as relevant to the question of remedy. In that case the argument would be that, even if the grievant was not properly discharged, his right to reinstatement and/or backpay should be curtailed as a result of the separate misconduct. Even under the Union's view of this case, this third approach would make the drug use allegation relevant.

Footnote#1 from the Arbitrator's March 24th ruling: In this case, it appears that the Union proposed consolidating all of the claims of misconduct into a single proceeding. I do not take this as a waiver of the argument that the allegations of drug use and other misconduct should be thrown out. Instead, I read the Union's December 9, 1998 letter to the Company's counsel as proposing that all issues surrounding the terminations, including this request to exclude evidence, should be considered by a single arbitrator.

In light of the ruling, which is hereby reaffirmed, the Union and the Company presented evidence on all of the allegations of misconduct in a single proceeding, and all of the allegations are treated as being properly before the arbitrator.

The Posture of the Case – Confidential Witnesses

The Company initially invited Union Secretary-Treasurer Jerry Jacobs to interview employes, in hopes that the Union would not proceed with grievances over the discharges. However, because employes expressed concern about possible retaliation, the Company told Jacobs he had to sign an agreement to keep his conversations confidential. He signed the statement, and spoke with 11 employes.

Prior to any hearing in this matter, the Company presented the arbitrator with identical signed affidavits from potential employe witnesses, attesting to fact that they feared physical reprisals from the grievants should they testify openly about the drug use at the Company:

> 1. My address is ----------. I am currently employed by Lloyd Transportation, Inc. ("LTI") in its shop/wash rack department as ----------. I have had this job since ----------. I am a member of Teamsters Local 43.
>
> 2. I understand that Local 43 has filed a grievance against LTI concerning its discharge of J*C* and B*D* for (1) failing a random drug test and (2) using and/or selling drugs on Company property. I have volunteered information regarding the facts of this case and my unwillingness to testify publicly at an arbitration hearing in front of the grievants. I have been advised by LTI that it will not voluntarily disclose my identity or my statement to the grievants.
>
> 3. I have provided this affidavit to LTI willingly and voluntarily. I have not been coerced or threatened by the Company. I have not been promised any benefit or reward for my cooperation. I have been assured that no adverse action would result if I chose not to provide this affidavit.

4. On or about Wednesday, August 12, 1998, I learned that the grievants had been taken for a random drug test. I subsequently learned that both failed that test and that they were discharged on or about Monday, August 18, 1998.

5. About a week later, I was asked by Jeff Lloyd, LTI's vice-president, to have a confidential discussion concerning the use of drugs on Company property. As stated in paragraph 3, my conversation with Lloyd was voluntary.

6. During that conversation, I told Lloyd that the grievants regularly used cocaine on Company property with the wash rack supervisor, Jim Gumm. I told Lloyd that I had personally observed those men using drugs on the property and that I heard them talking about drug use on Company property. Prior to that time, I have never discussed drug use by employees with Lloyd or any other supervisor.

7. On or about September 7, 1998, I learned that Gumm had been fired. About a week or so later, I learned that the grievants were discharged for using drugs on Company property.

8. On or about late October or early November, I met privately with Jerry Jacobs, president of Local 43, at LTI's offices to discuss the grievants' drug use on company property. I told Jacobs the same things I had privately told Lloyd. At that time, I was given assurances by both Lloyd and Jacobs that my conversation would be confidential. I later shared the contents of my conversation with Jacobs with Lloyd.

9. I will not testify publicly against the grievants at an arbitration hearing, I am afraid of doing so because both grievants have criminal records. I (sic) addition, one of the grievants is known to be a member of a gang. For these reasons, I fear for my personal safety and that of my family if I testify in the presence of the grievants.

10. I will testify before an arbitrator, Jacobs and Local 43's lawyer provided that adequate steps are taken to protect my identity.

I have read this affidavit consisting of 10 paragraphs. I fully understand its contents and I certify under penalty of perjury that it is true and correct to the best of my knowledge and belief.

. . .

The Company also presented evidence of the grievants' criminal records. It requested that employes who feared retaliation be allowed to testify before the arbitrator, in the presence of Union counsel and the Union's Secretary-Treasurer, but outside the presence of the grievants. The Company's request was granted, with restrictions:

In the arbitrator's view, the appropriate balancing of interests in this case is struck by acceding in part to the Employer's request. The employee witnesses who wish to remain anonymous will be permitted to testify separately and anonymously, with direction to the Union counsel and Union President to preserve their anonymity. However, this testimony will take place in a preliminary hearing, which will be transcribed. That hearing will be for the purpose of direct examination by the Company. The transcript will be redacted by the arbitrator with input from counsel for the parties, to remove identifying information, and the redacted transcripts will be made available to the grievants so that they may assist their counsel in preparing cross-examination. Should it prove impossible to remove the identifying information from the transcript, summaries of the testimony will be prepared by the arbitrator. The hearing will then be reconvened for the purposes of cross-examination of the employee witnesses and the presentation of the remainder of the case.

Footnote#2 from the Arbitrator's March 24th ruling: The decision of the National Labor Relations Board in MOBIL OIL CORP., 303 NLRB 780 (1991), is cited by the Company for the proposition that there is a public policy in favor of protecting the identity of drug informants. Granting the general point, there is a large practical difference between the situation there where anonymous tips trigger a reasonable suspicion drug test that in turn may or may not lead to discipline, and the situation here where the anonymous information is offered as the basis for a discharge decision.

Even with these procedures in place, there is no question that counsel for the Union will be at a substantial disadvantage in cross-examining the anonymous witnesses. The impairment of the right to cross-examine, and of the grievant's right to know the evidence against them, is such that the testimony taken from anonymous witnesses will be treated as hearsay in deciding this case. 3/ Hearsay is routinely used in arbitration cases, but the weight accorded to hearsay evidence is substantially less than that accorded to evidence presented by occurrence witnesses who testify with no restrictions on the right to cross-examination. In proceeding in this fashion, the Company should be mindful that, as noted in BORNSTEIN, ET AL., LABOR AND EMPLOYMENT ARBITRATION, (2D EDITION, MATTHEW BENDER), VOLUME 1 (RELEASE NO. 18, APRIL 1998), AT §506, footnote 1:

> ". . . it is almost certainly the "clear and convincing evidence" standard that will be applied (either expressly or by implication) by arbitrators in cases involving accusations of criminal conduct or moral turpitude . . ."

Footnote#3 from the Arbitrator's March 24th ruling: It might reasonably be asked why the special arrangements for taking the testimony in a separate hearing and providing

redacted versions are necessary, given that the testimony is to be treated as hearsay in any event.

The simple answer is that there is a difference between the impact of classic hearsay testimony and that of a declarant personally testifying before the arbitrator, where the testimony is rendered hearsay by the impairment of the right to confrontation rather than the unavailability of the declarant. The declarant has an opportunity in live testimony to make a greater impression on the decision maker, and the special arrangements for preparing cross-examination are intended to minimize any unfair advantage to the Company. The Union is free to waive this portion of the ruling if it believes it to be unnecessary or cumbersome.

On the day before the confidential witnesses were to testify on direct examination, the Company moved to dismiss the grievances, based on its belief that Jacobs had revealed the identity of the employes who were to give testimony against the grievants. It based its motion on the statement of an employe, who was told by another employe that J*C* had approached him at their children's school, and had discussed in detail who the Company's witnesses would be and what they would say. The Company alleged that as a result, one of the confidential witnesses declined to testify. The Motion to Dismiss was denied with leave to litigate the point and argue the impact, if any, of the alleged breach of confidentiality.

The Company now again urges that the grievances should be dismissed. In the alternative, it asserts that the grievants have effectively had the right to confront these witnesses and assist in cross-examination because they knew in advance what the testimony would be. Thus, the Company argues that the confidential testimony should not be treated as hearsay. With all due respect to the Company's position, the evidence of the breach of confidentiality is, itself, at least double hearsay. An employe said that another employe said that J*C* said he knew who was going testify. Another employe said that he'd heard talk that the grievants knew who was going to testify and that they would retaliate against the witnesses. This is a rather shaky basis for making a fundamental change in the treatment of this testimony, much less dismissing the grievances outright. Moreover, if there was a breach of confidentiality before the hearing, and if the grievants knew precisely who was going to testify and what they were going to say, there was no longer any justification for using the extraordinary system of confidential witnesses. Yet testimony directly accusing them of serious misconduct was still taken outside of the grievants' presence. They were still, quite literally, denied the right to face their accusers, and their accusers were still spared the need to face them. Union counsel was still denied the opportunity to consult with them as the testimony came in, and was prevented from testing the confidential witnesses' motives by identifying them to the grievants and exploring their past relationships with one another. The one undisputed fact is that the impairment of the grievants' rights remained and the arbitrator cannot ignore that. The fact that the procedure may not have been effective is unfortunate, but that does not logically lead to the conclusion that the prior ruling should be revisited.

The Merits

Drug Use on the Premises - Current versus Past

The Company concedes that the initial terminations for positive drug tests could not stand once the grievants completed their rehabilitation programs. Thus, the discharge of B*D* rises or falls on the evidence of drug use and sale on Company property. That of J*C* turns on drug use and sale, and on the theft allegations. Addressing the allegations of drug use on Company property, the arbitrator observes that there are some substantial problems with this theory of discipline. The most notable is that, even if I conclude that all of the Company's witnesses are to be fully credited, the drug use on Company property was more widespread than just these two employes and Gumm. At least two of the confidential witnesses admitted drug use on Company time and premises and were not disciplined for it. Another employe was identified as likely doing drugs with J*C* and B*D*, but there was no evidence of a follow-up inquiry by the Company. The Company cannot credibly claim that it was enforcing a blanket rule against all drug use on Company premises when it proceeded against the grievants, since it clearly did not act against all employes who had engaged in that conduct. Recognizing this problem, in testimony and argument, the Company draws three distinctions between the grievants and the other employes. First, it asserts that they were the only two who did not admit their transgressions when asked. Second, it claims that these were the only two who were currently engaged in drug use. Third, it claims that they were the only two who were selling drugs on Company property.

As to the claim that the grievants were the only ones who refused to admit their drug use and show remorse, there are two problems with this theory. First, one of the confidential witnesses testified that he had not told Jeff Lloyd of his drug use until a few days before the arbitration hearing and that he lied to Jerry Jacobs about it when the Union representative interviewed him in the Fall of 1998. As of the hearing, that witness had not been disciplined or threatened with discipline for his silence. The second problem with the theory that the grievants deserved stronger discipline because of their silence is that Jeff Lloyd testified that J*C* met with him in late August, before the second terminations, and admitted using drugs on Company time and Company property. Thus, the Company's own evidence does not support the notion that the terminations resulted from the grievants' silence.

The second possible distinction is that the grievants were engaged in current drug use, while the other employes had all voluntarily quit well before the Company's investigation. I agree that the Company can reasonably refrain from conducting some sort of witch hunt for those whose drug use is long past and deal instead with its existing problem, but I find the evidence supporting this distinction to be less than compelling. One witness said he stopped using drugs five months or so before the grievants were caught because he decided it was a waste of money. The other said he had quit some time in the summer of 1998, perhaps as late as August, because he wasn't seeing J*C* as much and no longer had easy access to drugs. Drawing a line between no discipline for these employes and termination for the grievants on

the basis of five months in one case and as little as a week in another is a fairly arbitrary exercise, even if the witnesses' obvious self-interest in claiming to have given up drugs before the investigation is ignored. 2/

2/ Jeff Lloyd seems to have understood that drug use among employees may not have been entirely a historical phenomenon, when he acknowledged to Jacobs in September of 1998 that widespread drug testing might seriously diminish his work force.

Drug Sales on the Premises - Credibility

The third possible distinction, and the most compelling, is that the Company had evidence that the grievants were not only using drugs on Company property, but were also selling drugs on Company property. The Union is correct in pointing out that the same rule covers both activities, and that the rule does not call for harsher penalties for selling than for use or possession. However, the Union's conclusion that the Company cannot draw distinctions on the basis of drug sales as opposed to drug use is neither practically nor conceptually sound. The use of drugs is a widespread problem, and using at work or being under the influence at work poses obvious safety risks to the user and his co-workers, as well as a loss of productivity to the Employer. There is no workplace in which this conduct must be tolerated, but as discussed above, the Employer has latitude in which penalties to impose subject to the need to be consistent across cases.

Drug sales introduce additional and more serious elements. Selling drugs is not only a more serious matter than drug use at criminal law, it compounds the difficulties faced by the Employer. While some drug use may be attributed to addiction, drug sale is not a matter of societal problems or human frailty. It is a premeditated conversion of the Employer's premises and time to criminal use, and an utter breach of faith between the employe and the employer. The employe is not at the premises for the employer's purposes. Rather, he is using it as a platform for his own illegal enterprise. Moreover, by definition, selling drugs at work means selling to co-workers and exacerbating the drug use, and the attendant safety, productivity and attendance problems, at the Company. There is every legal, practical and moral reason to treat the sale of drugs on Company property as a more serious matter than the use of drugs on Company property. Thus, if the evidence establishes that the grievants were selling drugs on Company premises, the Company had a reasoned basis on which to distinguish their cases from those of the employes who had merely used drugs at work.

Both grievants deny having used or sold drugs at work. Neither grievant's credibility is particularly strong. Their explanation that the only reason they failed the August drug test was that Jim Gumm set them up for discharge is almost impossible to credit. According to the grievants, Gumm mysteriously appeared at their homes and seduced them into using drugs.

There is some confusion in the record on when exactly this took place. The grievants said it was on the same night, and that was one of the things that caused them to realize they had been

set-up to fail the drug test on the 12th. B*D* said Gumm came to his home at just before midnight on August 10th, while J*C* remembered the visit to his home as being around 10 p.m. on the 11th. In any case, B*D* testified that Gumm, a person he did not socialize with and who was not a friend, came to his home with another person he did not know and asked to speak with him about his personal problems. When B*D* assented, Gumm sat down and pulled out a bag of cocaine. B*D* used the cocaine with him to curry favor with him, even though he had always refused Gumm's entreaties to use drugs before, and had not used any drugs since joining the Company at the beginning of the year.

According to J*C*, Gumm came to his house, something he had never done before, and asked him what drugs he had for his back, and whether he could have some of them. They then smoked a joint which Gumm had with him. J*C* did this to ease the pain of his back injury. Gumm left after 20 minutes or so. When Gumm called him a week later to say that Lloyd wanted to speak to him about his drug test, J*C* made no mention of Gumm having set him up to fail the test, because Gumm was a member of management and he was not going to share information with management. He did, however, tell Jack and Jeff Lloyd about it when he met with them.

Neither of these stories makes any sense. In order to credit this version of events, Gumm must have been in league with Jeff Lloyd from the start in an effort to get rid of the grievants. This means that everything that went after — Gumm's initial denials of drug use, his subsequent confession in Milwaukee and much of the Company's investigation — was a sham. Yet J*C* testified that Gumm and Lloyd did not get along and had shouting matches with one another at work. Thus, Gumm engaged in this involved conspiracy for someone he disliked, even though the price he had to pay in order to make it look good was the loss of his job. Gumm's role in the conspiracy is not something that can be fit into a rational scenario. Likewise, if the stories of Gumm's late night visits are to be believed, the grievants both acted very oddly. Gumm came with a stranger named Gus to B*D*'s house to pour out his troubles, even though the two of them were not friends. B*D* casually used cocaine with this man, even though he was not otherwise using drugs at the time and had refused prior offers to use drugs with him. For his part, J*C* also rather casually agreed to use drugs with Gumm when he mysteriously appeared at his home. Less than a week later, when Gumm told him that the Lloyds wanted to discuss his drug test, he made no mention to Gumm of his responsibility for the positive drug screen, because Gumm was part of management, but he did share the information with the Lloyds, who were the owners of the Company. They seemed surprised to hear it, even though they were part of the conspiracy. This complex conspiracy continued on, with Jeff Lloyd inventing several conversations between J*C* and himself, and coercing employes to give incriminating statements against the grievants and themselves both in private to Jacobs and under oath at the hearing.

I do not credit the grievants' explanations. They are illogical and inconsistent with all of the other evidence. Having said that, it is not up to the grievants to prove their innocence.

It is the Employer's responsibility to prove their guilt. Weighing only the Employer's evidence against them, I conclude that they clearly are guilty of using drugs on Company

property. However, I also conclude that the evidence of drug dealing against B*D* is neither clear nor convincing. It consists of one confidential employe's assertion that B*D* had offered to get him drugs, but had not pressured him to buy drugs and had once sold him some marijuana. No other witness implicated B*D* in selling drugs and, indeed, several witnesses said they were not even aware of any involvement by B*D* in drug use at the Company. Even if the single accusation was treated as something other than hearsay, it would not rise to the level of clear and convincing evidence that B*D* had sold drugs on Company property.

There is considerably more evidence that J*C* was involved in selling drugs on Company property. The evidence against him is, as with the accusation against B*D*, hearsay. It consists of confidential statements and the confessional letter allegedly supplied by Billen. Granting that it is hearsay, the testimony about J*C*'s drug sales was appreciably more detailed and persuasive than the single, bare allegation against B*D*. Three people implicated him with testimony that described his delivery of drugs to other employes, the appearance of the drugs as they were prepared for delivery, sightings of him leaving with powder and returning with cash and a description of how he cut the drugs with vitamins to increase his return and subsidize his own habit. Discounting the Billen letter, the degree of specificity in the testimony of drug dealing by J*C* persuades me that he did, in fact, sell drugs to other employes on Company premises.

Theft

I also conclude that there is clear and convincing evidence that J*C* siphoned gasoline from the Company's trucks. One confidential witness told of seeing him with a siphoning hose and smelling of gasoline near the truck, and Jeff Lloyd testified that J*C* admitted siphoning gas when he spoke with him in November of 1998, attributing it to the fact that the gas money his wife gave him had instead been spent on drugs. J*C* admits having a conversation with Lloyd, but denies making any admission. As discussed above, J*C*'s credibility is not strong. Given his dishonest claim that the initial drug tests were random, and his later untrue statement to Jacobs that he had videotapes proving the grievants' guilt, Lloyd's credibility on some points is certainly open to question. On the whole, however, I am persuaded that Lloyd is more likely telling the truth about the telephone call. The two men had a long-standing acquaintance and I do not find the possibility of an admission, particularly one styled as an attempt at justification, as difficult to accept as it might be in some other case. Given the choice between the two versions, and having observed each man's demeanor and assessed each man's credibility, I credit Lloyd.

I further conclude that there is no credible evidence to show that J*C* stole a paycheck from Custom Finishes. The only evidence supporting this assertion is the letter from Billen and his statements to Lloyd when they met in October of 1998. He promised to appear and testify in this case, but he vanished before the hearing, leaving only his written statement to

Lloyd. Billen executed the statement in return for a promise not to have him prosecuted. While he may well have told Lloyd that J*C* was behind the theft of the check, he is under

any version of events a markedly dishonest person and his motives for lying in order to please Lloyd are so transparent and obvious that his written statement cannot be accorded any weight whatsoever.

Conclusion on the Merits

The Company has a clear rule allowing for the termination of employes who possess, use or sell drugs on Company premises. Both grievants were clearly guilty of possessing and using drugs on Company premises. However, the Company has not uniformly enforced the rule with respect to possession and use. It has distinguished between the use by the grievants and that of others primarily on the basis of whether the use was current or in the past. On its face, this is not an irrational distinction, but here it does not hold up on close examination. Two other employes admitted drug use on Company premises during the same time period that the grievants' drug use occurred, and one of them testified that his use of drugs ended about the time that the grievants' were discharged. Neither was disciplined and, given these facts, the distinction drawn by the Company is arbitrary.

The Company also distinguished the grievants from other employes on the basis of drug sales. Notwithstanding the fact that the rule itself does not distinguish between using drugs and selling drugs, employes who sell drugs on Company property are engaged in more egregious conduct than those who use on Company property. The Company is clearly entitled to choose a harder line towards drug dealers than it might against drug users. The evidence of drug sales against B*D* is neither clear nor convincing. It consists of one witness's hearsay account of a single sale of marijuana. Other witnesses said they were unaware of any involvement by B*D* in drug sales and some said they were not aware of his involvement in drug use.

The evidence of drug sales by J*C* is likewise hearsay. Three witnesses alleged that he had been seen selling drugs and/or heard discussing the intricacies of drug sales. While the evidence is hearsay, it is far more detailed and believable than the single assertion against B*D*. On the whole, the record evidence is clear and convincing that J*C* was far more deeply involved in the drug culture at the Company than was B*D*, including the sale of drugs. The evidence also establishes that J*C* was guilty of stealing gasoline from the Company. There is hearsay evidence that he was in possession of a siphoning hose and smelled of gasoline, and he admitted siphoning gasoline in a November conversation with Jeff Lloyd. While Lloyd clearly made several dishonest claims during the early stages of these grievances, his version of the November conversation is more credible than is J*C*'s denial.

Taking the record as a whole, the Company has not proved that B*D*'s conduct was materially different than that of other employes who were not disciplined. Accordingly, there was not just cause for his discharge. In the case of J*C*, the record establishes that he was

guilty both of dealing drugs on Company property and stealing gasoline from the Company. Both are dischargeable offenses in virtually any work place. I therefore conclude that there was just cause for his discharge.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The grievant J*C* was discharged for just cause. His grievance is denied.

2. The grievant B*D* was not discharged for just cause. The appropriate remedy is to reinstate him to his former position, effective as of October 1, 1998, the date on which his successful completion of the drug rehabilitation program was certified, in September of 1998, and to make him whole for his losses.

Dated at Racine, Wisconsin, this 9th day of February, 2000.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

DN/ans
6016.doc