Labor Arbitration Awards: 1986 - Present, Veyance Technologies, Inc. (Marysville Plant) and United Steel Workers Local 843., 20-1 ARB ¶7563, (May 27, 2015)

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20-1 ARB ¶7563. MICHAEL PAOLUCCI, Arbitrator. Selected by the parties. Hearing held in Marysville, Ohio, March 18, 2015. Post-hearing briefs were filed. Award issued on May 27, 2015.

Headnote

Tests, employee: Termination: Drugs.–
An employee filed a grievance contending that the employer violated the collective bargaining agreement when it terminated her for refusing to take a drug test. The arbitrator denied the grievance. A forklift accident triggered the requirement that the forklift operator be given a drug test. The employee who was supposed to driving the forklift at the time of the accident had a history of drug use. Her best friend at work, however, claimed that she was driving the forklift at the time of the accident. The employer did not believe her, in part from testimony from another co-worker who saw the other employee driving the forklift. When the employer decided to test both employees, the employee with the drug history left work, and she refused thereafter to take the drug test. The employer's suspicion was reasonable, and it had just cause both to test her and to terminate her.

Bryan Mandzak for the Employer. John Michael Pusker for the Union.

[Text of Award]

OPINION AND AWARD

Administration

PAOLUCCI, Arbitrator: By e-mail dated July 14, 2015, from [A], the Human Resources Manager with the Company, the undersigned was informed of his designation to serve as arbitrator in an arbitration procedure between the Parties. On March 18, 2015, a hearing went forward in which the Parties presented testimony and documentary evidence in support of positions taken. The record was closed upon the submission of post-hearing briefs from both Parties, and the matter is now ready for final resolution.

Grievance and Question to be Resolved

The following Grievance (Joint Exhibit – 1) was filed on September 26, 2014, and is the pertinent subject matter of this dispute.

> * * *
>
> **Nature of Grievance** [B] was given a directive to go take a drug test. This is a random test. The party who was driving tow motor was already sent for drug screen ([B] Call). We don't have random drug testing at this facility.
>
> **Clause of Contract Violated** Drug/Alcohol Screening (Post Accident)
>
> **Settlement Desired** [B] reinstated with a pay reimbursed. Record expunged of this incident.

> * * *
>
> * * *

The questions to be resolved are whether the Company had just cause, and thereby whether it violated the Agreement, when it discharged the Grievant, [B] for refusing to take a drug test; and if so, what should the remedy be?

Cited Portions of the Agreement

The following portions of the Parties' Collective Bargaining Agreement (Joint Exhibit – 1), hereinafter "Agreement", were cited:

* * *

ARTICLE 3

MANAGEMENT CLAUSE

> The management of the business and the operation of the plants and the authority to execute all the various duties, functions and responsibilities incident thereto is vested in the Employer. The exercise of such authority shall not conflict with this agreement, its purposes, or the supplements thereto.

* * *

ARTICLE 5

GRIEVANCE PROCEDURE

* * *

> (5) It is recognized that the maintenance of discipline is essential to the orderly operation of the plants and also that the involving of disciplinary action should be designed to correct the conduct of the employees involved rather than to punish.
>
> > In the great majority of infractions of rules, termination of employment for disciplinary reasons is justified only after the employee has been given the opportunity to correct his behavior and has failed to respond to disciplinary measures.

* * *

ARTICLE 7

REPORTING AND MINIMUM WAGE PAYMENT

* * *

SECTION 1 – STANDARD WORK PERIODS

> (a) All employees are expected to work to the end of their shift, and all employees are to remain and work on their jobs until relieved at the end of the shifts. If an employee working on any operation is not relieved by an employee scheduled to work the following shift, the Employer will attempt to secure relief as soon as possible.

* * *

* * *

The following portions of the Company's Policy on Alcohol and Illegal Drugs (Company Exhibit – 15), hereinafter “Policy”, were cited:

* * *

> The use of alcoholic beverages, illegal drugs and unauthorized controlled substances threatens the health and safety of associates and customers, the quality of goods and services provided to our customers, and the productivity and profitability of our operations. Such usage has the potential to create a variety of work place problems, such as increased injuries on the job, increased absenteeism, greater use of medical and benefit programs, and decreased morale and productivity.

* * *

Post-Accident Testing

> In the event of an accident which results in an injury, or in the event of an incident which had the potential to cause injury, and where it is determined through an investigation that an associate's performance contributed to the accident or incident and where there is either:
>
> 1. a loss of human life,
> 2. offsite medical treatment for the injured individual,
> 3. the operation of a motor vehicle is involved, or
> 4. property damage which causes lost production, waste or equipment repair costs,
>
> An associate may be required to submit to substance testing (alcohol, illegal drugs, controlled substances) as soon as practical after the accident or incident, but generally no more than two hours following the incident. At locations without an assigned Human Resources representative on site, a longer period of time may be appropriate.

* * *

Factual Background

The Company operates a plant in Marysville, Ohio, under the name Contitech, and it employs approximately 290 bargaining unit members. Formerly known as Veyance Technologies, the Company came into existence as Contitech Marysville in January 2015, following its sale to Continental. The Company was formerly known as Veyance when, in August, 2007, The Goodyear Tire & Rubber Company (“Goodyear”) divested itself of its Engineered Products Division.

The Company, in all of its iterations, has been a manufacturer of heavy weight conveyor belts used in industrial applications - including mining operations, integrated steel manufacturing facilities and power plants. On

September 17, 2014, the Grievant, [B], was working the midnight shift and was operating a forklift (aka “fork truck”) on the Hot Former Line. Near the end of the shift the crew finished their work and shut the line down. What occurred at this point is the critical point of the dispute.

The Grievant claimed that she shut down her fork truck but left her key (swipe badge) in the ignition while going to use the rest room. Because the badge was left in the ignition, any employee could take over the machine and use it. In fact, she claimed that while she was in the restroom another employee, [D], used the fork truck to finish her clean up duties. The Union claimed that this was standard procedure at the plant when there are multiple employees working in an area, but only one fork truck was available. [D] testified that while operating the fork truck, she struck a steel-beam while moving a skid of rubber, causing damage to the equipment. Both [D] and the Grievant claimed that [D] was the person responsible for the accident, but other than these two (2) there were no other witnesses. The Company claimed that the two (2) were very close friends and therefore the testimony of both regarding who was actually driving the forklift was suspect.

It is undisputed that [D] called her Area Manager, [C], and reported that she had struck a steel I-beam with the forklift and the impact had triggered the shock-watch impact alarm on the forklift, causing it to shut off. The shock-watch alarm is a safety device that is intended to shut down the equipment if a strike is significant enough to cause damage. To get the forklift running again, it must be restarted by management personnel.

Upon confirming Ms. [D] was not harmed, [C] investigated what had occurred by speaking to [D] and the Grievant. [D] explained that she had been operating the forklift for the purpose of moving skids of rubber, assisting the Grievant. This task is typically performed by the position worked by the Grievant (“Utility”), not the 1 st Operator on the shift – [D]'s job. [C] understood that not only was the work not normally done by the 1s t Operator, but the work was in an area geographically different from the [D]'s. He concluded that [D]'s claim of responsibility was therefore suspicious. Since he knew they were close friends, he questioned the accuracy of the statements of the Grievant and [D]. Because the Grievant was badged in on the forklift, and had been the entire shift; since the work that [D] claimed to have been doing was something the Grievant should have been doing; and since there were no witnesses to the accident other than the Grievant and [D], [C] concluded that both needed to be tested for drug and alcohol use.

In addition, although it was unclear whether [C] knew it, the Grievant had previously been disciplined under the drug and alcohol policy. In 2011 she had tested positive for drug use and had gone through an employer sponsored treatment process. In order to avoid discharge, she was placed into the program and was familiar with Company Policy on drug and alcohol use. Although details were not provided, the crux of the matter is that the Grievant understood that an accident could result in an automatic drug test; that a failure of the drug test could lead to serious discipline, including discharge; and that she was motivated to avoid that process if she knew that she would test positive.

Faced with conflicting information, [C] consulted with the Operations Manager, [E], and the Safety Manager, [F], as to whether he should send both the Grievant and [D] for an alcohol and drug screen. [C] also reset the shock-watch alarm and put the forklift back in service. After the consultation it was confirmed that both should be sent for testing.

The Company policy is that is a shock-watch alarm is sufficient reason to require a drug test under the policy regarding post-accident testing. Because both individuals were being sent for testing, the Union Vice President, [G], was summoned to the area. After consultation with [D] and the Grievant, [G] challenged the directive for both employees to proceed for a drug and alcohol test – he took the position that [D] was the only associate operating the forklift at the time of the accident and should be the only one required to submit to a test. The directive was again communicated by [E] that both associates were to proceed for post-accident drug and alcohol testing.

[G] objected to the Company testing both employees, and claimed that they had never sent two (2) people for a drug test over one (1) incident. He also informed management that another line employee, [H], had witnessed [D] operating the forklift when it struck the I-beam. Ultimately, the Company stuck by its decision and ordered both individuals to submit to a drug and alcohol screening. [D] complied with this directive and the Grievant refused.

Training Manager, [I], was then summoned to the area by [E] to transport [D] and the Grievant using a company vehicle to the off-site testing facility. [I] had often performed this work, and was familiar with the process. [D] and the Grievant clocked out and followed [I] to the parking lot, accompanied by [G]. While [D] proceeded to get into the company vehicle, [I] noticed that the Grievant headed in a different direction than the transport vehicle. [I] remarked, loudly, to the Grievant three (3) times, “[B] you need to go with me.” The Grievant ignored the statements and proceeded to her personal vehicle and left the property.

Following these events, the Company agreed to provide the Grievant with an additional opportunity to submit to a drug and alcohol screen. Following a meeting between the Union President and the Plant Manager, the Grievant was given until September 20, 2014, to submit to a test. The Grievant failed to report for a drug screen. The Union complained that although the Grievant was given this “additional” opportunity, the Company represented that it still planned on giving her “some” discipline. She was place on a “two-day cool” pursuant to the Agreement, and was subsequently discharged on September 27, 2014. The basis for the discharge was her refusal to submit to a drug and alcohol screen in violation of the Company's Drug and Alcohol policy.

The discharge was grieved, was processed through the steps of the Grievance Procedure, and ultimately was appealed to arbitration hereunder.

Contention of the Parties

Union Contentions

The Union argues that there was no reason for the Grievant to have been tested. It contends that it was proven to be a common practice for only one employee to badge into a forklift throughout a shift. Since management is aware of the practice, it contends that the fact that the Grievant was badged into the machine does not necessarily create the conclusion that she had been operating the machine. Moreover, since [D] testified without contradiction that her badge did not work, then it argues that there is less reason to conclude that the Grievant had been operating the forklift. Since [D] claimed that she had been operating the forklift, and since she agreed to take a drug screen, then it asserts that there was no reason to include the Grievant. Since the shift was nearly over, it maintains that the work schedule language means that the Company cannot force an employee to work overtime. As [H] testified, the Company had never before ordered two (2) employees to take a test, and it asserts that doing so in this instance created a new practice that violated the Agreement.

The Union argues that the Grievant had done nothing wrong, was not in the area at the time of the accident, and was therefore justified in punching out at the end of the shift. It rejects the claim of [I] that he called out to the Grievant since [H] testified that he heard nothing. It argues that no manager told the Grievant that a refusal to take a drug test could result in her discharge. It argues that the Grievant reported off on September 18, 2014, because her uncle was having surgery in Kentucky. It contends that this provided a legitimate reason for her not appearing at the drug test after she left.

Based on all the foregoing, the Union maintains that just cause was not established, and it asks that the Grievant be made whole and all wages and benefits be paid.

Company Contentions

The Company argues that it proved that the Grievant violated the Policy, and that just cause was thus proven. It asserts that it proved the factual portion of its case since the Grievant was clearly ordered to take a drug and alcohol screen, and she instead clocked out and went home. Moreover, even though the Company agreed to an additional opportunity to take a drug screen, the Grievant failed to appear. It argues in this circumstance there is no factual issue to debate, and the Company sustained its factual burden. It cites arbitral precedent, including arbitrations involving these same parties, in support.

The Company contends that even without the outright refusal to submit to a test, the Grievant's conduct would have resulted in serious discipline. It argues that it had reason to demand a test, and it argues that her prior incident in January 2011, made its suspicions justified. It argues that it also proved the second element of its

burden by establishing just cause for her termination. It contends that the Grievant knew and understood the seriousness of violating the drug and alcohol policy since she received a seven (7) day suspension for her previous incident, and since she was advised that an additional violation would result in her discharge. It cites the policy itself in support of the claim that refusal or a positive test require discharge. As a result, it argues that application of the policy proves the just cause portion of its case.

The Company contends that the policy is reasonable, is consistent with its responsibility for creating a safe work environment, and is within the requirements of the just cause standard. Since there has been no claim that the policy is unreasonable in its terms or application, it argues that it proved the just cause component by properly applying the Policy terms to the facts proven here. It rejects the claim that this amounted to random testing since there was sufficient evidence to indicate that the Grievant was involved in the accident, and took steps to avoid inclusion, and that she did so solely to avoid the drug and alcohol screening. It contends that any claim of leniency should be rejected since management has sole discretion in determining whether leniency should be found.

The Company concedes some regret in the outcome, but claims that it has done its best by previously placing the Grievant in a treatment program, at its cost. It argues that her subsequent refusal to submit to a test make the decision to terminate unavoidable. It claims that none of the defenses presented by the Union have merit. It contends that, contrary to the Union's claim that the Grievant was not notified that her refusal to submit to a drug screening could lead discharge, the Grievant knew the policy from her previous experience. She plainly refused when ordered to submit to the test, amounting to insubordination, and her testimony that she expected to the "Union to handle it" implicitly acknowledges that she understood she was at risk of serious discipline. It rejects the claim of disparate treatment because in each incident cited the Company sent the involved employees for a drug and alcohol screening.

Finally, the Company asserts that, contrary to the Union evidence regarding employees using "other employee's badges", it was against Company Policy, and that if it occurs it requires the affected employee to accept responsibility for whatever may follow. Even if isolated incidents occur where employees share one badge, it argues that the normal behavior is for employees to badge in and out as they take over a machine.

Based on all the foregoing, the Company claims that the Grievance has no merit, and it asks that the Grievance be denied.

Discussion and Findings

A review of the record reveals that the Grievance must be denied. The basis for this finding is that the Company proved that it acted reasonably in ordering that the Grievant take a drug and alcohol test screen, and the Grievant's refusal created a just reason for her discharge.

All discharge matters have two (2) components – the question regarding whether the facts are as alleged, and whether the proven facts justify the discipline imposed. In this case, the central fact is that the Grievant refused a test when reasonably requested to do so. If the Company succeeds in proving that it reasonably ordered the Grievant to submit to the test, the just cause decision becomes axiomatic. There is no room in a manufacturing environment for employees to be able to refuse a justified order to submit to a test. To find otherwise would result in a hazardous situation where an employer could not remove employees who could be impaired, and thus dangerous to any and all co-workers.

In this case, the Union attempted to claim that because [D] claimed she was operating the forklift, it should simply take her at her word. There is no reason that the Company should rely on the statements of [D], and the Grievant, to determine who to test. It must be allowed to test based on the totality of the circumstances. In order for the Union to prevail, with the result of that the Company would be prevented from ordering a test, the following facts would have to be ignored:

1. The Grievant and [D] were good friends;
2. The Grievant had a recent, previous drug or alcohol problem that required treatment;

3. The Grievant was badged into the forklift at the time of the accident;
4. The work being done was that which the Grievant should have been doing;
5. The Grievant had been badged in to the forklift for the entire shift;
6. No other valid witnesses testified that they had used the forklift that shift, or had seen the accident with [D] driving;
7. [D]'s typical workplace was not nearby.

These facts are simply too significant to ignore, and the Company acted reasonably by ordering the Grievant and [D] to submit to a test.

It is important to note that for the Company to pass the test of reasonableness it must have evidence of something more substantial than a mere “gut feeling.” Its decision must be based on facts and not just on a hunch. Allowing an employer to make these decisions on intangible, indescribable facts would give unreasonable power to management, and could create a situation where the decision to test is excluded from consideration. In this case, the facts bear out the decision of management, and must be given evidentiary weight.

The question is thus whether the Company had a reasonable suspicion to test both the Grievant and [D] under these circumstances. A review of the foregoing facts shows that the Company proved that its conclusion was reasonable, based on a fair observation of what occurred, and was caused by the Grievant's decision to, at best, share her badge, and at worst, lie about who was operating the forklift when the accident occurred.

Based on this factual conclusion, all else that follows becomes automatic. The Company acted reasonably and ordered the Grievant to submit to the test. The Grievant knew and understood the order as proven by the fact that she called the Union Vice President for help in advocating against the order. She then left the plant against the order, and even chose to not act to mitigate her misconduct by submitting to a test within a few days. Her excuse regarding her uncle does not explain why she would not submit to a test somewhere near where she had traveled. The Company policy regarding testing is fair, and passes just cause muster. Her refusal amounted to a violation of a reasonable Company Policy, and the sole remaining question is whether the proven violation of that policy justified her discharge.

Based on the foregoing facts, it must be found that discharge is just. The Grievant not only refused a test, she acted insubordinately in the face of an order to submit to a test. Her actions superficially were a violation of Company Policy. A more serious view is that she acted to thwart the investigation because she knew it would show a positive test for drugs or alcohol. In either case, her actions were not justified on any level, and discharge was appropriate under the just cause standard.

For all these reasons, the Grievance must be, and is, denied.

Award

The Grievance is hereby denied.