Arbitration Decisions

Labor Arbitration Decision, Stater Bros. Markets, 2022 BL 132092, 2022 BNA LA 21

Labor Arbitration Decision, Stater Bros. Markets, 2022 BL 132092, 2022 BNA LA 21

LABOR ARBITRATION PROCEEDING

In the Matter of:

Stater Bros. Markets,

Employer,

and

Teamsters Local 63,

Union

Arbitrator Lee Hornberger

Suspension

DECISION AND AWARD

March 9, 2022

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BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Drug testing - Refusal of test - Confrontational behavior - DOT rules - Suspension
►118.653 ►118.640 ►94.553 ►118.303 ►118.305 [Show Topic Path]
Arbitrator Lee Hornberger ruled that Stater Bros. Markets had just cause under DOT regulations and company rules to suspend a truck driver/foreman for nearly four full days for his loud confrontational behavior that disrupted the collections process, and which constitutes a refusal to take a random drug test. The grievant was aware that such refusal would subject him to corrective action, he plainly stated “I am not taking this test,” and saying to the tech “Who the hell are you talking to like that” is inherently a failure to cooperate with the drug testing process. The suspension wasn’t excessive, since DOT regulations required that he be removed from safety-sensitive work and the length was designed to provide the grievant time to comply with prescribed education and to take a return-to-duty test before coming back to work.

APPEARANCES

For the Employer.

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INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Stater Bros. Markets (Employer) and Teamsters Local 63 (Union). The Union contends that the Employer violated the CBA when it suspended Grievant. The Employer maintains that it did not violate the CBA when it suspended Grievant.

Pursuant to the procedures of the CBA, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on November 4, 2021, in San Bernardino, California, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The hearing was transcribed. The transcript was received by me on November 24, 2021. The dispute was deemed submitted on February 28, 2022, the date post-hearing submissions were received.

The parties stipulated that the Grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

The parties filed powerful post-hearing briefs.

ISSUES

The Employer frames the issues as follows.

(1) Did the Employer have just cause to suspend Grievant from January 15, 2021 (partial day) to January 19, 2021?

(2) If the answer to (1) is "no," what was the appropriate remedy?

The Union frames the issues as follows.

(1) Was Grievant's suspension for just cause?
(2) If not, what is the appropriate remedy?

I frame the issues as follows.

(1) Was Grievant's suspension for just cause?
(2) If not, what is the appropriate remedy?

FACTUAL OUTLINE

The participants

Grievant

Grievant has been employed for seven years by the Employer. He works at the San Bernardino, California, distribution facility. His pay rate is $29.75 an hour/ca $1,300 gross a week. He was a foreman on January 15, 2021. He works in the office. He is a driver but does not do driving. His work hours are 2:00 a.m. to 10:30 a.m. According to the Transportation Director, Grievant can get loud and aggressive toward other employees. According to the Senior Transportation Supervisor, Grievant performs work pretty well. He can be loud. According to the Transportation Supervisor, Grievant is "a good worker. ... Sometimes agitated. ... and sometimes becomes loud and aggressive."

Assistant Manager [Tech]

The **Assistant Manager [Tech]** has been the Assistant Manager of the Healthpointe Clinic for 10 years. The Tech does drug tests two or three times a month. They are pretty often in the middle of the night. The Tech first met Grievant on January 15, 2021. The Tech was there to do random drug tests. He has done drug tests for at least[*2] four years. A different person had been scheduled to do the[*2] test. That night that different person asked the Tech to cover for

her. She told the Tech that Grievant was confrontational and hostile. The Tech agreed to fill in for her.

Transportation Director

The **Transportation Director** has been employed by the Employer for 40 years. The Transportation Director knows Grievant. He is one of Grievant's supervisors. According to the Transportation Director, the Transportation Director has no animosity toward Grievant. He treats Grievant the same as he treats all other employees.

Senior Transportation Supervisor

The **Senior Transportation Supervisor** has been employed by the Employer for five years. He knows Grievant. He is one of Grievant's supervisors.

Transportation Supervisor

The **Transportation Supervisor** has worked for the Employer for 34 years. The Transportation Supervisor works with Grievant. The Transportation Supervisor is one of Grievant's supervisors.

Dispatcher

The **Dispatcher** was working for the Employer on January 15, 2021. He no longer works for the Employer.

Truck Driver-Shop Steward

The **Truck Driver-Shop Steward** has been a Truck Driver with the Employer for 26 years. On January 15, 2021, he was a Shop Steward.

Background

Drug test protocol

According to the Transportation Director, there are DOT random drug test rules.

According to the Senior Transportation Supervisor, there is an Employer drug policy. The rules are posted. Exh. 1. Random drug testing is required for Class A drivers. If an employee fails to cooperate with the test, it is considered as a positive test. If an employee tests positive, the employee is offered self-referral, or termination. The DOT computer program determines who will be tested. DOT notifies the Employer.

According to the Transportation Supervisor, there are Employer rules and regulations. The rules are posted in the work area. The employees are given a copy. The rules require drivers to comply with the DOT rules. Exh. 1 is the only thing the employees get concerning DOT. An employee's failure to take the random drug test is "considered a failure." Exh. 1, #3. This would result in a suspension without pay. A failure to cooperate equals a positive drug test.

The Union Business Representative testified that Exh. 104 is still in effect. The Employer rule is under the DOT CFR's. With employers with 50 drivers or more, there is random drug testing. It is the Employer's responsibility, not the MRO's responsibility, to report back to DOT. The employee has to be observed until able to urinate. There has to be "an eye on you" by a "substance abuse professional."

The conference room

According to Grievant, the conference room is either 8 feet by 10 feet or 10 feet by 15 feet. There is a table right in the middle of the room. The test taker is at the far end of the room. The table was in the middle, in between Grievant and the Tech.

According to the Tech, the conference room is a small room with no windows.**[*3]** There was not a table between the Tech and Grievant.

According to the Transportation[*3] Director, the conference room is in sight of the dispatch room. There is a supervisor on duty. The conference room is either 8 feet by 12 feet or 8 feet by 14 feet. There are a table and six to eight chairs.

According to the Transportation Supervisor, it is a small conference room. The conference room is 8 feet by 12 feet. People could be more than 6 feet apart in that room. There are "small quarters" in the conference room.

According to the Shop Steward, the conference room is 8 feet by 10 feet. There are chairs and a desk in the center of the room.

The cubicles

According to the Transportation Director, there are 12 cubicles. The supervisors do their jobs in the cubicles.

2:00 a.m., January 15, 2021

According to Grievant, the Dispatcher was a front window Foreman that day. The Dispatcher told Grievant that Grievant had to take the drug test. The Transportation Supervisor took Grievant's temperature. When an employee comes in, the employee is not supposed to leave the area. Grievant was the only employee to be tested that day. Grievant has had three or four tests. Grievant had not been asked to wait outside the conference room before. The Transportation Supervisor was by the printer.

According to Grievant, the Tech told Grievant to "wait outside." It was not what the Tech said. It was how the Tech said it. The Tech was texting on the phone. According to Grievant, "I did not raise my voice at all." The Tech caught Grievant off guard. Grievant said to the Tech, "Who the hell are you talking to like that?" There was no other cursing. Grievant knows his limitations in that office. Grievant had an issue with waiting outside. During the pandemic, other people let Grievant stay in the conference room. "According to Grievant, Grievant walked out. Grievant told the Transportation Supervisor that the Tech was being rude to Grievant. Grievant said to the Transportation Supervisor, "I am not taking this test." The Transportation Supervisor said this is considered to be a refusal. The Transportation Supervisor made the decision to send Grievant home. The incident took around 20 minutes.

According to the Tech, the Tech went to the manager on duty. There was the chain of custody situation. There was a small conference room. The Tech set out the forms. These forms would include consent, releases, and COVID questionnaire documentation. Exhs. 3 to 6. The Tech asked for a sample from Grievant. Grievant "mentioned no." The Tech told Grievant to wait outside. This was because of Covid social distancing. Grievant then started using profanity and was aggressive. According to the Tech,

> I remember [Grievant] saying, "You motherfucker. You don't tell me to wait outside when other people are always waiting inside with the — with the tech." And he was really hostile about the situation that I asked him to wait outside. Tr. 55.

The Tech was really upset. The Tech testified that he "did not feel safe." The Tech went outside. The[*4] Tech found the Transportation Supervisor. Grievant did not[*4] calm down. The Tech texted the Tech's boss. The boss told the Tech that he could leave the premises. The Tech came back to his Clinic. He scanned the paperwork.

There is usually a manager who can see them. If an employee leaves the room, an employer supervisor would supervise the employee.

According to the Tech, Grievant was really hostile. Grievant became confrontational once the Tech asked Grievant to step out. Grievant became very aggressive, used profanity, and used a loud voice. The Tech left the conference room first. Grievant left the conference room second. They were still close to each other. The Tech testified that "I just wanted to leave. ... I could not continue with the test."

According to the Transportation Supervisor, the Transportation Supervisor was there on January 15, 2021. It was a random drug test. Grievant was the only employee to be tested that morning. Grievant came to work at 2:00 a.m. The Transportation Supervisor checked Grievant's temperature and escorted Grievant to the office. The Transportation Supervisor stepped outside. The Transportation Supervisor came back in.

According to the Transportation Supervisor, the Tech asked Grievant to step outside because of the Covid situation. Other drivers had previously been asked to step outside. Each person being tested was told would have to step outside the conference room. This was because of Covid.

According to the Transportation Supervisor, the Tech was not being disrespectful. The Tech asked Grievant to step outside until ready. The Tech was still in the office. The Transportation Supervisor had heard shouting. The Transportation Supervisor had not heard the prior conversation. The Transportation Supervisor heard loud arguing. There was shouting and screaming "at top of [Grievant's] voice." Grievant was "being argumentative." The Transportation Supervisor tried to calm Grievant down. Grievant did not immediately calm down. According to

the Transportation Supervisor, it was understandable that the Tech would feel threatened. The Tech is always professional. There were no prior issues with this Tech. The Tech has an accent. When the Transportation Supervisor tried to calm Grievant down, the Transportation Supervisor warned Grievant that not taking the test would constitute a refusal. Grievant was not confrontational with the Transportation Supervisor. Grievant was argumentative with the Tech. The Transportation Supervisor told Grievant that if he refused to take the test, it would be a failure.

According to the Transportation Supervisor, the Tech was intimidated and afraid. The Tech called the Tech's boss. the Tech said that the Tech was not going to do the test. The Transportation Supervisor told Grievant the test would be a failure. Grievant said "Not going to do it ... going to leave."

2:34 a.m., January 15, 2021, Tech email

The Tech's 2:34 a.m., January 15, 2021, email said,

> Please[*5] be aware, I went this morning at 2 am to do the random as Stater[*5] bros as [the scheduled Tech] did not feel comfortable with this patient. While finishing his paperwork, I asked the patient to wait outside. Patient went crazy using profanity toward me, making a whole uproar in their office. He mentioned that I was rude by asking to stepped outside of the conference room, stating other drivers stays with our technician inside, mentioning to supervisor that he already has an issue with Healthpointe. I did not feel comfortable with this donor so I left their premises and I refuse to go back. I emailed management in regards to this issue. Exh. 7.

6:49 a.m., January 15, 2021, Transportation Supervisor email

The Transportation Supervisor sent an email to the Senior Transportation Supervisor and the Transportation Director at 6:49 a.m., January 15, 2021. The email said,

> At 0200 as [Grievant] was coming into the door in dispatch I took his temperature and informed him that he had a random. [Grievant] went into the room with the technician. While I was taking the rest of drivers temperatures. When I came back into dispatch the technician gave me [Grievant's] driver license to make copy for him. Just as I had completed making a copy of [Grievant's] license I heard [Grievant] shouting you don't talk to me like that, I ask [Grievant] what was wrong, and why he was shouting at the technician, and he said [...] the technician told him to go outside in a disrespectful way. I told [Grievant] if he wasn't ready to go to use the restroom that he needed to wait out in one of the cubicle, again [Grievant] said it was the way [the Tech] said it and disrespected him. Then the technician said he was not going to do the random and left, that when I called [the Senior Transportation Supervisor] to let him know what happen. Exh. 2.

Dispatcher statement

According to the Shop Steward, the Shop Steward arrived at work at 4:00 a.m., January 15, 2021. He was made aware of the situation by the Dispatcher. The Dispatcher gave the Dispatcher's statement to the Shop Steward. The Dispatcher explained the situation to the Shop Steward. The Dispatcher no longer works for the Employer. The Dispatcher's January 15, 2021, statement said,

> Just a few minutes before 02:00, [Grievant] clocked in for his shift. [The Transportation Supervisor] immediately let him know that he was up for a drug test, once he walked in the office. Then [the Transportation Supervisor] walked outside into the break room to do temps. I was sitting at the front foreman window. While this was all taking place. [Grievant] and the nurse were both in the bid room filling out the paper work. I heard the nurse tell [Grievant] to go wait outside. To me, it sounded rude. [Grievant] took it the same way as I did. Then a verbal altercation happened[*6] between [Grievant] and the nurse. At this point, [the Transportation Supervisor] stepped back into the office. [The Transportation Supervisor] tried to calm the situation.[*6] But it did not help. At this time [Grievant] told [the Transportation Supervisor] that he didn't need to take the take this and he would just go home sick. [The Transportation Supervisor] got [Grievant] calmed down. But by this point the nurse told [the Transportation Supervisor] that he would not test [Grievant] and if he wanted him to be tested he would have to take [Grievant] to the clinic. [Grievant] explained to [the Transportation Supervisor] that he was upset because of the nurse's attitude. Also that he didn't understand why he was being told to wait outside. When everyone who was tested in the past just waited in the room. [The Transportation

Supervisor] explained that it was the new practice. [Grievant] and I both work as foreman and never see the guys waiting out of the bid room. [The Transportation Supervisor] told us that [Grievant] would have to go home and call [the Transportation Director] in the morning. He also said that it would go down as a refusal. I told [the Transportation Supervisor] that [Grievant] never refused and he was willing to go to the clinic. [The Transportation Supervisor] was not having it and told [Grievant] to go home and call in the morning. Exh. 102.

7:00 a.m., January 15, 2021, Transportation Supervisor call to Senior Transportation Supervisor.

According to the Senior Transportation Supervisor, the Senior Transportation Supervisor was called by the Transportation Supervisor. The Senior Transportation Supervisor was at home. The Transportation Supervisor told the Senior Transportation Supervisor what had happened. The Tech had called the Tech's boss and had been told to leave.

According to the Transportation Supervisor, the Transportation Supervisor called the Senior Transportation Supervisor. The Senior Transportation Supervisor said Grievant would be suspended. The Transportation Supervisor spoke with Grievant and told Grievant he was suspended. Grievant walked himself out of the facility.

9:05 a.m., April 9, 2021, Tech log entry

There is a 9:05 a.m., April 9, 2021, text statement from the Tech's log. This text says,

I went to the DC to perform a random drug screen collection at 2 am donor: [Grievant]. While finishing his paperwork (demo and demographics) I asked the patient to wait outside for purposes of social distancing due to COVID-19. The room is too small and it is our protocol as already discussed with Stater Bros that we will not have anyone in the same room while we wait for donor to be ready to provide[*7] specimen. Stater Bros agreed to adhere to Covid 19 protocol of social distancing. [Grievant] became very upset and volatile using profanity cussing at me, causing quite a scene. He told me that I was rude by asking him to step outside of the conference[*7] room. He mentioned that other drivers remain in the room with our technicians. He stated to [the Transportation Supervisor] that he has had issues with Healthpoint. At this point I no longer felt safe or comfortable to proceed with the collection. So, I left the premises and I notified management that I refuse to go back to be subjected to this type of behavior. At 2 am in the morning. The safety and security of my wellbeing was threatened by [Grievant]. Exh. 8.

9:00 a.m./10:00 a.m., January 15, 2021, meeting

According to Grievant, Grievant returned to the work site for a meeting later that morning. The Senior Transportation Supervisor or the Transportation Director called the later-that-morning meeting. Rx. 10. Grievant was told that he would lose his job if he did not sign the self-referral document.

According to the Transportation Supervisor, the Employer offered self-help or discharge. There had been a failure to cooperate. The DOT refusal to cooperate rules are at CFR paragraph 8.

According to the Senior Transportation Supervisor, the later-that-morning a meeting took place at the Director of Transportation's office with Grievant, Senior Transportation Supervisor, Transportation Supervisor, and the Shop Steward. Grievant in effect refused the test. Grievant was offered self-referral. Grievant signed the self-referral document. Exh. 10. Grievant was sent home without pay. Grievant went through the self-referral program. The handwritten notes from that meeting stated as follows.

Attended [Union Steward], [Grievant], [Director of Transportation], [Senior Transportation Supervisor]

[Director of Transportation] Explaining law — DOT Rule on Refusal Behaving in a way to disrupt collection — -Refusal same as a positive —

Consequences — same category as a positive — Are you going to self refer —

(A) I don't understand.

(B) Explain what self refer means —

(J) Not Term right?

(B) As long as he goes through program — no term

(J) Suspension — Call Romiro.

(B) Explaining Paperwork — will give to 1500 Monday to call back Bobby entering into program.

(A) Reads paperwork — Agrees and Signed

(B) Signed. — Gave copy to [Grievant]. Need case # and name of person talked to. Notes by [Senior Transportation Supervisor] Exh. 11.

January 22 or 23, 2021, Grievant took a drug test at Kaiser.

According to Grievant, the person who answered the phone number provided by the Employer at the meeting gave Grievant the runaround. Grievant had to call a driver that had just gone through the self-referral situation. Grievant got a different phone number from this driver. [*8] Via that phone number, Grievant made contact with Kaiser. Kaiser got Grievant in the same day for a drug test. Rx. 15. He got with Kaiser to get the drug tests. Kaiser provided Grievant with paperwork. Grievant gave the paperwork to the Senior Transportation Supervisor. Grievant missed four[*8] to five days of work. This equaled approximately $1300 gross pay.

According to the Transportation Director, at approximately 10:00 a.m., January 15, 2021, there was a meeting in the Transportation Director's office with Grievant. The Union Steward read Grievant paragraph 8. Exh. 9. Grievant said he did not understand paragraph 8. Options were discussed in that meeting.

According to the Shop Steward, the Employer read the rule at this meeting. The refusal equaled the same as a positive drug test. The options would be self-refer or be terminated. Grievant did not have a choice but to sign the self-referral form. The Union Steward has been drug tested at least 10 times.

January 23, 2021, return to work

Grievant was placed off work. He was suspended for four days plus part of one day. He was suspended for a partial day on January 15, 2021. He had clocked in for approximately 45 minutes on the date of the random DOT drug test and on January 16, 17, 18, and 19, 2021. January 20 and 21, 2021, were his normal days off. He could not return to work until he contacted the treatment facility, obtained a negative drug test, and was cleared by his doctor. It was Grievant's responsibility to contact the treatment facility and obtain the negative drug test results and doctor's note to provide to the Employer.

On January 23, 2021, the Employer received Grievant's negative drug test results and doctor's note from Kaiser Permanente. If Grievant would have provided his negative test results and doctor's note sooner than January 23, 2021, he could have returned to work sooner. The doctor's note placed Grievant off of work from January 20 to 22, 2021, and stated that Grievant was cleared to return to work on January 23, 2021. There was a typo on Grievant's January 2021 schedule for January 22, 2021. It should have stated that Grievant was on a leave of absence, rather than suspended without pay for that day.

Grievant was fully reinstated on January 23, 2021, after he provided the Employer with his negative drug test results and doctor's note clearing him to work.

Reporting to the DOT

According to the Transportation Director, the Transportation Director is familiar with the DOT rules. The MRO is Healthpointe. The MRO reports positive drug tests to the DOT. The Employer does not report anything to the DOT.

According to the Transportation Supervisor, the Transportation Supervisor does not know if the refusal was documented with the DOT. If the drug test were positive, the DOT could cause the driver to lose their license. He does not know if there was a report to the DOT.

January 15, 2021, Grievance

The Grievance was filed on January 15, 2021.

November 4, 2021, arbitration hearing[*9]

The arbitration was held on November 4, 2021, via Zoom.

CONTENTIONS OF THE PARTIES

a. For the Employer

The Employer had just cause for suspending Grievant due to Grievant's refusal to cooperate with a required DOT random drug test on January 15, 2021, Grievant was scheduled for a DOT drug test at the Employer's[*9] facility. After completing the necessary paperwork for the drug test, the Assistant Manager [Tech] asked Grievant to wait outside the small meeting room until his specimen was going to be collected, as was a standard protocol given the spike of COVID-19 at that time. Rather than leave the small meeting room as requested, Grievant refused and got loud and aggressive with the Tech. Grievant cursed at the Tech and invaded the Tech's personal space. Due to Grievant's behavior, the Tech feared for his safety and informed Grievant's supervisor that he would not be performing the drug test. Following, Grievant was sent home for behaving in a confrontational way towards the Tech which disrupted the collection process and unquestionably constituted a refusal to take a drug test under the DOT's regulations.

Under DOT regulations, a refusal must be treated as a positive test. Pursuant to the Employer's policy/practices, employees who test positive for drugs are afforded the opportunity to either enter a self-referral program or be terminated. Further, under the Employer's policy/practices, a driver cannot return to work until he has been cleared to return to work by a medical review officer and has received a negative drug test. Here, Grievant, a foreman (aka a lead driver), who must be willing and able to drive, if necessary, chose to enter a self-referral program. After a few days, Grievant obtained clearance from his doctor and a negative drug test to return to work. The length of Grievant's suspension was based on his diligence in arranging for an appointment with his doctor to return to work and obtain a negative drug test. Ultimately, Grievant missed less than five days of work and was fully reinstated upon the Employer's receipt of the necessary documentation for Grievant to return to work.

The Employer had just cause for suspending Grievant given his confrontational behavior towards the collector during his scheduled random drug test, which disrupted the collection process. Under DOT regulations, Grievant's actions clearly constituted a refusal to take a drug test, which had to be treated as a positive test. Accordingly, Grievant's suspension should be sustained, and the Grievance should be denied.

b. For the Union

The Employer did not have just cause to suspend Grievant because he never refused his DOT mandated random drug test. On January 15, 2021, Grievant, a foreman with the Employer, reported to his regular shift at 2:00 a.m. and was informed he had to provide a DOT random drug test. Grievant had no problem providing a specimen so he filled out the paperwork associated with the process, and turned it[*10] in by giving it to the test-taker Tech, a contractor employee. The Tech ordered Grievant, in a rude tone, to wait outside. Grievant had no issue with being asked to follow a specific process, but[*10] felt the tone the Tech used was inappropriate. Grievant also feared waiting outside would invalidate the testing process because he frequently witnessed other employees summoned for testing but never observed anyone waiting outside. The Tech had no legitimate reason to discontinue the testing process. Grievant was ready, willing, and able to test and the Employer's finding to the contrary lacks just cause.

The Transportation Supervisor called the Senior Transportation Director and was instructed to handle the matter as a refusal, suspend Grievant, and ask Grievant to surrender his employee credentials. Grievant protested having to leave because he never refused to take the drug test and merely objected to the test taker's rude and disrespectful tone. But by that point, it was too late, and's unpaid suspension began.

The following morning, Grievant met with the Senior Transportation Supervisor and the Director of Transportation. During that meeting, Grievant was told he had to sign a "self-referral" form or face termination even though it would require him to falsely admit he was under the influence of an illegal or non-prescribed drug. Grievant had no choice but to sign the form and was instructed to contact the Employer's drug treatment provider. Grievant was unable to receive services through the Employer's provider and went through his private medical insurance, obtained a statement that he does not suffer from a substance abuse disorder and provided drug test results (that were negative). He submitted that paperwork back to the Employer and returned to work after serving a four-day suspension.

The Employer also lacked just cause because it did not properly investigate this matter. While the Employer determined Grievant's conduct met the criteria of a DOT refusal, they did not comply with another part of the applicable regulations and instead initiated their own ad hoc process placing the entire burden on the employee. Grievant did not have notice of the DOT's definition of a drug test refusal. As such, his four-day suspension is not supported by just cause.

DISCUSSION AND DECISION

Introduction

The CBA provides that an employee cannot be disciplined without just cause. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. "Just cause" is a term of art in CBAs. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive[*11] elements is the existence of sufficient proof that the employee engaged in the conduct for which the employee was disciplined. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type[*11] of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be administered evenhandedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that the Employer did not violate the CBA when it suspended Grievant.

Discipline

Grievant was suspended for allegedly not cooperating with a DOT required drug test and needing the suspension time in order to qualify to return to work.

The Employer contends that Grievant did not cooperate with the drug test. The Union contends that Grievant did not fail to cooperate with the test.

Pursuant to the Employer's rules, its employees, including Class A drivers such as Grievant must comply with the DOT regulations. The DOT regulations require random drug testing of Class A drivers. **49 C.F.R. § 382.305** .

The applicable DOT regulations provide as follows.

> **49 C.F.R. § 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. Emphasis added.
>
> **49 C.F.R. § 40.191 What is a refusal to take a DOT drug test, and what are the consequences?** ... (a) **As an employee, you have refused to take a drug test if you: ... (8) Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process)** ... . Safety-sensitive function means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Emphasis added.
>
> **49 C.F.R. § 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[*12] 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[*12] bargaining agreements or other legal requirements. Emphasis added.

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

Grievant knew of the drug testing policy

The Employer's rules were established to provide safety and security for the Employer and its employees. Exh. 1. Each employee is responsible for remaining informed of the rules. *Id.* Rule 3 provides that "Drivers must comply with the Department of Motor Vehicles and the

Department of Transportation rules and regulations." The rules are given to each employee and are posted on a bulletin board in an area where employees can see them. Tr. 17:19-19:8, 74:17-24. Grievant knew or could reasonably be expected to know that failing a drug test or refusing to cooperate with a drug test would subject Grievant to corrective action. Elkouri & Elkouri, p. 15-78

The policy was a reasonable work rule

Management has the right to establish reasonable work place rules not inconsistent with the CBA. Elkouri & Elkouri, pp. 13-144 to 13-145. The Employer's drug test policy is reasonable. Abrams, p. 261. It has been indicated that "An arbitrator is mindful of the context of the employee's work. ... Concern about safety is essential in the workplace for every employee and for the employer." Abrams, p. 220.

There was a fair and objective investigation

There was an appropriate investigation.

"Industrial due process ... requires management to conduct a reasonable inquiry or investigation before assessing punishment." Elkouri & Elkouri, p. 15-49. It is a fundamental principle of employment law that the issue of due process and following correct procedures can impact on the issue of just cause and the amount of discipline, if any, that should be approved or imposed. *Id.* at 15-47 to 15-50. *Federated Dep't Stores v. Food & Commercial Workers Local 1442*, **901 F.2d 1494** (9th Cir. 1990) (arbitrator appropriately determined due process to be component of good cause for discharge); *Teamsters Local 878 v. Coca-Cola Bottling Co.*, **613 F.2d 716, 718** (8th Cir.), cert. denied, **446 U.S. 988** (1980) (appropriate for arbitrator to interpret just cause as including requirement of procedural fairness).

Abrams, p. 211, states:

> ... [T]he concept of "due process" is inherent in the just cause provision.
>
> ... [a]arbitrators prefer seeing evidence that management ... offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation.

Arbitrators "often overturn otherwise**[*13]** valid discharges where the employer has denied the employee those [due process] protections." Nolan, *Labor and Employment Arbitration* (1999), pp. 205 to 206.

Arbitrator Goldstein indicated at *State of Illinois*, **136 LA 122, 129-130** (2015), that:

> [A]n employer's obligation to a predisciplinary investigation is determined by context. ... [T]he level of discipline involved is an important consideration**[*13]** ... in determining whether the underlying investigation by the employer was fair and reasonable.

It was indicated at *Mead Corp.*, *113 LA 1169, 1184* (Franckiewicz, 2000),

> The Union contends that the Company's investigation was deficient, and that no discipline should be imposed. I do not agree. The Union's argument has its genesis in Arbitrator Carroll Daugherty's famous seven tests of just cause, which place considerable emphasis on due process aspects of the employer's investigation of the alleged misconduct. Daugherty viewed the arbitrator's role as analogous to that of an appellate court, a view that reflected his experience in the railroad industry, where the arbitrator did not hear live witnesses but received a written record outlining the facts and how the discipline came about. My own view, which I think is in rough accord with that of the majority of arbitrators today, is that while there is a due process dimension in the concept of just cause, a grievant's primary guarantee of due process stems from the requirement that the employer prove to a neutral arbitrator that the purported misconduct in fact occurred. Thus while I would not condone a discharge based solely on the hunch that the employee had engaged in misconduct and the hope that evidence could be found to justify that hunch, I do not believe that just cause requires an employer to do more than to conduct a reasonable investigation and to afford the grievant an opportunity to give his side of the case. I do not believe it is required to search for possible corroboration or contradiction of the witnesses against the grievant, at least where such avenues have not been suggested by the grievant himself to the employer. Nor is the investigation deficient merely because the company fails to ask every question that can be suggested retrospectively. Further, while the employer should not approach its investigation like a "hanging judge,"this does not mean that only those who have no personal knowledge of facts can be involved in the decision making process.

There was a meeting with Grievant, the Union Steward, Transportation Supervisor, and Senior Transportation Supervisor. Concerning this meeting, the Union Steward testified,

> Q. ... what happened or what is your recollection of what happened at that meeting, if you could tell the arbitrator, please?
>
> A. Well, they brung [Grievant] in to talk to him about the incident and I guess inform him of what they were going to do and described what was going on, described to him what had happened and the process they had to go through. They read down the rule or the law that pertains to what happened. Tr. 155.

Grievant was given a meaningful opportunity to tell[*14] his side of the story before discipline was imposed. There was a reasonable inquiry of the situation. There was an adequate check against the possibility of an incorrect decision. Elkouri & Elkouri, p. 15-50. The Employer had information from Grievant, the Tech, and the Transportation Supervisor. The Union Steward[*14] had the Dispatcher's statement, Exh. 102, prior to the meeting. Tr. 153.

The rule was applied evenly and without discrimination

There is no evidence that other employees have allegedly violated the drug test rule.

There is a preponderance of proof that there was a violation

Neither Employer nor Union witnesses should be given higher deference. "[S]upervisors should not necessarily be given greater credibility ... . [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible ... ." Elkouri & Elkouri, p. 8-97.

I have considered all the circumstances of all the witnesses when assessing testimony. I have considered the totality of the circumstances. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98.

Furthermore:

> The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." Abrams, p. 202.

An arbitrator may require a high degree of proof in one discharge case and at the same time recognize that a lesser degree may be required in others. Similarly, where the burden of proof was not strong enough to justify a discharge, some arbitrators have found it strong enough to justify a lesser penalty. Elkouri & Elkouri, pp. 15-28 to 15-29.

"[A]rbitrators frequently give employers significant latitude in disciplining employees who ... have jeopardized workplace safety." *Id.* at 16-3.

Grievant testified that "I looked at [the Tech] and I said, 'Who the hell are you talking to like that?'" Tr. 181. An employee saying to the Tech "Who the hell are you talking to like that?" is inherently a failure to cooperate with the testing process and behaving in a way that would disrupt the collection process. Elkouri & Elkouri, pp. 15-50 and 15-78.

I find that Grievant violated the drug test policy when Grievant failed to cooperate with the testing process by behaving in a confrontational way that disrupted the collection process. By failing to cooperate and behaving in a confrontational way Grievant refused his DOT drug test.

The suspension was not excessive. It is said to be "axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." *Capital Airlines*, *25 LA 13, 16* (Stowe, 1055) (reinstatement without back pay). Discipline may be considered to be excessive and without cause "if it is disproportionate to the degree of the offense, if it is out of step with principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances were ignored." Brand & Biren, *Discipline and*[*15] *Discharge in Arbitration* (3d Ed. § 2-83). Disciplinary penalties are modified when there are mitigating circumstances that lead the hearing officer to conclude that the penalty is too severe or that the employer has failed to follow progressive discipline procedures. *Nature's Best*, **114 LA 217** (Grabauski, 1999)(reinstatement with 30 work day suspension). In the case before me, once Grievant's failure[*15] to cooperate with the Tech resulted in a failure to pass the test pursuant to DOT regulations, the Employer had no choice but to suspend Grievant. The length of the suspension was determined not by the Employer but rather by how much time it took Grievant to contact an appropriate facility and obtain the necessary documentation to show that he had the DOT required qualifications to return to work. If the Employer "decide[s] that [it] want[s] to permit the employee to return to the performance of safety-sensitive functions, [the Employer] 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." **49 C.F.R. § 40.305** . The length of the suspension was not excessive under the circumstances.

> **49 C.F.R. § 382.107** states,
>
> *Safety-sensitive function* means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:
>
> **(1)** All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;
>
> **(2)** All time inspecting equipment as required by §§ **392.7** and **392.8** of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;
>
> **(3)** All time spent at the driving controls of a commercial motor vehicle in operation;
>
> **(4)** All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of § **393.76** of this subchapter);
>
> **(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded**; and
>
> **(6)** All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle. Emphasis added.

The Union argues that the Employer misused the DOT rules to improperly discipline Grievant. The Employer cites *Southern California Gas Co v. Utility Workers Union of Am, Local 132, ALF-CIO*, **265 F.3d 787** (9th Cir. 2001) (upholding arbitrator's decision to reinstate two employees, with backpay, who tested positive because there was a failure to comply with DOT regulations when it was discovered the "doctor" [the "doctor" was arrested for impersonating a licensed physician] who reviewed the results was not licensed). In the case before me, there is no evidence that the Tech, contractor**[*16]** Healthpointe, or any doctor was not qualified or licensed. The Employer also cites *Daniel Constr. Co. v. Local 257, Int'l Bro. of Electrical Workers*, **856 F.2d 1174** (8th Cir. 1988) (two employees were reinstated because their psychological tests did not comply with the Nuclear Regulatory Commission's regulations). In the case before me, there is no evidence**[*16]** that the scheduled drug test did not comply with the DOT regulations.

The Union argues that:

> It is the cardinal rule of labor-management relations that the degree of discipline must be reasonably related to the seriousness of the offense and the employee's work record." *City of Portland, 77 LA 820* (Axon, 1981); *Capital Airlines, 25 LA 13* (Stowe, 1955); *see also, How Arbitration Works*, Supra, at § 15-40 (8th Ed. 2019). An arbitrator must look at the entire situation before coming to the conclusion that discharge is justified. *Id.* If the evidence dictates a lesser penalty is more appropriate, the lesser penalty shall be imposed. *Id.* Many factors can influence mitigation of an offense, such as "the nature of the offense, due process violations, delay in assessing discipline or other management fault, the employee's disciplinary record and length of employment effort of improvement or contrition, among others." *In re BASF Catalysts*, **129 LA 571** (Szuter, 2011)

After Grievant failed to cooperate with the test and behaved in a confrontational way that disrupted the test, **49 C.F.R. § 40.191(a)(8)** , it was reasonable, if not required, for the Employer to remove Grievant from work and provide Grievant the time in which to requalify to return to work. Giving Grievant "less time" in which to requalify would not have been to Grievant's benefit. This is not a discharge case. It is not a suspension case in a vacuum. The removal from work status was required by DOT regulations because of Grievant's uncooperative and confrontational conduct during the test. "No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions." **49 C.F.R. § 382.211**

The suspension was done in order to provide Grievant with time to obtain the qualifications in order to return to work.

The Union argues that the Employer must notify the DOT. The Employer's Director of Transportation testified that the Medical Review Officer, a contractor, is responsible for notifying DOT of any test results. **49 C.F.R. § 40.15** states,

> May an employer use a service agent to meet DOT drug and alcohol testing requirements? ... (a) As an employer, you may use a service agent to perform the tasks needed to comply with this part and DOT agency drug and alcohol testing

regulations, consistent with the requirements of Subpart Q and other applicable provisions of this part.

DOT's regulations allow employers to use service agents to comply with DOT rules and regulations related to drug testing. *Id.*

Conclusion

The crucial points in this case include:

1. In violation of DOT regulations, Grievant failed to cooperate with the Tech;
2. In light of the DOT regulations, a failure to cooperate equaled a failure of the test by Grievant;
3. In light of the DOT regulations, once Grievant failed the test, he could not be returned to work until he met certain qualifications;
4. The time off from work was required[*17] in order to enable Grievant to fulfill the DOT required return to work qualifications;
5. The totality of the circumstances; and
6. The CBA.

This decision neither addresses nor decides issues not raised by the parties.

The Employer did violate the CBA when it suspended[*17] Grievant. Grievant's suspension was for just cause.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the Grievance.

LEE HORNBERGER
Arbitrator
Traverse City, Michigan

Dated: March 9, 2022