BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

MEYER MATERIAL COMPANY

Case 1
No. 59318
A-5891

(Grievance of Daniel Koderca)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jonathan M. Conti**, on behalf of the Union.

Attorney Louis W. Brydges, **Jr.,** on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Company", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Racine, Wisconsin, on January 23, 2001. There, both parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was not transcribed and the parties thereafter filed briefs that were received by March 12, 2001.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Whether the Company had just cause to terminate grievant Daniel J. Koderca and, if not, what is the appropriate remedy?

BACKGROUND

The Company operates a redi-mix concrete plant in Kenosha, Wisconsin. Its drivers therefore drive very large concrete trucks to various construction sites.

Grievant Koderca, a truck driver, commenced employment in May, 1991, and was terminated on July 27, 2000 (unless otherwise stated, all dates herein refer to 2000), "due to insubordination and refusal to take a Drug and Alcohol Test." (Joint Exhibit 13). Before that date, Koderca had taken and passed about five or six random drug tests.

Koderca on July 27 reported for work at about 5:45 a.m. to begin his early morning runs.

Dispatcher Raymond Lohmeyer testified that he did not see Koderca when he first reported for work that day and that after Koderca had finished his first run, he told Lohmeyer at about 7:06 a.m. he was sick and "I'm still drunk. I can't do my job." Lohmeyer telephoned Manager Rich Dembinski to report Koderca's condition and Dembinski then said that Koderca would have to take a drug and alcohol test. Lohmeyer said he relayed that message to Koderca who replied: "I can't believe you are doing this to me." Koderca agreed to do an alcohol test, but not a drug test, even though Lohmeyer repeatedly told him he would have to do so. Lohmeyer telephoned Dembinski several more times who told him that a refusal to take a drug test would be treated as a positive test, which he relayed to Koderca. Lohmeyer added that Koderca then punched out; that Koderca was gone when Union steward Joel Brommer returned from a run, at which time he told Brommer what had happened; that Koderca returned to the plant at about 10:30 a.m., accompanied by Brommer; and that he then told Koderca it was too late to be tested.

On cross-examination, Lohmeyer said that Koderca admitted to being drunk before he smelled alcohol on his breath and before he noticed that his eyes were red and that he looked sleepy. He acknowledged that he never told Koderca to get off Company premises, but he did tell him he would have to punch out if he did not take a test.

Manager Dembinski testified about federal regulations governing drug and alcohol use by truck drivers (Joint Exhibit 14), and said that he had earlier told Union representatives in contract negotiations that those regulations superseded the parties' collective bargaining agreement. He also said that if employees fail to take a drug and alcohol test, it is treated the same as a failure to pass the test. Dembinski added that he repeatedly spoke to Lohmeyer on the morning of July 27 about Koderca's refusal to take a test and that Koderca was guilty of insubordination because he refused to do what the Company ordered him to do and because he has wasted about an hour's time in the office. He telephoned union steward Brommer to relate what was happening and Brommer then agreed Koderca had to take the test. Dembinski said

that Koderca finally agreed to be tested for alcohol and drugs when he returned to the plant at about 10:30 a.m. with Brommer and that Koderca was told it was too late to be tested because he had earlier left the Company's premises. He also said that Koderca during a grievance meeting said that he would have failed an alcohol test if he had taken it.

Dembinski said that he fired Koderca because he had violated federal regulations and the Company's Drug and Alcohol Abuse Policy ("Policy"), (Joint Exhibit 5). He also testified that Union Business Agent Terry Biarnesen and former Union Business Agent Meryl Hansen earlier had told him that the Company's Policy was fine and that the contract language relating to drug and alcohol testing has not been changed because the Policy is "federally-mandated and thus supersedes the contract."

On cross-examination, Dembinski ackowledged that the Company's Policy and the federal regulations do not mandate termination if employees refuse to take a test. He also said that he never ordered Koderca off Company premises; that no employees have ever refused to undergo prior testing; and that Koderca had never tested positive for prior random testing; and that page 37 of the Company's Policy does not deal with refusing to take a test. He added that Article 13 of the contract dealing with "Discharge and Suspension" and what is to happen if an employee either refuses or fails to pass a drug test, was never deleted because that would only cause more problems. He also said that Union officials never negotiated over the Company's Policy.

Grievant Koderca testified that he had been drinking on July 26 up to about midnight; that he reported to work sick on July 27; that after he had made his first run, he asked Lohmeyer at about 7:18 a.m. for permission to go home and told him he was hung over; that he was not then drunk and that he never told Lohmeyer he was drunk; that he agreed to take an alcohol test, but not a drug test "because I didn't think it was right to take a test"; and that Lohmeyer told him to either take the test or punch out after Lohmeyer had telephoned Dembinski.

Koderca then contacted Union steward Brommer who said he would meet him at the plant. Koderca left the premises to look out for Brommer and he returned to the plant at about 10:30 a.m., accompanied by Brommer, who told him he had to take the alcohol and drug test. When they met with Lohmeyer to tell him Koderca would take the test, Lohmeyer - after speaking to Dembinski - told him it was too late to do so because he had left the plant premises. Koderca also said that Lohmeyer never told him he would be fired if he did not take a drug test; that he never before had refused to take a drug test; and that he in the past had passed the 5-6 random drug tests he had taken. Koderca denied ever saying at a subsequent grievance that he was drunk that morning.

On cross-examination, Koderca said that he did not know why Lohmeyer testified falsely and that he in fact did not reek of beer on July 27, as alleged by Lohmeyer. He also testified extensively about his grievance and several written statements he had prepared which appear contradictory and which acknowledged he was "under the influence of alcohol." (Joint Exhibits 2-4).

Union Steward Brommer testified that he came back to the yard at about 8:35 a.m. and that Koderca then was nowhere to be seen; that when he returned to the yard at about 10:30 a.m., he told Koderca to take the alcohol and drug test and that Koderca finally agreed to do so; that Koderca was not drunk at that time and that he did not smell of alcohol; and that Dembinski told him it was too late to be tested. On cross-examination, he said he does not know if Koderca admitted at a grievance meeting that he was drunk. He also said the term "under the influence" means, "You're still screwed up" from drinking.

Union Business Agent Biarnesen testified that the Company in the last contract negotiations never discussed whether the Company's drug and alcohol Policy superseded the contract. On cross-examination, he acknowledged, "I looked at it" – i.e. the Company's Policy (Joint Exhibit 5) – and that "I did approve it" because "Every company has work rules."

Upon further questioning, he said that an employee manual never supersedes the contract; that "I didn't sign off on it" – i.e. the Company's Policy – and that "I misspoke" when he earlier testified to the contrary since "that was already their policy." He also flatly contradicted Dembinski's claim that the parties had discussed the Policy in contract negotiations.

Koderca grieved his termination on July 28 (Joint Exhibit 2), hence leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union asserts that the Company lacked just cause to terminate Koderca because it did not have reasonable suspicion to require him to take a drug and alcohol test; because Koderca was not insubordinate; and because his refusal to take a test was not a dischargable offense under the contract's progressive disciplinary policy. It also maintains that the contract supersedes the Company's Policy and separate Employee Manual ("Manual"), (Joint Exhibit 7) which in any event do not mandate discharge for refusing to take a test; that the contract is "consistent with the Department of Transportation Motor Carrier Safety Regulations"; and that "Mitigating factors dictate that discharge was an excessive penalty." As a remedy, the Union asks for a traditional make-whole remedy that includes Koderca's reinstatement and backpay.

The Company, in turn, claims that it had just cause to terminate Koderca because "Preemptive federal regulatory law prohibited the Company from continuing to employ the grievant in any safety-sensitive function." Alternatively, the Company argues that it had the right to terminate him under the contract and under the terms of its Policy and Manual which have been acquiesced to by the Union and that it also had just cause to do so.

DISCUSSION

This case involves the interplay between Article 13 of the contract (Joint Exhibit 1), entitled "Discharge or Suspension", and the Company's Policy (Joint Exhibit 5), and Manual (Joint Exhibit 7).

Article 13 of the contract states in pertinent part:

> **Section 1.** The Employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension shall give at least two (2) warning notices of the complaint against such employee to the employee, in writing, and a copy of the same to the Union and job steward affected, provided, however, that if the Employer considers the conduct of the employee to be so serious that repetition of it should lead to discharge, the Employer may state on the warning notice that it constitutes a first final notice, subjecting the employee to discharge or suspension upon its repetition, provided further, however, that if the Union disagrees that such misconduct warrants a first final notice, it may take the matter up under the grievance procedure.
>
> The Employer shall notify the authorized representative of the Union of his intention to issue a first final notice, prior to issuing the same. The disposition of each first final warning notice, whether it results from the failure of the Union to grieve, agreement of the parties, decision of the Joint Grievance Committee, or an award of the impartial arbitrator, shall constitute neither a precedent nor evidence in any other dispute relating to the issuance of the first final notice. Neither party shall submit such disposition or such a dispute to, nor testify concerning it, before the impartial arbitrator in an arbitration involving the issuance of another first final notice. The Union shall also have the right to take up the issuance of any written notice under the grievance procedure.

Section 2. Notwithstanding any other provision of this Article to the contrary, no warning notice need be given to an employee before he is discharged, if the cause of such discharge is theft or recklessness resulting in a serous accident while on duty, or the carrying of unauthorized passengers while on the job. The employee shall submit to a drug or alcohol test when requested to do so by the Employer. Failure to do so shall be interpreted as an admission of drunkenness, and subject to disciplinary action as follows: First (1st) offense- five (5) working days off without pay, with the employee receiving a written warning notice. Second (2nd) offense – Discharge. Pay for the day will be determined by the results of the test. The first warning notice in case of tardiness shall be only for chronic tardiness, and only after the affected employee and the Employer meet to review the need for the warning notice. The steward shall be notified of any action of such meeting.

. . .

Under Section 2 of this contract language, only a five-day suspension can be imposed for the first time offense of either refusing to take a drug or alcohol test or not passing one. Period. Thus, the contract precludes the Company from terminating an employee for the first time that he/she either fails or refuses to take a drug or alcohol test. If this contract language controls, Koderca's termination must be overturned because July 27 marked the first time he refused to take a drug test, thereby subjecting him to the maximum five-day suspension.

Section 10 of the Company's Policy, which Koderca personally received, states in pertinent part:

. . .

A violation of this policy will result in termination.

Our company will advise the driver who violated this policy of the resources available in evaluating and resolving problems associated with the misuse of drugs and/or alcohol, even though the driver is terminated.

If our company so chooses, prior to being eligible for rehire, a driver who received a "positive" test result shall go to a SAP for an evaluation who shall set up any assistance needed. When the driver has complied with all of the recommendations of the SAP, the driver shall request from the SAP a letter stating whether the driver had a problem, if any, and that the driver has complied or is continuing to comply with the SAP's recommendations, if any. If the SAP did determine that the driver had a problem, the SAP shall also state in the letter the number of follow-up tests that will need to be administered after the driver returns to duty.

. . .

Elsewhere, the Policy on page 10 states: "Refusal to submit to a reasonable cause test shall be considered a positive test."

The Company's Manual, which Koderca also personally received, provides in pertinent part on page 15:

> Drug/Alcohol Testing
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> Medical screens to determine the presence of drugs or alcohol in the body are used in the administration of this policy. These screening methods are used in the following circumstances:
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> a) with the pre-employment physical exam.
>
> b) with any re-employment physical exam following a layoff or other absence of 1 year or more;
>
> c) with investigation of any accident or incident involving injury, lost work time, major property loss as determined by management judgment, or in accordance with DOT requirements.
>
> d) in the event there is reasonable suspicion that an employee is possessing, using, or reporting to work under the influence of illegal drugs or alcoholic beverages.
>
> e) on a random basis in accordance with DOT requirements.
>
> Employees who test negative will be returned to work and paid for any lost time.
>
> An employee may be suspended from work without pay pending evaluation of the results of a drug and alcohol test. A positive test result showing presence of drugs or alcohol in the body may be grounds for dismissal. In the event an employee refuses to submit to a physical exam and/or drug and alcohol screening test when directed, such action shall be viewed as insubordination. (Emphasis added).

Normally, a collective bargaining agreement trumps employer-promulgated work rules. See *How Arbitration Works*, Elkouri and Elkouri (BNA, 5th Ed., 1997), at 511. See too WESTINGHOUSE ELECTRIC CORP., 48 LA 131 (Hebert, 1965); CENTEL BUSINESS SYSTEMS, 95 LA 472 (Allen, 1990); Here, though, the Company asserts that the reverse is true because the

Union in contract negotiations expressly agreed to the Company's Policy allowing for termination for a first-time offense. Manager Dembinski thus testified that Union Business Agent Biarnesen and former Union Business Agent Hansen (who did not testify), both told him that the Company's Policy was fine. Dembinski also said that the contract has not been changed because the Policy is "federally-mandated, and thus supercedes the contract."

For his part, Biarnesen flatly denied that the Company's Policy was discussed in the last contract negotiations. He added, however, that he did look at it and that "I did approve it" because "Every company has work rules." He later insisted that "I didn't sign off on it" and said he had "misspoke" when he earlier said that he had agreed to the Company's Policy.

It is difficult to resolve this credibility clash between Dembinski and Biarnesen because there is no objective way of determining what, in fact, occurred over this issue in the parties' past contract negotiations and because Biarnesen contradicted part of his own testimony. Given this uncertainty, there is insufficient proof to overcome the clear and unequivocal language set forth in Article 13, Section 2, of the contract which provides that first-time offenders who refuse to be tested cannot be suspended for more than five (5) days. As a result, the language of Article 13, Section 2, must be applied here because: "If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it meaning other than that expressed." *How Arbitration Works*, supra, at 482. See too, CLEAN COVERALL SUPPLY CO., 47 LA 272 (Whitney, 1966); CITY OF TIPP CITY, 88 LA 315 (Imundo, 1987).

If the Company at any time on July 27 told Koderca that he would be fired if he did not immediately consent to a drug and alcohol test, its case would be considerably strengthened because Koderca then would have been given express notice that his job was in jeopardy. However, no such warning was given.

Given Article 13, Section 2's, clear prohibition on terminating first-time offenders who refuse to be tested, Koderca on July 27 was entitled to receive such a warning so that he could then determine whether he wanted to continue his obdurate behavior. Since no such warning was given, and since a contractual just cause standard requires that employees be forewarned over the consequences of their behavior, the Company lacked just cause under the contract to terminate Koderca. See *How Arbitration Works*, supra, pp. 930-931. See also CINCINNATI METROPOLITAN HOUSING AUTHORITY, 109 LA 427, 433 (1997), wherein Arbitrator Stanley H. Sergent ruled that a discharge for refusing to take a drug test had to be overturned in part because "the grievant's supervisor did not inform him unequivocally that he would be discharged if he refused to take the test. . ."

That, though, does not end this matter since the Company asserts that federal law supercedes the contract and that Koderca's termination was mandated under federal law. On this issue, Section 382 of the Department of Transportation Motor Carrier Safety Regulations ("Regulations"), (Joint Exhibit 14), expressly prohibit commercial drivers from using alcohol and/or drugs and/or from being under their influence and they also provide for detailed testing procedures and the immediate removal from work of any drivers who either refuse to take such a test or who fail to pass it. However, there is nothing in the Regulations stating that an employee who either fails to take a test or who fails the test once it has been given must be terminated. To the contrary, Section 382.501 of the Regulations, entitled "Subpart E-Consequences for Drivers Engaging In Substance Use Related Conduct", provides for various measures, none of which mandate termination.

Moreover, the Company's position must be rejected because Koderca never tried to work after he told Lohmeyer he was ill or drunk (depending on whose version is accepted). For, as the Union correctly points out,

> "Had Koderca not asked to go home sick and revealed that he was hung over, the Company would never have had reason to even suspect that Koderca was possibly under the influence."

Sustaining Koderca's discharge therefore would have the perverse effect of discouraging other drivers from reporting that they are too ill or even too drunk to work. Given the need to keep unfit drivers off the road, the Company's position here, if sustained, would make it all the more difficult for impaired drivers to come forward to report their unfit condition for fear that they, too, might be terminated under the Company's view of the law.

The Company relies on Sections 382.103, 382.105 and 382.107 of the Regulations in support of its claim: "it is undisputable that the Company could not continue to employ the Grievant in any safety-sensitive position following his refusal to submit to a drug and alcohol test."

That is not true. What is true is that the Company on that day – i.e. July 27 – could not let Koderca drive a truck because of his condition and his initial refusal to be tested. Yet, since Koderca himself did not want to drive that day after he had finished his first run and after he had spoken to Lohmeyer, there was no danger whatsoever that Koderca would continue to drive under his condition. Hence, the overriding public policy goal of the Regulations – to get impaired drivers off the road – was met when Koderca came forward to say he was too ill to work.

The Company also asserts that Section 382.211 of the Regulations prohibits "an employer from continuing to permit a driver who refuses to submit to such tests from performing or continue to perform any safety-sensitive function." Again, that is true for the events of that day. That does not necessarily mean, however, that such a driver must be terminated.

The Company shifts gears somewhat by claiming that it was prohibited from employing Koderca "in any safety-sensitive function, at least not until he has completed the evaluation and treatment prescribed by Section 382.605" of the Regulations, entitled "Referral, Evaluation and Treatment."

But, the Company did not discharge Koderca over his failure to obtain such an evaluation and treatment. Instead, the Company fired him for "insubordination and refusal to take a Drug and Alcohol Test" (Joint Exhibit 13).

Secondly, the Company itself refused to let Koderca take a drug test after he finally agreed to do so at about 10:30 a.m. when he returned to the plant with union steward Brommer. Hence, we do not know whether Koderca would have tested positive or negative and/or whether he would have needed treatment and an evaluation. (We do know that he passed all prior drug tests in his nearly nine years of employment). Since that uncertainty has been created by the Company, it cannot now turn around and claim that it either was justified in terminating Koderca because he was never evaluated or treated or that he now cannot be reinstated on that ground.

Thirdly, Section 382.605(c) (1) states: "Before a driver returns to duty. . ." he/she "shall undergo a return-to-duty alcohol test. . ." if the problem involved alcohol or "a controlled substances test with a verified negative result if the conduct involved a controlled substance." Given the Company's refusal to let Koderca take a drug and alcohol test at 10:30 a.m. and the record's failure to establish whether Koderca would have passed such a test, it is unclear whether these provisions are applicable. However, this part of the Regulations in any event can be met by making Koderca's return to work contingent on passing an alcohol and drug test.

Section 382.605(b) and (c)(2) provide for the evaluation by a substance abuse professional who may provide a rehabilitation program. Again, that can be made part of any return to work order.

The Company also asserts that certain arbitration cases hold that a grievant's termination for refusing to be tested under an employer's drug and alcohol policy "is a matter of contract interpretation, rather than whether the Company had "just cause" and that a union bears the burden of proof in such cases. See MUELLER COMPANY AND PACE INTERNATIONAL

UNION, 1999 WL 1491632 (O'Grady, 1999); NATIONAL GYPSUM CO., 112 LA 248 (Nicholas, 1999). The Company also claims that "Arbitrators have applied this concept in a variety of circumstances", as it cites BUICK YOUNGSTOWN GMC, 1997 WL75396 (1997); WESTIN HOTEL, 90 LA 1194 (Dobry, 1988); ITT GENERAL CONTROLS, 76 LA 1258 (Bickner, 1981); U.S. CORRUGATED FIBRE BOX CO., 41 LA 804 (Shister, 1963).

Without going into the details of these cases, it suffices to relate that none of them contained the kind of clear language found in Article 13, Section 2, of the contract which expressly provides for a one-week suspension for those employees who either refuse to take a drug and alcohol test or who fail it.

Moreover, irregardless of what was decided in those cases, it is well established that employers bear the burden of proof in discipline cases. See *The Common Law of the Workplace: The Views of Arbitrators*, St. Antoine, Ed. (BNA, 1998), at 177, which points out:

. . .

> **ss. 6.9 Burden of Proof**
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> **(1) The employer bears the burden of proving just cause for discipline. That includes proof that the level of discipline was appropriate. The employer must also prove any alleged aggravating factors.**
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> **(2) The employee bears the burden of proving any affirmative defenses (such as condonation by the employer, provocation by other employees, or disparate treatment) and any mitigating factors.**
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> **Comment:**
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> *a. Allocation of the Burden of Proof.* Normally one bringing a grievance, like one bringing a lawsuit, bears the burden of proving the claims. One exception to that rule invovles the imposition of discipline. Arbitrators uniformly hold that employers bear the burden of proving just cause for discipline. The reasons for that distinction are lost in the mists of history. Nevertheless, parties and arbitrators alike accept that allocation of the burden of proof. Because "just cause" includes a requirement that the discipline be proportional and progressive (see ss. 6.7, above), part of the employer's burden of proof is to show that the discipline imposed satisfies those tests.

. . .

See too, *How Arbitration Works*, supra, at p. 905, which states:

> "Because of the seriousness of this penalty, the burden generally is held to be on the employer to prove guilt or wrongdoing, and probably always so where the agreement requires 'just cause' for discharge." (Footnote citations omitted).

See also *Evidence In Arbitration*, Hill and Sinicropi (BNA, 1981), p. 13, which states:

> "As a general practice, however, in disciplinary cases the burden is on management both to proceed first with its evidence and to prove employee guilt or wrongdoing" (Footnote citations omitted).

Since Article 13, Section 1, of the contract here contains a just cause requirement, the Company must meet a similar burden of proof here.

Based upon the above, I conclude that the Company under Article 13, Sections 1 and 2, had just cause to suspend Koderca for five days because of his refusal to immediately take a drug and alcohol test. It did not, however, have just cause to terminate him since Article 13, Section 2, only provides for a five-day suspension for such an offense.

As a remedy to rectify this contractual breach, the Company shall convert Koderca's termination to an unpaid five-day suspension and it shall make him whole by immediately offering to reinstate him to his prior position. Excluding the time of his unpaid five-day suspension, the Company also shall pay him all wages and benefits, including seniority, that he lost from the time of his termination to the time of his reinstatement, minus any monies that he received or could have earned during that period. Koderca's return to work is conditioned on passing a drug and alcohol test. If Koderca passes such a test, he shall be reinstated, after which time he must be evaluated by a substance abuse professional. In order to resolve any questions arising over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

In light of the above, it is my

AWARD

1. That while the Company had just cause to suspend grievant Daniel Koderca for five days, it did not have just cause to terminate him.

2. That the Company shall make grievant Daniel Koderca whole by taking the remedial action stated above.

3. That to resolve any questions arising over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 26th day of April, 2001.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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