BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

SUPER MIX OF WISCONSIN, INC.

Case # 1
No. 70063
A-6420

Appearances:

Sara J. Geenen, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., 1558 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union No. 43.

Jack Pease, Owner, Super Mix of Wisconsin, Inc., 1810 120th Avenue, Kenosha, Wisconsin 53144, appearing on behalf of Super Mix of Wisconsin, Inc.

ARBITRATION AWARD

Super Mix of Wisconsin, Inc., hereinafter Super Mix, Company or Employer, and Teamsters Local Union No. 43, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to provide a panel of five WERC Commissioners or staff members from which they could jointly select an arbitrator to hear and resolve a dispute between them regarding the termination of Michael Gehrke. Commissioner Susan J.M. Bauman was selected. A hearing was held on October 1, 2010, in Kenosha, Wisconsin. The hearing was not transcribed. The record was closed on October 1, 2010, after both parties had presented oral summations of the evidence and their respective arguments.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties stipulated that the issue to be decided is:

Was the Grievant, Michael Gehrke, discharged for just cause? If not, what is the appropriate remedy?

FACTS

The Grievant herein, Michael Gehrke, was employed by the Company as a truck driver. He worked in this capacity from August 29, 2005 until his termination on May 4, 2010. Gehrke was discharged after having tested positive for cocaine during a random drug test on April 29.[1] On May 3rd, around 5:00 p.m., Gehrke was advised of the positive test and informed Mike Anderson, manager of the Kenosha facility. At that time, Anderson removed Gehrke from his safety sensitive position of driver and, according to the Employee Notice Anderson completed: "I told Mike he was done driving and I would check into the details and give him a call."

On May 4th, Anderson told Gehrke that the Company had a zero tolerance policy and, therefore, Gehrke's employment was terminated. Gehrke was not aware that the company has a zero tolerance policy and was aware of at least one former employee who had tested positive for cocaine and continued working for Super Mix. Accordingly, Gehrke grieved his termination. The parties were unable to resolve the matter and the instant arbitration ensued.

Additional facts are included in the **Discussion,** below.

RELEVANT CONTRACT PROVISIONS

(June 1, 2007 – May 31, 2010)

ARTICLE 8. ABSENCE

. . .

Section 6. Loss of DCL.
Any employee temporarily losing his/her CDL due to any violation other than the use of illegal drugs or major violation while operating a commercial motor vehicle shall be granted a leave of absence without loss of seniority. [Bold in original]

. . .

[1] All dates are in 2010 unless otherwise indicated.

ARTICLE 13. DISCHARGE OR SUSPENSION

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, 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, provider further, however, that if the Union disagrees that such misconduct warrants a first final notice, it make take the matter up 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 serious accident while on duty, or the carrying of unauthorized passengers while on the job. The employee shall submit to an alcohol or drug test when requested to do so by the Employer. Failure to do so shall be interpreted as an admission of drunkenness, and shall be cause for discharge. . . .

. . .

ARTICLE 31. GRIEVANCE PROCEDURE

. . .

Section 3. The impartial arbitrator shall have the sole and exclusive power and jurisdiction to determine whether a particular grievance, dispute or complaint is arbitrable under the terms of the Agreement. The decision of the impartial arbitrator on any matter submitted to him shall be final and binding of [sic] all parties. The impartial arbitrator shall issue his decision no later than thirty (30) days after the case has been submitted to him.

. . .

ARTICLE 32. GENERAL PROVISIONS

It is agreed that the following six (6) cardinal points form a part of this Agreement:

A. That there shall be no limitation as to the amount of work an employee shall perform during the working. [sic]

B. That there shall be no restriction of the use of machinery or tools.
C. That there shall be no restriction of the use of any raw or manufactured material.
D. That the foreman shall be selected by the be the [sic] representative of the Employer.
E. That all employees are at liberty to work for whomsoever they see fit.
F. All employees who work in a driver classification must procure a valid chauffeur's license, and if it is suspended or revoked the employee must notify the Employer of the fact immediately. In the event of suspension or revocation, Article 8, Absence, Section 2. shall apply.

APPLICABLE EXCERPTS FROM DOT REGULATIONS

Sec. 40.17 Is an employer responsible for obtaining information from its service agents?

Yes, as an employer, you are responsible for obtaining information required by this part from your service agents. This is true whether or not you choose to use a C/TPA as an intermediary in transmitting information to you. For example, suppose an applicant for a safety-sensitive job takes a pre-employment drug test, but there is a significant delay in your receipt of the test result from an MRO or C/TPA. You must not assume that ``no news is good news'' and permit the applicant to perform safety-sensitive duties before receiving the result. This is a violation of the Department's regulations.

Sec. 40.23 What actions do employers take after receiving verified test results?

(a) As an employer who receives a verified positive drug test result, you must immediately remove the employee involved from performing safety-sensitive functions. You must take this action upon receiving the initial report of the verified positive test result. Do not wait to receive the written report or the result of a split specimen test.

. . .

(c) As an employer who receives an alcohol test result of 0.04 or higher, you must immediately remove the employee involved from performing safety-sensitive functions. If you receive an alcohol test result of 0.02-0.039, you must temporarily remove the employee involved from performing safety-sensitive functions, as provided in applicable DOT agency regulations. Do not wait to receive the written report of the result of the test.

(d) As an employer, when an employee has a verified positive, adulterated, or substituted test result, or has otherwise violated a DOT agency drug and alcohol regulation, you must not return the employee to the performance of safety-sensitive functions until or unless the employee successfully completes the return-to-duty process of Subpart O of this part.

. . .

Sec. 40.285 When is a SAP evaluation required?

(a) As an employee, when you have violated DOT drug and alcohol regulations, you cannot again perform any DOT safety-sensitive duties for any employer until and unless you complete the SAP evaluation, referral, and education/treatment process set forth in this subpart and in applicable DOT agency regulations. The first step in this process is a SAP evaluation.

(b) For purposes of this subpart, a verified positive DOT drug test result, a DOT alcohol test with a result indicating an alcohol concentration of 0.04 or greater, a refusal to test (including by adulterating or substituting a urine specimen) or any other violation of the prohibition on the use of alcohol or drugs under a DOT agency regulation constitutes a DOT drug and alcohol regulation violation.

Sec. 40.287 What information is an employer required to provide concerning SAP services to an employee who has a DOT drug and alcohol
regulation violation?

As an employer, you must provide to each employee (including an applicant or new employee) who violates a DOT drug and alcohol regulation a listing of SAPs readily available to the employee and acceptable to you, with names, addresses, and telephone numbers. You cannot charge the employee any fee for compiling or providing this list. You may provide this list yourself or through a C/TPA or other service agent.

Sec. 40.291 What is the role of the SAP in the evaluation, referral, and treatment process of an employee who has violated DOT agency drug and alcohol testing regulations?

(a) As a SAP, you are charged with:

(1) Making a face-to-face clinical assessment and evaluation to determine what assistance is needed by the employee to resolve problems associated with alcohol and/or drug use;

(2) Referring the employee to an appropriate education and/or treatment program;

(3) Conducting a face-to-face follow-up evaluation to determine if the employee has actively participated in the education and/or treatment program and has demonstrated successful compliance with the initial assessment and evaluation recommendations;

(4) Providing the DER with a follow-up drug and/or alcohol testing plan for the employee; and

(5) Providing the employee and employer with recommendations for continuing education and/or treatment.

(b) As a SAP, you are not an advocate for the employer or employee. Your function is to protect the public interest in safety by professionally evaluating the employee and recommending appropriate education/treatment, follow-up tests, and aftercare.

Sec. 40.305 How does the return-to-duty process conclude?

(a) As the employer, if you decide that you want to permit the employee to return to the performance of safety-sensitive functions, you must ensure that the employee takes a return-to-duty test. This test cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment. The employee must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties.

(b) As an employer, you must not return an employee to safety-sensitive duties until the employee meets the conditions of paragraph (a) of this section. However, you are not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that you have the discretion to make, subject to collective bargaining agreements or other legal requirements.

(c) As a SAP or MRO, you must not make a ``fitness for duty'' determination as part of this re-evaluation unless required to do so under an applicable DOT agency regulation. It is the employer, rather than you, who must decide whether to put the employee back to work in a safety-sensitive position.

DISCUSSION

Grievant, Michael Gehrke, was required, as a condition of employment, to have a valid Commercial Driver's License (CDL) issued by the State of Wisconsin.[2] Wisconsin requirements for a CDL are the same as those required by the federal government and, in fact, it is the federal law that mandates CDLs for persons driving heavy trucks like the ones the Grievant drove for the Employer.

Federal and State regulations require that CDL holders be subject to random drug testing. The Employer herein has contracted with a service provider to select, on a quarterly basis, those to be tested. The Grievant was one of those tested on April 29, 2010. He tested positive for cocaine and having received the results on May 3, reported this fact to his supervisor, Mike Anderson, who, in accordance with the federal requirements, removed the Grievant from his safety sensitive work. On May 4, the Grievant was terminated from his employment, with Anderson advising Gehrke that the Employer has a zero tolerance policy regarding drugs and alcohol.

The record is silent as to whether Anderson gave Gehrke the names of Substance Abuse Professionals (SAPs) to see, but Gehrke was assessed by a SAP on May 14, 2010. The SAP report of that date, directed to the Employer, states in pertinent part:

> Michael Gehrke was assessed on 5/14/2010 because he tested positive for cocaine on a random drug test. This violation of Department of Transportation Federal drug and alcohol policy was reported on 5/3/2010.
>
> Mr. Gehrke was evaluated with the DAST drug/alcohol screening instrument. He is recommended to complete 2 alcohol/drug education and awareness sessions. I anticipate that the employee can be reevaluated after the employee has successfully attended session.

By letter dated June 2, 2010, the SAP advised the Employer as follows:

> Michael Gehrke was assessed on 5/14/2010 because he tested positive for cocaine on a random drug test. This violation of Department of Transportation Federal drug and alcohol policy was reported on 5/3/2010.

[2] Although Article 32, Section F refers to a chauffeur's license, there is no dispute that this requirement has been modified as a result of federal and state legislation to require a CDL.

> Mr. Gehrke was recommended to complete two drug education and awareness sessions. He initiated sessions on 5/19/2010 and kept his second appointment on 5/24/2010.
>
> Mr. Gehrke had a follow-up evaluation on 5/27/2010. Mr. Person, the counselor, reports that Mr. Gehrke accepted the consequences of his referral, recognized the negative impact of illicit drug use, and stated his determination to successfully maintain a drug free state. Mr. Gehrke has demonstrated successful compliance with his initial recommendations. It is my professional determination that the employee complied with my recommendations and is eligible to be considered for return to safety sensitive duty at the discretion of his employer and following the return of a negative drug screen. There are no further aftercare recommendations at this time.
>
> I recommend that the employee be tested for drugs 8 times per year for one year following his return to safety sensitive duty. Unannounced drug tests are to be conducted over the entire period. Collections for all follow-up exams must be observed.
>
> I certify that I am a qualified Substance Abuse Professional and that I have knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substance use and related disorders. I further certify that in my professional opinion, the above-named employee has complied with my recommendations for assistance related to drug use or alcohol misuse. As a Substance Abuse Professional, I have complied with DOT or company regulations regarding my evaluation, recommendation, and monitoring of the above-named employee.

As evidenced in the federal regulations cited above, as well as in the letter from the SAP, having successfully completed the recommendations of the SAP, the Grievant could return to safety sensitive work, could have continued in his employment with the Employer. There is nothing in the federal regulations that would have prevented Mr. Gehrke from returning to his position.

The Employer refused to return the Grievant to his position, claiming that it has a zero tolerance for illegal drugs and would not deviate from that policy. It is an oral policy which the Company's representative, Jack Pease, contends is conveyed orally to all of the company's employees at the annual safety meeting that is held in conjunction with a presentation by the Company's insurer. The Company's experience has shown that a high percentage of persons testing positive for either cocaine or heroin have had serious accidents and, therefore, the Employer treats persons testing positive for these illegal drugs differently from the manner in which it treats persons who test positive for alcohol. It is the position of the Employer that it has enforced the policy fairly over the years that it has been in business, including the years that the Kenosha plant has existed.

The Grievant testified that he has attended the annual safety meetings throughout his employment with the Company but he has never been told that Super Mix has a zero tolerance policy. After he tested positive he was surprised that he was terminated as he was aware of two individuals who had tested positive and who continued to work for the Employer: John Martinez had tested positive for cocaine and continued to be an employee of the Company[3] for a period of time until he was killed in a motor vehicle accident; Dan Eckstrom tested positive for alcohol. It appears that Mr. Eckstrom was allowed to continue working.[4] Based on his knowledge of these two examples, the Grievant believes that he should be allowed to continue to work for the Employer.

The Employer is of the opinion that the language of the collective bargaining agreement at Article 8, Section 6 puts employees on notice that a positive test for an illegal drug will result in termination. This part of the agreement reads

> Any employee temporarily losing his/her CDL due to any violation other than the use of illegal drugs or major violation while operating a commercial motor vehicle shall be granted a leave of absence without loss of seniority.

While agreeing that the words do not state that the use of illegal drugs will result in loss of seniority, which the Employer equates to termination, the Company argues that this language means the same thing. The cited language is found in an article of the collective bargaining agreement entitled "Absence". The clear and unambiguous language provides that an employee who loses his or her CDL shall be granted a leave of absence without loss of seniority in the event the loss of the CDL is not for use of illegal drugs or major violation while operating a commercial motor vehicle.[5] This language does not say that a positive drug test will result in termination. Further, an

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[3] There was considerable hearsay evidence regarding Mr. Martinez' evaluation by a SAP, his fulfilling the requirements of the SAP, and his eventual return to work. There is no evidence in the record regarding the SAP recommendations, if any, nor are they relevant to the disposition of the instant case. It is undisputed that Martinez tested positive for cocaine and was not terminated, although there is some dispute as to whether the principals in the organization, including Jack Pease, were aware of the positive test.

[4] The federal regulations require that a positive alcohol test also requires referral to a SAP and the completion of that individual's recommendations before returning to safety sensitive work. Mr. Pease appeared to be unaware of this requirement at the hearing in this matter.

[5] It is quite likely that this language refers to a situation when an employee looses his CDL where there is police involvement. The language appears to permit an employee who looses a CDL (which could be for a period of 6 months to a year) will be granted a leave of absence and allowed to return to work without loss of seniority when the license is restored unless the loss of the license was the result of use of illegal drugs or involved a major violation while operating a commercial motor vehicle. In most collective bargaining agreements, language of this nature is included in contracts to protect employees who are arrested for driving while the influence of intoxicating beverages while off duty.

employee who tests positive does not automatically "lose" his CDL even though he cannot engage in safety sensitive work pending evaluation by a SAP and fulfilling the SAP's recommendations. The regulations are clear that an individual can return to safety sensitive work after a positive drug test and the recommendations of a SAP are followed.

The Employer argues that the language of Article 8, Section 6 requires termination of the Grievant. However, Article 13, Section 2 of the same agreement demonstrates that the parties are capable of stating, with clarity, what actions will result in immediate termination:

> 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 serious accident while on duty, or the carrying of unauthorized passengers while on the job. The employee shall submit to an alcohol or drug test when requested to do so by the Employer. Failure to do so shall be interpreted as an admission of drunkenness, and shall be cause for discharge. . . . (emphasis added)

The language of the collective bargaining agreement does not support the Employer's argument that its employees, including the Grievant, are on notice that the Company has a zero tolerance policy with respect to the use of illegal drugs.

The question before the undersigned is whether the Employer had just cause to terminate Mr. Gehrke. An initial and fundamental component of just cause is whether the employee is on notice that the behavior in question will result in termination. As noted above, the Employer's drug policy is an oral policy that it claims it repeats annually to employees at a safety meeting. The Employer produced no written policy, and no written documentation to the effect that this policy was discussed at any of the annual safety meetings that the Grievant attended. The Grievant claims that he was never told that the Employer has a zero tolerance policy.

It is self-serving on the part of both the Employer and Mr. Gehrke to make these statements – the Employer claims that it put the Grievant on notice, the Grievant contends that he was never put on notice. In a discharge case, the Employer has the burden of proof, a burden which it has not sustained. The fact that there are two

individuals who tested positive for cocaine or alcohol, Martinez[6] and Eckstrom respectively, facts known to the Grievant, adds support to the Grievant's statement that he was unaware of a zero tolerance policy.

There is no doubt that the Grievant was aware that he was subject to random drug testing. He has been employed for over 15 years in similar positions and has been subjected to such testing during that time. He testified that the April 29 test was the only time that he tested positive. He acknowledged that he had made a "huge mistake" and that he was "not thinking correctly". Mr. Gehrke said that this would not be a problem again and that he would pass a drug test if given one the day of the hearing. The Grievant clearly knew that he should not use illegal drugs, and that he could be tested at any time. What the Grievant did not know was that there was a zero tolerance policy and that he would be fired the first time he tested positive.

Likewise, there is no doubt that the Company's experience has led it to adopt a policy of zero tolerance with regard to illegal drugs, and some degree of leniency with respect to alcohol. The undersigned agrees with the Employer's concerns about the safety of its drivers and, especially, the safety of the public. The policy that Super Mix has adopted, if applied as stated and made known to all its employees, is an excellent policy. Unfortunately, the policy has not been disseminated to the employees and has not been applied uniformly.

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The grievance is sustained. The Employer did not have just cause to terminate the Grievant. The Employer is directed to offer the Grievant immediate reinstatement with his continued employment subject to his passage of a drug and alcohol screening. In addition, the Employer may subject the Grievant to additional random drug testing throughout his first year of re-employment in accordance with the SAP recommendations.

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[6] The Employer argues, persuasively, that the top management of the Company was not aware that Martinez had tested positive for cocaine and was allowed to continue as an employee of the Employer. It contends that the then manager, Rob Gerloch, may have let Martinez continue working despite the positive test and despite his knowledge of the zero tolerance policy. Pease claims that the Company never got the positive report from the contracting service until after Martinez' death. The burden is on the Employer that sends an employee for testing to ensure that it gets the results in a reasonable period of time. Regardless of the reasons why Martinez was allowed to continue to work, the Grievant's knowledge was limited to the fact that there was a positive test and continued employment – evidence that there was not a zero tolerance policy. The company's argument that if Gerloch acted compassionately, the Company shouldn't have to be "compassionate" forever is correct, but it must put employees on notice that there is a zero tolerance policy.

The Employer is to make the Grievant whole as to seniority, lost wages and benefits he would have received since June 2, 2010, the date the SAP indicated that he was able to return to work, less any interim earnings earned since his termination May 4, 2010 including unemployment compensation.

The arbitrator will retain jurisdiction in this matter for the purpose of resolving any disputes as to the implementation of the remedy awarded, and will relinquish jurisdiction sixty (60) days from the date of the Award unless she is advised in writing before then that there is a problem or dispute with regard to the remedy.

Dated at Madison, Wisconsin, this 14th day of October, 2010.

Susan J.M. Bauman /s/
Susan J.M. Bauman, Arbitrator

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