

**Bloch #1**

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

**FACTS**

The facts of this matter are not disputed. The Employee was, prior to his termination, a Lead Inspector at the Employer's City 1 maintenance facility. On January 9, he was selected for a random urine drug test, which was performed pursuant to the F.A.A.'s mandated drug testing program. On January 15, 1992, he was advised the test showed positive for amphetamine/methamphetamine.

In accordance with the Employer's policy prohibiting drug usage, the Employee was terminated.

The union does not contest the validity of the test results.

**ISSUE**

Was the discharge of the Employee for just cause and if not, what should the remedy be?

**UNION POSITION**

As indicated above, the union does not contest the positive drug test, nor does it dispute the premise that discharge is the standard penalty for violation of the prohibition against drug use. In this case, however, the Employee contends that he had unknowingly ingested the amphetamines,

which, he claims, his brother secretly placed in a beer he was drinking. The union contends that these facts should be considered as mitigation.

## **EMPLOYER POSITION**

The Employer claims that its drug policy is clear: The presence of a controlled substance in the Employee's system, under the circumstances, constituted a violation of the applicable rules for which discharge was proper.

## **ANALYSIS**

There are two competing, but equally clear, principles in this case. On the one hand, there is no question that, under ordinary circumstances, the Employer's prohibition against drug usage will result in immediate termination, without regard to other factors such as long seniority. At the same time, if it may be said that the drugs were ingested in some manner for which the Employee may truly be released from responsibility, then mitigation is appropriate.

The key issue concerns the proof. In demonstrating that the Employee came to work with drugs in his system, the employer has satisfied its burden of setting forth a prima facie case of misconduct. At this point, the burden shifts to the Employee, the responsibility being to prove elements that would mitigate or obviate the charges. It is here that the Employee faces an imposing task, for he must establish both that the drugs were administered secretly and that he was somehow unaware of their presence in his system (so as to make it impossible for him, for example, to inform the Employer in advance.) The question is whether one may make conclusive findings to that effect based simply on one's say-so. The finding here is that the evidence is not persuasive.

It is simply too easy, following discovery of drugs in one's system, to claim that someone else put them there; that they were ingested accidentally and that there was no apparent affectation. Given the gravity of the misconduct and the overall stakes in terms of safety in this industry, it is not unreasonable to require that something more be presented. In the absence of hard evidence upon which one may base a finding of "no fault", the Employee may not be found to have carried his burden.

Arbitration precedent provides no grounds for a contrary conclusion. In another grievance cited by the union, the Employee had been discharged for refusal to take a drug test. He claimed he had been taken ill. There, as here, the arbitrator concluded that the employer had proven a prima facie case, there, by refusing to test. There, too, the claim of illness was a readily available and, therefore, a suspect contention by the Employee. Noting that any employee raising such a defense would have the burden of substantiating the assertion, the arbitrator stated that "merely stating that one is ill will not constitute a sufficient basis. An employee will have to demonstrate by sufficient evidence that the explanation given by him/her is credible."

In that case, however, the arbitrator found a number of corroborating factors to substantiate the claimed illness. Among other things, he noted that the employee had reported feeling ill to other employees before the testing direction. Additionally, a doctor's slip procured the next day certified that the Employee was, in fact, suffering from influenza. He also found that the Employee had indicated a willingness to test the same day, even after he left work. Based on these circumstances, the termination was set aside. On the other hand in another case Arbitrator Robert Ables allowed that there might be circumstances that would mitigate the misconduct of reporting for work with drugs in one's system but rejected, as unbelievable, the Employee's story that an acquaintance had, unbeknownst to him, fed him cocaine during an evening.

In sum, the finding is that the Employer has sustained its burden of showing that the Employee violated the existing policy against drug usage. For the reasons set forth above, the evidence proffered in support of mitigation falls short of the type of clear, persuasive evidence required to counter the clear misconduct. For these reasons, the grievance will be denied.

#### **AWARD**

The grievance is denied.