BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES AND HELPERS UNION, LOCAL NO. 695, OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

and

WIS-PAK WATERTOWN, INC.

Case 19
No. 58735
A-5836

Appearances:

Attorney John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union, Local No. 695, of the International Brotherhood of Teamsters, which is referred to below as the Union.

Attorney Dennis G. Lindner, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Wis-Pak Watertown, Inc., which is referred to below as the Employer, or as the Company.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the Company agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Elwood Metzger, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was conducted on May 31, 2000, in Watertown, Wisconsin. A transcript was prepared of the hearing and provided to the Commission on June 12, 2000. The parties filed briefs by July 14, 2000.

ISSUES

The parties stipulated the following issues for decision:

Was the Grievant discharged for cause?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 5 – DISCIPLINE AND DISCHARGE

5.1 No employee shall be discharged or suspended except for dishonesty, insubordination, drunkenness, being under the influence of or in possession of illegal drugs, or the illegal use of dangerous drugs or other just cause. At least one (1) warning notice shall be given in writing to the Union and to the employee before discharge or suspension can be made except in cases of dishonesty, insubordination, drunkenness, being under the influence of or in possession of illegal drugs, or the illegal use of dangerous drugs or other serious offenses as calling for no advance notice of discharge. The first such warning notice shall be effective for a period of six (6) months. Any succeeding warning notice given to an employee for the same or similar offense shall be effective for a period of twelve months, except that a succeeding warning letter for attendance violations shall be effective for a period of nine (9) months.

BACKGROUND

The Grievant received a letter from Bill Hoffart, the Company's Facility Manager, headed "Termination of Employment," dated February 18, 2000 (references to dates are to 2000, unless otherwise noted) which states:

> As Dave Magnan informed you on February 14, 2000, we were to call you when a determination on your employment status with Wis-Pak was made. After attempting to reach you by telephone on three occasions and leaving messages on your answering machine, this letter will serve as formal notification of your termination of employment at Wis-Pak.
>
> You are being terminated from employment due to your refusal to submit to a drug screen following medical treatment for a work-related injury, pursuant to

> Wis-Pak's Drug Free Workplace Policy. As you are aware, this policy has been in effect at Wis-Pak of Watertown since August 6, 1998, and you acknowledged receipt of this policy and employee training and educational materials on August 11, 1998.
>
> . . .

The Grievant responded by filing a grievance on February 23, which states that the "Company is in violation of Article 5 by discharging me without just cause per letter dated 2-18-00." The grievance seeks that the Grievant "be reinstated and made whole."

The Drug Free Workplace Policy, which is cited in the February 18 letter, and which is referred to below as the Policy, includes the following provisions:

> 1. PURPOSE
>
> Wis-Pak, Inc. is strongly committed to providing a safe workplace. The wide-spread abuse of drugs and alcohol in today's society poses a very serious problem. The use and/or abuse of these substances jeopardizes the health, safety, and well-being of all of our employees and the general public, and increase (sic) business costs by contributing to increased incident of accidents, injuries and theft; lowers productivity and morale; excessive absenteeism and tardiness; and excessive health care cost (sic). Since our employees are our most valuable resource and the safety and well-being of our employees and the general public are of paramount concern to us, we have developed a policy to help us maintain a work environment that is free from the effects of drugs and alcohol.
>
> . . .
>
> II. DRUG AND ALCOHOL RULES AND PROHIBITIONS
>
> Violation of the provisions of this policy will be considered serious misconduct and may result in termination.
>
> . . .

E. Any employee refusing to cooperate with the terms of this policy which includes submitting to questioning, reasonable searches, drug and/or alcohol testing, medical or physical tests or examinations, when requested or conducted by the Company or its designee, is in violation of Wis-Pak's Drug Free Workplace Policy and subject to disciplinary action, up to and including termination.

. . .

III. TESTING CIRCUMSTANCES

C. Post-accident:

Drug and/or alcohol testing will be conducted on all employees involved in accidents occurring during work time or on Company property. Covered accidents include, but are not limited to, accidents that the employee caused or contributed to that involve injury to employees or others which necessitate medical attention or result in lost work time. Employees are expected to make themselves available for post accident testing. Any employee who fails to report any work-related accident is in violation of this policy and is subject to disciplinary action, up to and including discharge.

D. Reasonable cause:

Current employees will be asked to submit to a drug and/or alcohol test if reasonable cause exists to suggest that the employee's health or ability to perform expected job duties is impaired. Reasonable cause will exist when an employee's appearance, behavior, speech, or body odors indicate drug and/or alcohol use.

IV. COLLECTION PROCEDURES

. . .

C. Employees and applicants will be required to cooperate in the collection procedures. A failure or refusal to cooperate may result in discipline up to and including discharge for an employee . . .

E. Employees required to submit to a post-accident test will not be allowed to drive themselves to or from a collection site. The Company will make arrangement for the employee's safe transport to and from the collection site which could include being transported by the supervisor, co-employee, or a taxi. Employees required to undergo a post-accident test will not be allowed to return to work until a negative test result is received. If the test result are (sic) negative, the employee will be returned to work with no loss of pay or seniority.

F. In the case of testing after an accident, if the employee required medical attention, necessary medical attention will not be delayed in order to collect the specimen. The employee must provide the necessary authorization for the employer to obtain hospital tests, records or other reports, including reports form (sic) law enforcement authorities, that would indicate whether there were any drugs/alcohol in the employee's system and the levels of those substances present. If the employee refuses, the employee may be disciplined up to and including discharge.

. . .

VI. TEST RESULTS AND EMPLOYMENT STATUS

. . .

D. An employee testing positive may be disciplined up to and including discharge. Nothing will prohibit the Company from imposing other discipline up to and including discharge. An employee may be given the opportunity to participate in an evaluation program and any treatment program recommended by the evaluator in lieu of discharge. An opportunity for evaluation and treatment will only be considered if the incident is the employee's first violation of the Drug Free Workplace policy. Any subsequent violations of the policy will result in the

> employee's discharge. Employees who admit to a problem with drug and alcohol use and request assistance though (sic) evaluation and treatment before a violation of the policy is discovered by the Company, will be allowed the opportunity to participate in and successfully comply with evaluation and recommended treatment. Should this employee subsequently admit renewed use prior to a violation of the policy being discovered, this employee will be given a final opportunity to participate in and successfully comply with evaluation and recommended treatment. No other opportunities for evaluation and treatment will be provided. Any subsequent violations of the policy will result in discharge. Violations of this policy more than five years old will not be considered for disciplinary action.
>
> . . .

Since the implementation of the Policy, the Company has altered its practices under Section IV E. It now permits an employee to return to work following a post accident drug test, prior to the determination of the test results, if a supervisor executes a Reasonable Cause form stating that the employee manifests no observable symptom of drug abuse.

The Company implemented the Policy on August 6, 1998. Prior to its implementation, the Company met and conferred with the Union regarding the Policy. The Company incorporated certain changes in the Policy as a result of those meetings, but implemented the Policy without express Union agreement. As part of its implementation of the Policy, the Company contracted with a consultant to provide training on Policy provisions to all of its employes, including those in the unit represented by the Union. Unit employes received a copy of the Policy as part of this training, and were required to sign a receipt for it. The Grievant signed such an acknowledgement on August 11, 1998.

The Company hired the Grievant on March 18, 1980. He served the Company in a variety of positions, and at the time of his termination served as an Alvey Take-Away Driver in the warehouse. An Alvey is a type of fork-lift. The Grievant's termination was part of the aftermath of a collision, on February 14, between two fork-lifts. The Grievant drove one of the fork-lifts, and Curt Rosenow drove the other.

On February 14, at roughly 1:30 p.m., both Rosenow and the Grievant were driving north on passageways separated by storage racks. The Grievant turned to the east, to proceed through a entryway that opened onto the passageway in which Rosenow was driving. The Grievant proceeded through the entryway, turning south. He drove a double-wide fork-lift,

with its forks collapsed to make it easier to transport a single pallet of product. Rosenow drove a double-wide fork-lift carrying two pallets of product. The passageway the Grievant turned into was just wide enough to permit the fork-lifts to pass each other if each strictly maintained its lane. The Grievant's turn carried him into Rosenow's path. Each driver stopped. The Grievant's fork-lift stalled, and Rosenow's momentum carried his fork-lift into the Grievant's. The fork-lifts hit roughly head on. As the Grievant dismounted his fork-lift, he felt numbness in his leg. He then proceeded to the office, and asked to be taken to a hospital for treatment. Rosenow did not complain of any injury. The Company transported Rosenow to a facility in Oconomowoc for a post-accident drug test, and transported the Grievant to Watertown Memorial Hospital for treatment and a drug test.

Jill Sebeck, the Company's Administrative Assistant, and Stanley Staniszewski, the Company's Warehouse Supervisor for the first shift, transported the Grievant to the hospital. During the trip to the hospital, Staniszewski attempted to investigate the circumstances surrounding the accident. At the hospital, the Grievant was admitted to Urgent Care. After treatment, a physician's assistant returned the Grievant to Sebeck and to Staniszewski, informed them that the treating physician had directed the Grievant to take the following day off from work and had prescribed a pain-killer. Sebeck and Staniszewski then led the Grievant to the Occupational Health Services Department for drug testing. When they arrived, and discussed the point, the Grievant informed them he would not submit to a test.

The Grievant insisted that his prescription be filled at the hospital's pharmacy. After learning it would take roughly forty-five minutes to fill the prescription, Sebeck and Staniszewski decided to return to the office. Sebeck felt uncomfortable returning to the hospital, so Staniszewski and David Magnan, the Company's Operations Manager, returned to the hospital so that they could drive the Grievant home. When they arrived, they found the Grievant asleep on a couch near the pharmacy. They woke him, and informed him that they would drive him home. The Grievant asked to return to the plant so that he could pick up some personal belongings from his van. During the roughly fourteen mile trip from the plant to the Grievant's home, Magnan attempted to inform the Grievant that he had been indefinitely suspended from work for refusing to submit to a drug test. The Grievant and Magnan discussed this point at least in passing in the car and again when the Grievant left the car to walk to his home.

The Grievant phoned Jody Jeche, the Company's Human Resources Manager, on February 15. They discussed the accident and his refusal to submit to a drug test. The Grievant attempted, with limited success, to get her to discuss safety problems in the warehouse. He did not seek a drug test, nor did she offer him the opportunity to take one.

Magnan had concluded that the Grievant would attempt to return to work on February 16, and had informed administrative and security personnel that if he reported for work, he should be immediately escorted to Magnan's office. The Grievant reported for work on February 16, and was escorted to Magnan's office. Magnan informed him that the Company had indefinitely suspended him, and that he should not return to work until contacted by Human Resources. Magnan perceived the Grievant to be "very somber" (Transcript, [Tr.] at 94). The Grievant asked to remove personal belongings from his locker, and Magnan escorted him to his locker and then from the building.

On February 17, Jeche met with Hoffart and John Utech, the Company's Vice-President of Operations, to determine the Company's response to the Grievant's refusal to submit to a drug test. They ultimately concluded that the Grievant's conduct was "flat-out insubordination" (Tr. at 112) warranting his termination.

The Company does not claim that the Grievant's conduct on February 14 manifested any basis to invoke the "Reasonable cause" provisions of the Policy. It is also undisputed that the Company has compelled a drug test from each employe involved in an accident falling within the "Post Accident" provision of the Policy. Prior to February 14, the Company had required twenty-six drug tests under that provision. The Grievant is the first employe to refuse to submit to drug testing under the Policy. The Company concluded that both the Grievant and Rosenow were partially at fault for the February 14 collision.

The general statement of facts noted to this point is undisputed. The balance of the background to the grievance is best set forth as an overview of witness testimony.

Jill Sebeck

Sebeck testified that she and Staniszewski spent roughly two hours at the hospital while the Grievant was being attended to. Sebeck listened while the physician's assistant explained the prescription to the Grievant and explained that Sebeck and Staniszewski would escort him to Occupational Health Services for drug testing. When they arrived at that part of the hospital, the Grievant asked Sebeck why they had come there. Sebeck detailed the conversation that followed thus:

> And I said, "You know . . . you have to have a drug screen after an accident."
>
> . . .

> And he said – He said, "No, I'm not taking a drug screen." And I said . . . and I was going to tell him that he was going to be in trouble, but . . . he just leaned forward and he said, "No. You can terminate me. I'm not taking a drug screen. It's against my civil rights." (Tr. at 35).

Sebeck and Staniszewski concluded further dialogue was useless, and accompanied the Grievant to the pharmacy. She noted the Grievant appeared to be in pain, but manifested no symptom indicating drug or alcohol abuse. She acknowledged that the Company has afforded employes who test positive after a post-accident drug test the opportunity for evaluation and rehab.

Stanley Staniszewski

Staniszewski testified that the Grievant became "quite agitated" when asked to submit to the drug test, stating:

> No. I will not take this test. You can terminate me. (Tr. at 57).

Staniszewski noted that he and Sebeck were unsure what to do next, and considered trying to counsel him on the significance of his actions, but concluded he was too agitated to be counseled. Staniszewski filled out the accident report while he and Magnan drove the Grievant home. Magnan attempted to inform the Grievant that he was indefinitely suspended and should not report to work until contacted by Human Resources. The Grievant responded that he was under medication, and did not want to discuss the point. When they arrived at the Grievant's home, Magnan again sought to explain to the Grievant what was to happen, but the Grievant responded: "I will be there at 5:30 on Wednesday and we'll settle the score then." (Tr. at 60). Staniszewski stated that he did not view this statement as a physical threat. Neither Magnan nor Staniszewski attempted to get the Grievant to take a drug test at any time after his refusal.

David Magnan

Magnan testified that the training in the Policy afforded by the Company was quite detailed. He noted the presenter covered post-accident testing, and detailed that anyone involved in an accident requiring treatment would be required to submit to a drug test, without regard to fault. He also noted that the presenter stated at some length that the Company, unlike other companies, had not adopted a zero tolerance policy, but would afford a last chance at rehab to an employe who tested positive.

Magnan also testified that an Alvey classification meeting took place on February 10. The Grievant and Rosenow attended this meeting. The meeting covered a number of points including training, paperwork accuracy and a number of safety related issues. Toward the end of the meeting, the Grievant brought up a recent accident in which a fork-lift driver, Jeff Stai, struck an employe, Scott Henning, walking in the warehouse. Henning was injured, and both employes were required to take a drug test. The Grievant questioned why Stai had to submit to a drug test, adding:

> If I was involved in an accident, I'm not taking the test. It's a violation of my rights. (Tr. at 79) . . . If it's a safety issue, then it's a violation of my rights to take the test. (Tr. at 104).

This remarked caused stir among the employes, in part because Henning was present at the meeting. Magnan ended the conversation by stating that everyone involved in an accident is tested, and "(i)f you choose not to, then we'll deal with it at that time" (Tr. at 81). The Grievant also stated his belief that operators were going too fast in the warehouse and that he would slow down, and the Company would have to deal with it. Magnan acknowledged it was not uncommon for the Grievant to voice safety concerns.

Magnan noted that he tried to inform the Grievant of his indefinite suspension on the way to the Grievant's home on Februrary 14. The Grievant declined Magnan's attempt to discuss the matter, and informed Magnan as they pulled into his driveway that he had a release to return to work on Wednesday and "would see us at 5:30 a.m. to settle the score." Magnan took this remark to mean the Grievant might bring a lawyer with him on February 16.

Magnan did not think the Grievant appeared to be under the influence of medication on February 16, but did seem very somber, as if he was convinced the meeting marked the end of his career with the Company. The Grievant did cause any disruption on February 16.

Jody Jeche

Jeche affirmed that the Grievant is the first employe to refuse to submit to a drug test since the implementation of the Policy. She noted that the Grievant phoned her on February 15, stating that Magnan had advised him to do so. She noted that after they discussed his accident, she attempted to question why he had refused to take the test. He responded that testing violated his rights, and she responded that the Policy was within state and federal law. She repeated that he was indefinitely suspended pending further action from Human Resources, and declined his attempts to turn the discussion to safety issues.

From her perspective, the termination decision reflected a variety of factors focusing on insubordination. His comments at the February 10 meeting coupled with his comments at the hospital on February 14, indicated that he was aware of what he was doing and what the implications would be. His failure to show any remorse left the Company nothing but insubordination to consider. She, Hoffart and Sebeck attempted to phone the Grievant to advise him of the termination, but could neither reach him nor get him to return their calls. As a result, the Company sent the February 18 termination letter to his home, by certified mail.

The Grievant

The Grievant noted that his termination cut his Company service less than a month from his twentieth employment anniversary date. He noted that the forklift he drove on February 14 was an older model. It stalled while he made his turn, and he sat in the aisle unable to avoid the oncoming fork-lift driven by Rosenow. The collision caused him considerable pain, and the numbness in his leg necessitated treatment. He reported to the office to get that treatment. He noted office personnel had no interest in the matter beyond insurance issues. He noted his anger to office personnel at the irony of his being an advocate for safety, but a victim of unsafe conditions.

He noted he was in great pain at the hospital, and that he was not fully aware of where Sebeck and Staniszewski were leading him until they reported for a drug test at Occupational Health Services. He affirmed he refused to take the test, and stated that he would not do so because the injury was a safety, not a drug, issue. He could not recall whether he made the termination remark attributed to him by Sebeck and Staniszewski. He wanted his prescription filled at the hospital, so he could get relief from the pain as soon as possible.

He noted that Magnan and Staniszewski attempted to get him to sign an accident report while they drove him home. He did not feel the report was accurate, and refused to sign it. To get them to leave the point alone, he noted to them that he was on medication. When they arrived at his home, Magnan advised him that he was on indefinite suspension and should call Human Resources on February 15. He could not recall telling Magnan that he intended to report to work on Wednesday to "settle the score."

He phoned Jeche on February 15, and they discussed the accident. Jeche declined to discuss safety issues, asserting "The only thing we're concerned with is disciplining you" (Tr. at 151). She did not tell him to stay home pending further action from her department.

The Grievant noted that he reported for work on Wednesday as his work release directed. He spoke with Magnan, and became convinced that the Company had determined to terminate him. He noted this saddened him, and made him regret not taking the drug test so that he could continue "fighting them over the safety issues" (Tr. at 153). No Company representative

advised him to stay home until he received a phone message to that effect at his home, after his conversation with Magnan at the Company offices.

He noted that he did voice safety issues at the February 10 meeting, but not in the fashion asserted by Magnan. Rather, he questioned why Henning had to submit to a drug test when Stai had been at fault for the accident. His emphasis at the meeting was to clarify that requiring drug tests obscured that the more significant issues focus on unsafe conditions.

This emphasis also motivated his refusal to take the drug test:

> I felt that you needed to draw out the safety issues going on back there. I needed to make the statement that things aren't safe; that accidents are constantly happening; we're only a split second away from actually killing another Dennis Snow, cutting off another person's fingers, sending another one to the hospital. (Tr. at 164).

He acknowledged that he has not volunteered to be a member of Company safety committees, but challenged the assertion that those committees included other than Company-selected members.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Company's Brief

After a review of the evidence, the Company contends that "just cause" under Section 5.1 must be read with the Company's implementation of the Policy. Under governing law, the Policy was not implemented until the Company had met and conferred with the Union. Acknowledging that "the Union did not agree in writing with the Policy," the Company asserts that "the Union certainly agreed with its purpose, intent and contents." That the grievance is the first challenge of the Policy after thirty "post accident testing scenarios" underscores that the Policy has become an accepted part of the work environment.

Under the Policy or under arbitral precedent, a "refusal to submit to required testing" is "tantamount to insubordination." In any event, the established principle of "obey now grieve later" applies to the Grievant. Against this background, the Company cannot reasonably be expected to formally forewarn the Grievant of the consequences of his conduct and its reasonable response to the Grievant's conduct "should not be second guessed by an arbitrator."

A review of the record establishes, according to the Company, that the Union has not established any defense for the Grievant's conduct. The Grievant's failure to challenge the Policy prior to the incidents posed by his grievance and his failure to avail himself of any established internal mechanism for addressing safety issues precludes a conclusion that he declined the post-accident test "to draw out safety issues and that he needed to make the statement that things weren't safe." Beyond this, the evidence on this issue underscores the weakness of the Grievant's testimony. That testimony was, the Company contends, "at first just evasive" but evolved into a series of unfounded assertions that are "not creditworthy."

Nor will the evidence establish any valid reason to support the Grievant's refusal to take the post-accident test. His refusal rests on no more than an unsubstantiated assertion that it violated his rights. His refusal establishes not that he had a principled objection to the test but that "(h)e dared the Company to terminate him." Nor can "the circumstances of his own accident" support his refusal. The Company's investigation found that each employe bore responsibility for the accident, and the Grievant "admitted to making a wide turn." Even if safety considerations could excuse the Grievant from testing, the persuasive force of those considerations turns on "the immediate risk of physical harm" which plays no role here. The Grievant's view that the Company should have suspended him states his personal hope, but no justification for refusing the test.

Nor will the evidence support a Company "abuse of discretion." The Grievant's insubordinate refusal to take the test would support termination standing alone. His subsequent insubordination in "defying orders by both Magnan and Jeche not to appear at the plant pending notification of his status" further underscores the reasonableness of the Company's decision. His failure to show any "remorse for his behavior" demonstrates the lack of disciplinary options available to the Company. The Company concludes by requesting that "the grievance herein be denied and dismissed."

The Union's Brief

The Union states that the grievance "involves the unfair and incongruous result of a discharge of a 20-year employee for making what he believed to be a statement about unsafe conditions at the (Company)." Characterizing the Grievant's choice of refusing to submit to a drug test to make that statement as "unfortunate," the Union contends that the evidence establishes that the Grievant's safety concerns were well-established. The Grievant openly stated his concerns at the February 10 meeting, and stated "that if he is involved in an accident caused by unsafe conditions, he will not submit to a drug test."

The evidence establishes that the February 14 accident is traceable to the unduly narrow aisles that forklift operators have to drive through. After the accident, the Grievant advised the Company of the extent of his injury. The Union notes that it is significant that throughout the aftermath of the accident, the Grievant "showed no outward signs of impairment." The evidence establishes that "(a)bsent the injury, the grievant would not have been drug tested" and thus that his job would never have been put at risk.

A review of the evidence concerning the Grievant's conduct going to and returning from the hospital establishes that no Company representative clearly counseled him regarding the implications of his refusal to submit to the test until he was under the influence of the pain-killers prescribed at the hospital. Testimony regarding that portion of the accident's aftermath should not be considered, according to the Union. Discussion between the Grievant and Company representatives prior to that point was unremarkable. The Grievant "was in no way confrontational or physically threatening." That the Grievant phoned Jeche on Februrary 15, then reported for work on February 16, manifests nothing more than his sincere belief that he was acting consistently with the directives of his physician and his supervisors. His appearance at work on Wednesday "caused no disruption of any kind," and revealed no more than his sadness at having his employment put at risk.

The full incongruity of the Company's action is established by the Policy, which permits an employe testing positive to return to work after rehabilitation, but "allows the employer to discharge an individual who refuses to take the test altogether." The Union puts the point thus:

> There is no evidence of illegal drug or alcohol use on the part of the grievant. While the grievant's decision may have been ill-advised, he was standing on a sincerely-held principle. His eccentric, aberrant stance on one day at work should not trump his 20 years of otherwise unflawed service. . . . His appearance on the morning of February 16th was not an act of insubordination or vengeance . . . (h)e simply wanted to find out what the employer had decided. Anyone with 20 years on the job would be anxious about such a decision.

The Union concludes that "the grievant deserves a second chance" and that discharge "is inappropriate in these circumstances." From this, the Union "submits that the grievant should be returned to work and be made whole for his losses, including the loss of seniority and the attendant benefits."

DISCUSSION

The stipulated issue is whether the Company had cause to discharge the Grievant. Where the parties have not stipulated the standards defining cause, the analysis must, in my opinion, address two elements. First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed reasonably reflects that interest. This does not state a definitive analysis to be imposed on contracting parties. It does state a skeletal outline of the elements to be addressed and relies on the parties' arguments to flesh out that outline.

Section 5.1 states the cause standard, and requires that a written warning notice precede discharge except in certain cases, including "insubordination." Various Policy provisions authorize "discipline up to and including discharge" for certain violations. The Company contends that the circumstances surrounding the Grievant's refusal to submit to a post-accident test are tantamount to insubordination, warranting summary discharge.

An arbitrator's authority flows from the labor agreement, and the relationship of the Policy to the labor agreement can, at least in theory, pose difficult interpretive issues. In this case, however, the Company asserts the same disciplinary interest in the Grievant's conduct, whether viewed under Section 5.1 or under the Policy. Section 5.1 recognizes insubordination as a basis for summary termination, as do a series of Policy provisions, including Sections II, II E, III C, IV C and IV F. The first element of the cause analysis thus questions whether the Grievant's conduct can be considered insubordinate.

"Insubordination," is the "deliberate defiance of . . . supervisory authority." Bornstein, Gosline and Greenbaum, *Labor and Employment Arbitration*, (Matthew Bender, 1999) at Sec. 20.04. As Section 5.1 underscores, insubordination can be treated as a capital offense in labor relations. The severity of the sanction is rooted in the willful nature of the offense, which involves the deliberate undermining of work place management.

Arbitrators have stated the elements to proving insubordination in a variety of ways. In my opinion, to establish insubordination, the City must demonstrate that the Grievant understood and deliberately defied a clear, work-related order issued by a known supervisor. See, for example, *Roberts' Dictionary of Industrial Relations*, (BNA, 1986); and Bornstein, Gosline & Greenbaum at Section 16.04.

In this case, the issue turns on conduct tantamount to insubordination because it focuses less on a specific work order from an individual supervisor than on the provisions of the Policy, viewed as a management directive on workplace conduct. Through the terms of the Policy and related training, the Grievant was aware that the Company expected and enforced

compliance with its terms. The Grievant's, Sebeck's and Staniszewski's testimony establish that the Grievant was aware of, and deliberately refused to submit to, the drug test required by the Policy. The Grievant acknowledged in his own testimony that he was aware, throughout the period of his suspension, that his refusal to submit to the test defied the Policy and needlessly put his job at risk. By February 14, the Company had implented the Policy, trained employes in its requirements, and had required, without challenge, twenty-six post accident drug tests. It was, by February 14, a part of the work environment. This does not make it unchallengeable, but does establish that the Grievant's conduct constitutes a willful defiance of a work-related directive.

This poses the second element of the cause analysis. The Union focuses its argument on this point and asserts that discharge is not a reasonable reflection of the Company's disciplinary interest. The force of the Union's arguments must not be obscured. The Grievant was (almost) a twenty-year employe. There is no allegation he manifested any symptom of drug abuse. His concerns with the intrusive nature of drug testing and with warehouse safety cannot be lightly brushed aside, and the Union's position that the severity of the sanction posed here produces an "incongruous result" cannot be ignored.

However forcefully stated, the Union's attempt to mitigate the discipline cannot undercut the factual basis for the Company's determination that discharge was appropriate. That it is incongruous to afford an employe who tested positive a lighter discipline than imposed on the Grievant must be granted. This cannot obscure, however, that the Grievant's conduct provoked this, or that it is an incongruous result to treat an employe who defies a policy as leniently as one who complies with it. Had he submitted to the test, then grieved, he could have put the Policy, rather than his refusal, at issue. If his test was positive, he could have returned to work on a last chance basis. If negative, he would have returned to work unconditionally. In any event, his conduct did nothing to further his professed safety concerns. He asserted that warehouse speeds were too high; that the passageway he turned into was too narrow; that his fork-lift was not operating properly; and that drug usage had no bearing on the accident. As noted above, his concerns cannot be lightly brushed aside. The passageway, for example, has been widened since the accident. However, his assertions ignore that he steered his fork-lift widely around a sharp turn, placing himself in the path of Rosenow's fork-lift. This does not establish that he is solely responsible for the accident. It underscores, however, that his professed safety concerns had only a peripheral relation to the February 14 collision. Beyond this, his refusal to submit to the post-accident drug test did nothing to highlight any safety issue. At most, it undercut his assertion that the accident had no relation to drug usage.

More significant than this is that the record supports the reasonableness of the Company's conclusion that the Grievant's conduct precluded a lower level of discipline. Insubordination is viewed as a capital offense when it manifests serious undermining of workplace supervision. Presumably, a lesser level of discipline would be appropriate if the Grievant's conduct had a minimally adverse effect on the workplace and if he demonstrated a willingness to modify the adverse aspects of his behavior. The evidence affords little support for the Grievant on either point.

Presumably, his professed safety concerns could represent a positive impact on the work environment. The evidence reveals, however, less the productive assertion of unit-wide concerns than a consistent pattern of combatively advocated, personal concerns. That the Grievant, a former Union Steward, made no attempt to involve the Union in his concerns until well after his February 14 refusal casts some doubt on the unit-wide scope of his concerns. His personal advocacy of those concerns is no less troubling. Without regard to how the Company creates its safety committees, the Grievant's refusal to volunteer for them is difficult to square with his asserted concern for safety.

More revealing is his conduct at the February 10 meeting of Alvey drivers. It is not immediately apparent how his challenge to the Company's testing of Henning advanced his safety concerns. The Grievant testified that he wanted to challenge the Company's testing of an innocent victim. That he thus supported the drug-testing of the driver whom he viewed to be at fault is difficult to square with his own conduct on Februrary 14. More significantly, his conduct disrupted the meeting, causing controversy among unit employes. How this furthered consideration of his own opinion is apparent. How it furthered unit-wide safety is not. He concluded his view on fork-lift speeds and on the drug testing following the Henning-Stai accident by stating he would act as he saw fit, without regard to the Company. His statements constitute less a statement on unit-wide safety than a personal challenge to the Company.

This pattern of behavior continued throughout the events of February 14. The Grievant detailed his conduct toward the employe who sought insurance information from him thus:

> I just told her I was pissed at them for having these safety issues and now I'm the one that's hurt you know. (Tr at 142).

The relationship between this personal demand for attention and unit-wide safety issues is not apparent. It is apparent, however, that he assumed no responsibility for the collision.

No less troubling is the Grievant's response to Staniszewski's and Magnan's attempts to investigate the accident. The Grievant was less than cooperative, and appeared more interested in denying any personal responsibility for the collision than in detailing specific safety problems.

His comment that he was "on medication" and did not want to sign the accident report did not reflect any concern with a safety issue. Rather, it reflected his belief that Magnan's account shaded responsibility for the collision away from Rosenow and onto him.

More striking than the Grievant's concern with safety throughout this course of events is his combative relationship with supervisors and other employes. Safety is a unit-wide concern. The Grievant's advocacy, however, tended to be disruptive and personal.

Further complicating the Union's attempt to challenge the discharge is the Grievant's intransigence in dealing with supervisors. His lack of cooperation with Staniszewski and Magnan is difficult to understand. There was no apparent provocation, and no persuasive evidence either supervisor sought anything from him beyond an honest recounting of the circumstances surrounding the collision. Magnan and Jeche failed to get the Grievant to understand on February 14, 15 and 16 that he should not report to work until advised to do so. The Grievant's testimony makes it impossible to conclude he did not understand them. Rather, he chose to ignore them. This makes it difficult to characterize as unreasonable a conclusion that he could not modify his conduct in response to a lower level of discipline. The Grievant expressed regret, during his testimony, for his intransigence. At no point prior to his discharge, however, was any such regret expressed to the Company.

In sum, the Union's attempt to characterize the discharge as an excessive penalty is well-stated, but lacks support in the evidence, particularly the Grievant's testimony. The Grievant's refusal to submit to the drug test is tantamount to insubordination, and the evidence of his conduct preceding and following the refusal manifests a consistent pattern of combative behavior, which did little to further concerns beyond his own. The Grievant's conduct affords no room to focus on his past work record or any other mitigating factor cited by the Union without effectively gutting the Policy. The Company's conclusion that the Grievant's conduct constituted an "all or nothing" challenge of the Policy cannot be dismissed as unreasonable.

This conclusion should not be read to indicate the Grievant's conduct threatened anyone. Magnan did not take the "we'll settle the score" comment to connote anything beyond litigation. Nor do I. The Grievant's refusal to stay away from the work-site was neither disruptive nor intimidating. The somberness Magnan perceived in the Grievant on February 16 reflects a fundamental sadness surrounding this record. The Grievant's twenty years of service should not be minimized. However, the labor agreement does not make an arbitrator a manager. The Company's view that the Grievant's conduct was insubordinate and that there was no basis to believe a lesser penalty would be effective cannot be dismissed as unreasonable. This means both elements of the cause analysis have been met.

AWARD

The Grievant was discharged for cause.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 6th day of September, 2000.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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