

In the Matter of an Arbitration

between

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1245,**

Complainant,

and

PACIFIC GAS and ELECTRIC,

Respondent

Involving the Termination of
Case No. 202

Opinion & Decision

of

Board of Arbitration

-oOo-

San Francisco, California

BOARD OF ARBITRATION

Neutral Board Member: Barbara Chvany

Employer Board Members: John Moffat, Pamela Benitez

Union Board Members: Larry Pierce, Roger Stalcup

APPEARANCES

On Behalf of the Union:

Tom Dalzell
IBEW 1245
P.O. Box 4790
Walnut Creek, CA 94596

On Behalf of the Employer:

James Goodfellow
Legal Department
PG&E
P.O. Box 7442
San Francisco, CA 94120-7442

INTRODUCTION

This dispute arises under the Collective Bargaining Agreement between the above-captioned Parties (JX 1). Pursuant to the Agreement, a Board of Arbitration was duly appointed and an arbitration hearing was conducted on August 29, 1994 in San Francisco, California. At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant exhibits. A verbatim transcript of the proceedings was taken (cited herein as TR __). The Parties stipulated that the prior steps of the grievance procedure have been followed or waived and the matter is properly in arbitration (TR 3). The matter was submitted for decision upon receipt of post-hearing briefs.

The Grievant, S has worked for the Employer since approximately 1967 (TR 48). He was terminated on or about February 18, 1994 after a second positive drug test.

ISSUE

The Parties were unable to agree on a statement of the issue to be submitted to the Board. They stipulated that the Board has the authority to formulate the issue(s), based upon the Parties' proposed issues and the record presented (TR 3).

The Employer's proposed issue is: "Did the termination of Mr. S violate the collective bargaining agreement between the Parties, namely, the Drug-Free Pipeline Agreement? If so, what shall be the remedy?" (TR 3). The Union's proposed issue is: "Was the termination of the Grievant, S for just cause. If not, what remedy?" (TR 2).

The Board determines that the issue is:

Did the termination of the Grievant, S violate the Collective Bargaining Agreement between the Parties? If so, what is the appropriate remedy?

REMEDIES REQUESTED

The Union requests that the grievance be granted and that the Grievant be reinstated with full seniority, backpay and benefits. The Employer requests that the grievance be denied in its entirety.

RELEVANT PROVISIONS OF THE AGREEMENT

Title 7.1

The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend and discipline or discharge employees for just cause. ... (JX 1)

THE DRUG-FREE PIPELINE AGREEMENT

In March 1991, in response to Department of Transportation (D.O.T.) drug testing requirements, the Parties entered into the Drug-Free Pipeline Agreement, pursuant to which the Company may require employees to submit to urine tests for the presence of prohibited substances in five situations: pre-employment, post-accident, random, reasonable cause, and post-rehabilitation. The relevant provisions of the Drug-Free Pipeline Agreement are quoted below:

**PROCEDURES FOR DRUG TESTING
IN COMPLIANCE WITH D.O.T. REGULATIONS
FOR PIPELINE COMPANIES**

* * *

An employee who tests positive for illegal drugs during one of the testing programs may be offered the First Time Offender program which currently exists. This will include prescribed rehabilitation program as specified by a Medical Review Officer who is specially trained in substance abuse illnesses. In most cases, a second positive test for illegal drugs will result in the employee's discharge.

* * *

ITEMS OF UNDERSTANDING

* * *

8. An employee in a covered position who tests positive the second time for illegal drugs when there was no on-the-job impairment evident, will be given another opportunity for rehabilitation if they had previously self-referred to EAP and were following EAP's recommended course of treatment in the prior 30 days. A subsequent positive test on this employee will result in discharge.

* * *

Appendix G

Post-Rehabilitation Testing

1. The Company representative will obtain recommendations from the Medical Review Officer (MRO) for the duration and frequency of post-rehabilitation drug testing for employees returned to duty upon completion of rehabilitation. The duration will not exceed 60 months.
2. The Company representative will schedule post-rehabilitation testing, in addition to random testing, for rehabilitated employees and will notify the immediate supervisor of the appointment and location for collection.

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Appendix H

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2. Requirements for Review and Notification of Test Results

A. The MRO must review and evaluate all "positive" test results, as described in Section 4, prior to notifying the Program Coordinator.

B. Any "positive" test result received from the laboratory shall be considered a "confirmed positive" test until the MRO has completed his/her evaluation. If the MRO determines that the result is a positive, only then shall the result be considered to be "verified positive." A confirmed positive will require an interview process as described in Paragraph 3A.

* * *

E. Upon receipt of urine specimen test results from the HHS-certified laboratory, the MRO shall review and evaluate all positive test results and report to the Program Coordinator test results (positive and negative) within 10 days of the initial screening performed at the HHS-certified laboratory.

F. The MRO shall notify the Program Coordinator of all negative and verified positive test results.

* * *

3. Interview of Individuals

A. The main element in the review and evaluation of a positive test result received by the MRO from the laboratory is a confidential interview by the MRO with the individual who tested positive in order to examine possible alternate medical explanations for the positive test result.

* * *

D. During the interview the MRO shall inquire about the individual's medical history, use of legal and illegal drugs, and other biomedical factors. The MRO shall review and consider medical records and other information made available by the individual to determine if the positive test result could have resulted from legally prescribed medication or can be explained on another basis.

* * *

4. Evaluation and PG&E Notification of Test Results

A. The MRO shall determine if further information or verification is required to reach a "verified positive" determination. This additional information can include consultation with the individual's physician or reanalysis [sic] of the initial specimen if there is any question regarding the accuracy or validity of the positive test result. The MRO shall request the assistance, as needed, of the HHS-certified laboratory and other qualified individuals.

B. If the MRO determines that a positive test result for drugs can be attributed to the use of DOT prohibited drugs not prescribed to the individual (e.g., prescription drugs for relatives), in such cases the MRO shall declare the test result as "verified positive".

C. The MRO shall also authorize a reanalysis of the initial specimen if he/she deems necessary to complete the analysis.

D. In his/her evaluation and interpretation of the positive test result from the laboratory the MRO shall not consider the results of any tests that were not obtained or processed in accordance with the PG&E Drug Testing Program. (JX 3)

BACKGROUND

The Incident Leading to Termination:

The basic facts underlying the termination of the Grievant's employment are not in dispute. The Grievant tested positive for the presence of THC (marijuana) in March, 1993 (TR 7, 50).¹ At the time, the Grievant explained to Medical Review Officer (MRO) Dr. David Smith that he had used marijuana at a party several days before he was tested. Smith found the Grievant's explanation credible, and concluded that the Grievant did not have a significant substance abuse problem. The Grievant was assigned to the least intensive type of treatment available for first time offenders under

¹ Other than a written reminder resulting from this positive test, the Grievant had never been disciplined during his approximately 27 years of employment with the Employer (TR 50, 75).

the Drug-Free Pipeline Agreement. In addition to the treatment program, the Grievant was also assigned a post-rehabilitation urine testing schedule under which he was tested approximately two times a month. Until the test resulting in his termination, none of the tests showed signs of possible drug use (TR 80-85).

As a condition of returning to work after the positive test, on March 12, 1993, the Grievant signed a standard Return to Work Agreement utilized for first offenders under the Drug-Free Pipeline Agreement (TR 64-65). That Return to Work Agreement states, in pertinent part:

I understand that pursuant to DOT regulations, I am subject to unannounced post-rehabilitation drug testing as defined by the Medical Review Officer for up to sixty (60) months following my return to work. I further understand that post-rehabilitation drug testing is in addition to my continued participation in random drug testing, and that I also remain subject to reasonable cause and post-accident testing where applicable.

I understand that if I test positive for any prohibited drugs, including legal drugs for which I do not have a prescription, during the next sixty (60) months, I am subject to immediate discharge. (JX 2)

On February 1, 1994,² the Grievant was given a urine test pursuant to the Drug-Free Pipeline Agreement. The test results showed the presence of amphetamines (TR 7-8).³ After receiving the results of the test, Dr. Smith interviewed the Grievant. According to Dr. Smith, the Grievant was shocked that he had tested positive. The Grievant denied any drug use, and said he could not understand how he had tested positive. Dr. Smith found the Grievant's denial of drug use to be credible. He ordered that a stereoisomer separation test be performed on the Grievant's urine sample to determine whether the positive result might be explained by the presence of something other than

² Unless otherwise noted, all dates hereafter refer to 1994.

³ There is no dispute as to the accuracy or validity of the test.

amphetamines. The test showed that the positive result reflected the presence of amphetamines. Because the Grievant had advised Dr. Smith that he was not taking any prescription amphetamines, Dr. Smith reported the test as a verified positive. (TR 55-56, 86-87).

On February 18, the Employer notified the Grievant that his employment was terminated for a second violation of PG&E'S Drug-Free Pipeline Agreement; for violating the Company's First Time Offender Policy; and for breaching the Return to Work Agreement (JX 2).

The Grievant's Explanation for the Positive Test Result:

After learning of the positive test result, the Grievant checked with his personal physician and his hypertension specialist to determine if they might be able to explain the result; they were unable to do so. The Grievant also recalled that on Sunday, January 30 (two days before the test), he had attended a Super Bowl party. Because his first positive had occurred after he used marijuana at a party, he was concerned that he might have unintentionally been exposed to amphetamines at the Super Bowl party. He checked with his friends who had attended the Super Bowl party, but they were unable to explain the results (TR 57-58).

Linda Greule is the sister of the Grievant's girlfriend, Jeannie. Jeannie and the Grievant have lived together for approximately 15 years. Greule and Jeannie work at the same job. Greule testified that, approximately one and one-half to two weeks after Super Bowl Sunday, she noticed that Jeannie was depressed at work. She asked Jeannie several times what was bothering her, and eventually Jeannie told her that the Grievant had been suspended from work as a result of a positive drug test which showed the presence of amphetamines. Later that day, while at home, Greule realized that she might be responsible for the positive test result, as explained below.

Gruele testified that she is a regular or occasional user of "crank" (methamphetamine) (TR 19-23, 40-45). On Super Bowl Sunday, she was driving from her home in Guerneville to the San Francisco Bay Area when she experienced car problems. She stopped at the Grievant's home in Santa Rosa to have him check the car. The Grievant and Jeannie were at home. Gruele asked the Grievant to look at her car, and he did so. While the Grievant was looking at the car, Gruele poured a glass of Coca Cola, leaving some Coca Cola in the can, and then dissolved approximately 1/10 of a gram of crank in the glass (TR 9-11, 40-41, 106). After she drank about half of the contents of the glass, the Grievant came into the house and asked her to come outside so he could explain the problem with her car. She went outside with the Grievant and, after he explained the problem, she drove away, without returning to the house and disposing of the spiked Coca Cola remaining in the glass (TR 11-12, 46).

The Grievant corroborated Gruele's testimony that she had visited his home on Super Bowl Sunday and that he had worked on her car. He also testified that, after Gruele left the house, he found a glass of Coca Cola and a partially filled Coca Cola can on a table. He poured the remainder of the Coca Cola into the glass and drank it. He further testified that he did not feel any unusual or stimulating effect after drinking the Coca Cola. At the time, he was suffering from sinus problems and had been using various over-the-counter remedies such as Sudafed, Dristan and/or Vicks Inhaler. (TR 52-55, 65-66, 69-70).

Gruele realized that the Grievant might have drunk the remaining spiked Coca Cola, so she called PG&E and spoke to the Grievant's supervisor. She explained to the supervisor that she believed she might be responsible for the Grievant's predicament. The supervisor told her that she should speak to Bruce Levy, a psychologist with the Employer's EAP. Gruele left a message for

Levy that day, and spoke to him shortly thereafter. When she explained the situation to Levy, he told her that he could not speak to anyone about it due to concerns for confidentiality. He asked her if she had spoken to the Grievant about the problem, and she said she had not. Greule then went to the Grievant's house and advised him what had occurred. The following day, Jeannie told her to call Dr. Smith, which she did (TR 12-15).⁴

In a letter dated March 9, Dr. Smith responded to questions posed to him by Pamela Benitez, a Human Resources Advisor for the Employer:

Question 1. If Mr. S did in fact consume these amphetamines on Sunday, would they still have been in his system at a detectable level on Tuesday?

Answer 1. Yes. Amphetamine has a relatively long half life and will stay positive in the urine for up to four days even with the quantity that Mr. allegedly ingested.

Question 2. If that is so, would the amount of amphetamines he ingested on Sunday be such that he might reasonable have realized that there was something out of the ordinary in the Coca Cola?

Answer 2. The cut-off level for amphetamine on the DOT test is relatively low. However, even at relatively low levels of amphetamine R should have registered some stimulant reaction. He was taking Sudafed and Coca Cola, which contain caffeine. He may have mistaken the stimulant effects of these compounds for the effects of amphetamine. I must also add that in my interview I gave Mr. S the opportunity to lie which would have substantially decreased the credibility of the interview. For example, I asked him repeatedly if he felt any more intense stimulant effects with the accidental ingestion of amphetamine on January 30, 1994. He repeatedly denied feeling such an effect. Had he lied and said he remembered the stimulant effect it would have filled the gap in this interview and would have been a dishonest response. He denied it, in my estimation adding credibility to the interview.

⁴ Greule was uncertain about the exact timing of these events. Dr. Smith recalled that he spoke with Greule in the latter part of February (TR 88).

Question 3. Was any other information disclosed to you that would tend to discount the explanations provided by Linda [Greule] or Mr. Smith?

Answer 3. No.

Question 4. Is the Grievant's explanation of the circumstances scientifically possible?

Answer 4. Yes. It is quite common for stimulant users to put amphetamine into coffee or Coca Cola in order to mask the taste and produce a stimulant reaction. For example, Linda said she worked at a bakery requiring that she got [sic] up early every morning. She indicated that when she felt fatigued she used amphetamine to help her with her energy level and facilitate job performance. This is common behavior among stimulant users.

Question 5. How do you evaluate the Grievant's credibility in light of your experience with him?

Answer 5. In my opinion the Grievant is credible and his story as corroborated by Linda is acceptable and believable. In my clinical experience accidental ingestion of amphetamines in coffee or Coca Cola can and has occurred.
(Exhibit 4 to JX 2)

The Union called Dr. Smith as a witness at the arbitration hearing, and he testified in conformity with the opinions he expressed in the letter quoted above (TR 86-93). In response to questions from the Employer's Counsel, Dr. Smith gave the following testimony:⁵

Q: ... In your experience as an expert on addiction and as an MRO, an individual like Mr. Smith lets be hypothetical on the relevant factors, average weight, no tolerance, what amount of drugs above the NIDA cutoff level would you expect to see for an individual to feel their effects.

* * *

⁵ The Parties rely heavily on Dr. Smith's testimony. The Union asserts that it establishes the credibility of the explanation given by Greule and the Grievant. The Employer, on the other hand, argues that Smith's testimony at the arbitration hearing modifies his initial credibility conclusion. Because both Parties rely on Dr. Smith's testimony, relevant portions are quoted below.

A: Madam Arbitrator, as I have stated in the beginning, the urine test is not quantitative, it's not like a blood alcohol, where you can make precise judgments, because of all the variables I have talked about, including the fact that a known dosage was not administered, so if you take in all of those variables that I have to use . . . it would be my opinion that 15 to 20 milligrams of methamphetamine would have to be ingested to get above the cutoff level, which is one diet pill.

It's my opinion that if somebody took a diet pill they could, or should, feel it, but they may misinterpret it. For example, one of the things a diet pill would do would be to clear your sinuses, because it's a vasoconstrictor. And you may be taking another stimulant like ephedrine, which does the same thing. But as it exceeds that level, there is an increasing probability that the individual should know they took a stimulant such that there should be at some level a dosage that everybody would know they were wired on speed.

In my rough opinion, given all the qualifiers that I have just stated, that if it was two to three times the NIDA cutoff level, would be in the area of 30 to 60 milligrams, it would be certain that a nontolerant individual would feel it.

Individuals that regularly use and have some tolerance don't feel it, but individuals that have nontolerance, tolerance meaning more of the drug to achieve the same effect, are more sensitive to its effect.

So I understand the question, and as I understand it, my response would be two to three times the cutoff level, I think there's a very high probability he should have felt the stimulant effect. (TR 97-99)

Dr. Smith was then shown the quantitative analysis of the urine test at issue, which he had not seen prior to the arbitration hearing. That analysis showed the presence of 2.7 times the NIDA cutoff amount of amphetamine and 1.4 times the NIDA cutoff amount of methamphetamine. Given this new information, Dr. Smith testified the Grievant "should have felt" the effects of the drugs which he ingested. But, he qualified that opinion by stating, "I feel uncomfortable about quantifying that because of all the variables . . .", and ". . . quantitative analysis from urine is the riskiest . . ." (TR 104-105). Dr. Smith estimated that approximately 10 to 20 milligrams of pure

methamphetamine had been placed in the Coca Cola (TR 108). Finally, in response to a question from the Arbitrator, Dr. Smith testified, as follows:

Q: Is that level consistent or inconsistent with this document [quantitative urine analysis] in terms of the quantities of metabolites?

A: Because of all the variables that I have described, it is possible that that dosage could have produced this urine pattern. But this quantitative urine, which I did not have at the time I was doing my evaluation, is on the high side for that administration. I would think that it would be more like 40 milligrams that would produce the quantitative urine profile.

Again, I have tried to give you the citations that stress how hazardous quantitative analysis of urine specimen is.

(TR 108-109)

POSITIONS OF THE PARTIES

The Employer:

• The Agreement does not require that a second verified positive drug test be accompanied by a showing of intentional use of prohibited substances before discipline may be imposed. The specific language of the Drug-Free Pipeline Agreement prevails over the “just cause” language of Title 7.1 of the Agreement. Numerous arbitrators have held that, where a collective bargaining agreement specifically defines transgressions for which discharge is appropriate, an arbitrator may not consider whether those transgressions would otherwise constitute just cause for discharge. Similarly, in cases arising under negotiated drug testing programs, arbitrators have uniformly limited their “just cause” analysis to the terms of the agreed upon procedures, and have resisted union efforts to impose additional equitable burdens on the employer (citing arbitration awards).

» The award in *Arbitration Case 190* upheld a grievance regarding the termination of an employee who tested positive under the Drug-Free Pipeline Agreement at issue in this case. That award strictly construed the Drug-Free Pipeline Agreement against the Company, and ordered reinstatement of the employee because procedural testing requirements had not been met, even though there was no evidence that the test results were unreliable. In that case, the more specific language of the Drug-Free Pipeline Agreement subsumed the generic just cause provision of the Collective Bargaining Agreement. The same strict interpretation should be applied here.

» The Union cannot credibly argue that the Drug-Free Pipeline Agreement requires the Company to show that an employee intentionally used prohibited substances. The Drug-Free Pipeline Agreement includes a Return to Work Agreement which unambiguously provides that a second positive test result shall subject the employee to “immediate discharge.”

» In the Drug-Free Pipeline Agreement there are only two exceptions to immediate termination for an employee who uses prohibited substances after a first positive test: (1) The employee may self-refer to the Employee Assistance Program before testing positive a second time, and (2) The MRO may not consider the results of a positive test result which was “not obtained or processed” in accordance with the negotiated program. There is no exception for an employee who accidentally ingests a prohibited substance.

» If the Union had intended to make intentional ingestion a requirement for discipline under the Drug-Free Pipeline Agreement, it should have bargained for it.

» A requirement that the Company show intentional ingestion would be unreasonable, because any employee could conjure up a scenario like the one the Grievant presents in this case.

- » Even if the Board were to decide that the Company must prove intentional use, the Grievant's explanation is not credible. Testimony from both the Grievant and Greule makes little, if any, sense.
- » The Grievant testified he conducted his own investigation to determine why he tested positive, but he somehow forgot to question Greule even though he remembered finishing her soft-drink two days before he tested positive.
- » As a habitual user of illegal substances, Greule's testimony should be discounted all together. Her story is transparent. As she made clear, habitual users do not leave unfinished fixes of crank, and she does not normally do so. She has no credible explanation as to why she did not take the few extra seconds which would have been required to pour the spiked drink down the drain.
- » The Union mistakenly relies on Dr. Smith's letter to the LIC to establish the credibility of the Grievant's explanation. At the time Dr. Smith wrote the letter, he was not aware of the quantity of drugs evidenced in the test results. At the arbitration hearing, Dr. Smith testified that, given the quantity of drugs, a non-tolerant individual (such as the Grievant) would have felt the effects of drinking the spiked Coca Cola. This is inconsistent with the Grievant's earlier statement to Dr. Smith that he did not feel the effects of the drink.
- » One of the reasons Dr. Smith initially found the Grievant to be credible was that the Grievant did not avail himself of an opportunity to say that he had felt the effects of any stimulant in the days immediately preceding the positive test result. Had the Grievant changed his story after Greule came forward, Dr. Smith would not longer have found him credible. But the lab report shows that the Grievant would have felt the effects of the spiked drink.

The Union:

- » The Company argues that the Drug-Free Pipeline Agreement must be interpreted literally and that any second positive test must lead to termination, regardless of the circumstances. But, a rigid, literal interpretation is uncalled for.
- » The Company's reliance on the award in *Arbitration Case 198* is misplaced. The Union did not urge a literal interpretation of the Drug-Free Pipeline Agreement, and did not argue that any deviation, no matter how trivial, would require that test results be ignored. More importantly, the Board explicitly recognized that literal interpretation would not be proper: "As the Union admits, not all violations of the procedures required by the Letter Agreement necessarily warrant application of the preclusive effect of Paragraph 4-D" (*Arbitration Case 198*, at page 23).
- » In a precedent-level case, the Parties agreed that two minor deviations from the testing procedures did not require application of the preclusive effect of Paragraph 3D (*Pre-Review Committee Decision 1573*). Thus, the Parties have already rejected the central legal premise of the Employer's argument.
- » The Drug-Free Pipeline Agreement should not be interpreted in a rigid, literal manner, but with common sense. Even if the testing procedures are not strictly followed, a termination may be for just cause; even if the testing procedures are strictly followed, a termination may not be for just cause.
- » The Grievant's explanation of how he ingested the prohibited substance resulting in the positive test result is credible. The Company's attack on Dr. Smith's expertise is surprising and without merit. The Parties chose Dr. Smith because of his undeniable expertise. His evaluation of the Grievant is of no small consequence. He found the explanations of the Grievant and Greule to

be credible, and the quantitative test results which he reviewed at the arbitration hearing did not shake his opinion. He explained that urine tests are not quantitative, that retrograde extrapolation is impossible with drugs, and that any quantitative analysis is hazardous. While Dr. Smith felt that the Grievant could or should have felt the effects of the spiked drink, he acknowledged that the Grievant might have misinterpreted the effects as symptoms of his cold or reactions to the cold medication he was taking.

• The testimony of the Grievant and Greule rang of the truth, albeit an unlikely truth. Greule had nothing to gain from admitting, publicly and under oath, her regular use of prohibited substances. Similarly, the Grievant did not project the tone of either a con artist or someone in denial; his testimony demonstrated a responsible, honest man caught in a truly bizarre situation - guilty but innocent.

DISCUSSION

Findings of Fact:

The Union's argument that the Grievant accidentally and unknowingly ingested methamphetamine by drinking the spiked Coca Cola left at his home by Greule is credited. As the Employer argues, and as the Union admits, the sequence of facts described by Greule and the Grievant is unlikely. But, careful review of the record requires the conclusion that the Union has established the events occurred as testified to by Greule and the Grievant, for the reasons stated below.

Greule's version of the events has been consistent from the time she first reported them to Dr. Smith, through her testimony at the LIC meeting and, finally, in her testimony at the arbitration

hearing. Moreover, her testimony at the arbitration hearing was internally consistent, and her demeanor was indicative of truthfulness. Although she was subjected to rigorous cross-examination, her testimony as to the central events remained unshaken.

The factors relied on by the Employer to discredit her do not undermine the persuasive force of her testimony. Minor differences in her recollection, such as whether she first realized that she might be responsible for the Grievant's positive drug test one and one-half or two weeks after Super Bowl Sunday, are not sufficient to cast doubt on her veracity. In the absence of recording the events when they occurred, such minor lapses of recall are to be expected. Similarly, the fact that she cannot recall when, if ever (other than Super Bowl Sunday, 1994), she may have left behind an unfinished dose of crank does not render her testimony unbelievable. As the Union notes, recollection about common and routine occurrences is likely to be less precise than recollection of unusual or significant occurrences. Nor does the fact that she is an admitted crank user require that her testimony be disregarded. Rather, her candor in testifying against her interest that she frequently used crank enhances her credibility.

Other factors also support a finding that Greule is a credible witness. According to her unrebutted testimony, she reported the facts to the Employer before discussing her realization with either her sister or the Grievant. This sequence of events belies any contention that her testimony was the result of a conspiracy or scheme perpetrated by Greule, her sister and/or the Grievant. Finally, Dr. Smith found Greule's explanation of the events plausible and credible. In particular, he noted that amphetamine users commonly dissolve the drug in Coca Cola (or coffee) because the caffeine in those drinks enhances the stimulant effect of the drug. In addition, according to

Dr. Smith, accidental ingestion of amphetamines in the manner described by Greule and the Grievant is known to have occurred.

Similarly, the Grievant's testimony that he drank the spiked Coca Cola left behind by Greule and that he did not feel a stimulant effect from the drink is credited. When the Grievant expressed surprise at having tested positive for amphetamines in February 1994, and denied any drug use, Dr. Smith found his denial credible. After hearing Greule's explanation of the events, Dr. Smith concluded that the Grievant was "credible" and that their version of the events was "acceptable and believable" (Exhibit 4 to JX 2). At the arbitration hearing, Dr. Smith confirmed this opinion:

Q: [By Union Counsel] Did you find Mr. S . . . credible in all respects in conjunction with the second positive, everything he told you?

A. Yes. (TR 93)

The Employer correctly notes that Dr. Smith's opinions, referred to above, were rendered before he was aware of the quantitative analysis of the urine test. However, contrary to the Employer's argument, the record does not establish that consideration of the quantitative analysis caused Dr. Smith to change his mind regarding the Grievant's credibility, or the acceptability or believability of the explanation that he accidentally ingested amphetamines. Dr. Smith's original opinion of the Grievant's credibility was based, in part, upon the Grievant's statement that he did not feel the stimulant effect of the amphetamines. After considering the quantitative analysis, Dr. Smith testified "he should have felt the stimulant effect at this level" (TR 101). However, he then testified that, because the Grievant's ingestion of amphetamines was accidental,

. . . he might have misinterpreted the effects, clear sinuses, a little jittery, maybe that was the Sudafed or caffeine, but the higher you get above that cutoff level, which is what Mr. Goodfellow presented which I did not have at the time, the more likely it is that he would have felt it to the point where

there is some level where it is absolutely certain that he would have felt it, head pounding, pulse rate going, can't sleep for a couple of days.

(TR 106-108)

Finally, in response to a question from the Neutral Board Member, Dr. Smith testified:

Because of all the variables that I have described, it is possible that that dosage [testified to by Greule] could have produced this urine pattern. But this quantitative urine, which I did not have at the time I was doing my evaluation, is on the high side for that administration. I would think that it would be more like 40 milligrams that would produce the quantitative urine profile.

Again, I have tried to give you the citations that stress how hazardous quantitative analysis of urine specimen is. (TR 108-109)

At most, this testimony shows that Dr. Smith felt it was more likely than he had previously believed that the Grievant would have felt the effects of the amphetamines. However, given Dr. Smith's clear reluctance to rely on quantitative analysis of urine, and his statement that the dosage testified to by Greule could have produced the urine pattern shown by the test, the testimony does not show that Dr. Smith changed his original assessment of the Grievant's credibility.

For all of the above reasons, and based on the record as a whole, the finding is required that the positive urine test resulted from the Grievant's accidental and unknowing ingestion of amphetamines, in the manner testified to by Greule and the Grievant.

Standard to be Applied:

The threshold determination is whether, as the Employer argues, the Drug-Free Pipeline Agreement must be strictly construed so that any second verified positive drug test requires automatic termination; or whether, as the Union argues, the Drug-Free Pipeline Agreement should be more liberally construed such that a second verified positive test may result in discharge only if the just cause standard in the Collective Bargaining Agreement is met.

Section 7.1 of the Collective Bargaining Agreement establishes the right of the Employer to “discipline or discharge employees for just cause” (JX 1), but does not go on to define just cause. However, a vast body of arbitral authority has developed the concept of just cause. That standard contemplates an individualized and fair assessment of the facts and circumstances of each case to determine if just cause for disciplinary action is present. In discharge cases in particular, just cause is a significant and important protection, which must be applied as the Collective Bargaining Agreement provides unless some clear and firm basis is present for doing otherwise.

The Drug-Free Pipeline Agreement provides for the testing of employees for the presence of drugs, and states that “[i]n most cases, a second positive test for illegal drugs will result in the employee’s discharge” (JX 3) (Emphasis added). This provision aids in defining just cause in the event of a second positive drug test: in most instances, just cause for discharge will be present. However, that provision does not state unequivocally that discharge will always result from a second verified positive drug test, regardless of the circumstances; nor does it state that discipline pursuant to the Drug-Free Pipeline Agreement is an exception to or supersedes of the just cause requirement of the Collective Bargaining Agreement. In the absence of language so providing, the just cause provision of the Collective Bargaining Agreement and the Drug-Free Pipeline Agreement must be interpreted in harmony, not in a manner which causes one to nullify the other. Such a finding is consistent with the recognized rules of contract interpretation.

The foregoing conclusion is supported by other factors, as well. The record fails to show that, in negotiating the Drug-Free Pipeline Agreement, the Parties intended to abrogate the just cause requirement of the Collective Bargaining Agreement. Certain provisions of the Drug-Free Pipeline Agreement, as written, contemplate an individualized examination of the facts and circumstances

of a positive drug test, recognizing that legitimate explanations may exist. For example, Appendix

H, Paragraph E(1) states as follows:

E. Within one day of receipt of all available information on the positive test result (i.e., test report, Chain of Custody Form, interview information, both verbal and documents, etc., reanalysis of test results, if applicable, consultation with physician) the MRO must determine, if the test result is "verified positive" or "negative" in accordance with the following guidance:

1. The MRO determines that there is a legitimate explanation for the positive test results and the use of substance, as identified through the testing. In this case the MRO shall declare the test result as negative, record the result as negative in the individual's file, and report the result as negative to Program Coordinator. (JX 3)

A "strict liability" concept which renders irrelevant legitimate explanations for a positive test, thus, is inimical not only to the just cause standard but to certain provisions of the Drug-Free Pipeline Agreement. Neither document evinces an intent to substitute an automatic or rote result for an individualized review of the particular circumstances involved in a positive test result.⁶

Both Parties rely on the award in *Arbitration Case 190* to support their positions regarding the proper interpretation and application of the Drug-Free Pipeline Agreement. In that case, an employee was terminated after a second verified positive drug test. However, because the record established that the procedures used for the test were not in compliance with the procedures set forth in the Drug-Free Pipeline Agreement, the Board of Arbitration upheld the grievance and ordered that the employee be reinstated, subject to appropriate conditions.

⁶It must be noted that, when Dr. Smith reported the Grievant's second verified positive test, all of the pertinent circumstances were not yet known.

The decision in *Arbitration Case 190* does not stand for the proposition that the Drug-Free Pipeline Agreement must be interpreted and applied without regard to the just cause provision of the Collective Bargaining Agreement. To the contrary, the Parties stipulated that the issue before the Board of Arbitration in that case was, “Did the Company terminate the employment of [the grievant] without just cause?” (emphasis supplied). Further, the Board of Arbitration clearly applied the just cause standard: “Because consideration of the test violated the [Drug-Free Pipeline Agreement], the termination of the Grievant's employment was without just cause.” (emphasis supplied)

Nor does the decision in *Arbitration Case 190* stand for the proposition that the literal words of the Drug-Free Pipeline Agreement must be strictly construed and applied in all circumstances, regardless of the consequences. Rather, the Board of Arbitration adopted the following standard:

The clear meaning of that additional reference is that, where the process involved in a test violates the [Drug-Free Pipeline Agreement] in any meaningful and significant respect, the MRO should not consider the test. The Company is bound by the negotiated Letter Agreement.

* * *

As the Union admits, not all violations of the procedures required by the [Drug-Free Pipeline Agreement] necessarily warrant application of the preclusive effect of Paragraph 4-D. But, this case does not require the Board to draw a fine line between violations which do or do not require that result. Rather, the Board must determine only whether the failure to split a sample at the collection site, in the circumstances presented here, warrants the application of Paragraph 4-D. (pp. 23-24)

A second verified positive drug test, obtained in conformity with the requirements of the Drug-Free Pipeline Agreement, establishes a *prima facie* case for just cause discharge. Where, as here, the Union argues that discharge is not appropriate in spite of a second verified positive test, the burden shifts to the Union to establish that there is not just cause for discharge. Given the mutual agreement of the Parties to the terms of the negotiated Drug-Free Pipeline Agreement, that burden

is a heavy one. Contrary to the argument advanced by the Employer, the Board of Arbitration anticipates that it will be the rare case in which sufficient evidence is adduced to meet that burden.

Close review of the record in this case requires a finding that the Union has met that heavy burden. As discussed above, the Union has established that the Grievant's second verified positive test resulted from accidental and unknowing ingestion of amphetamine. That factual finding is based not only on the testimony of the Grievant and Greule, but also upon the expert opinion of the MRO, Dr. Smith, to whose expertise the Parties have stipulated.

Because the record clearly shows Grievant's second verified positive test resulted from accidental and unknowing ingestion of a prohibited substance, in circumstances in which he had no reason to suspect that he might be exposed to such substances, the finding is required that he was without fault and did not engage in any improper conduct which would constitute just cause for termination. The circumstances constitute a legitimate explanation for the positive test result. Accordingly, there was not just cause for the termination, and the termination violated the Collective Bargaining Agreement.

Remedy:

Because the discharge was without just cause and in violation of the Collective Bargaining Agreement, the Grievant is entitled to reinstatement and full restoration of his seniority rights. Further, because the essential facts upon which this decision is based were known to the Employer no later than the LIC Report, back pay from and after the last signatory date of that Report (April 4, 1994) is found to be appropriate. The Employer, like the Grievant, was an innocent victim of the events set in motion by Greule. However, by the conclusion of the LIC process, the Employer had sufficient notice of and opportunity to investigate the facts involved to find responsibility for back

pay and benefits from and after that point. Because not all of the facts were known to the Employer as of the date of the termination, back pay on or before April 4, 1994 is not appropriate. The Grievant's reinstatement shall be subject to his satisfying any applicable D.O.T. requirements, as well as any requirements which may continue under the Return to Work Agreement dated March 12, 1993. The period the Grievant has been off work as a result of the second positive drug test shall toll any time period for purposes of the Return to Work Agreement. The period for which the Grievant shall not receive back pay or benefits does not constitute a disciplinary suspension.

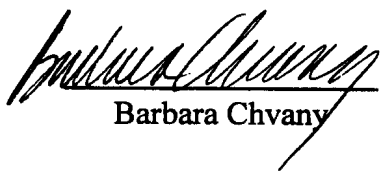
Accordingly, the following decision is rendered:

DECISION

1. The termination of the Grievant, S _____, violated the Collective Bargaining Agreement between the Parties. The grievance is granted.
2. As a remedy, the Company shall reinstate Mr. S _____ forthwith to his former position, without loss of seniority. Reinstatement shall be conditioned upon Mr. S _____ satisfying normally applicable D.O.T. requirements. Upon his reinstatement, Mr. S _____ shall also be subject to any continuing requirements under the Return to Work Agreement of March 12, 1993. The period that Mr. S _____ has been off work as a result of this termination shall toll any applicable time period(s) for purposes of application of the Return to Work Agreement dated March 12, 1993. The Company shall also make the Grievant whole for wages and benefits Mr. S _____ lost as a result of the termination, for the period on and after April 5, 1994 to the date of his reinstatement, less interim earnings, if any. The period for which Mr. S _____ is not

entitled to back pay and benefits under this decision shall not be regarded as a disciplinary suspension.

3. Pursuant to the stipulation of the Parties at the hearing (TR 3), the exact computation of the amounts due Mr. S is hereby remanded to the Parties. The Board of Arbitration retains jurisdiction in the event any dispute arises over computation or implementation of the remedy.


Barbara Chvany

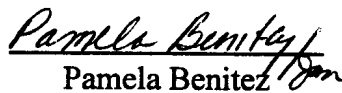
Concur / ~~Dissent~~

February 16, 1995
Date


John Moffat

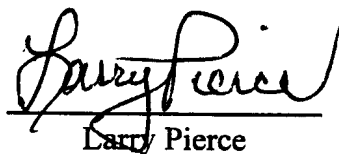
Concur / Dissent

3/6/95
Date


Pamela Benitez

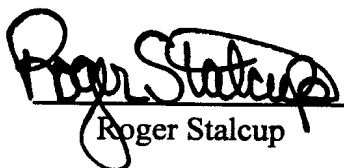
Concur / Dissent

2/27/95
Date


Larry Pierce

2-28-95 / Concur / ~~Dissent~~

2-28-95
Date


Roger Stalcup

2/22/95 / Concur / ~~Dissent~~

2/22/95
Date