Nevins #7

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

PRELIMINARY STATEMENT

David C. Nevins, Arbitrator: This proceeding involves a dispute between the Union and the Employer. A hearing was held before the parties' System Board of Adjustment on November 2, 1993, where the parties presented evidence and put forth their respective arguments.[1]

The question to be resolved in this proceeding is, as stated in the Union's submission to the System Board, the following:

ISSUE

Was the discharge of the Employee just and proper; if not, what should be the remedy?

BACKGROUND

The Employee, prior to her discharge in March of 1992, had worked for the Employer for some 16 years, the last three of which she had served as a lead mechanic for sheet metal work. Except

[1]Following the November 2 hearing, the parties agreed by telephone to provide the Arbitrator with a brief extension of time in which to submit this Opinion and Award. The parties' collective bargaining agreement (the "Bargaining Agreement") by its terms, calls for the System Board chairman to "give his decision within thirty (30) days of the close of the hearing unless extended by mutual agreement."

for one matter of significance, the facts surrounding her discharge are straightforward and undisputed.

The Employee, as many other Employer employees, was considered as having a "safety sensitive" position and, thus, was subject to drug testing requirements promulgated by the federal government and in accordance with the Employer's drug policies reflecting those requirements. Pursuant to those requirements and policies, on June 4, 1991, she was subjected to a random drug test, which turned up a positive result for marijuana ingestion (one of the five drug substances the tests look for). Unlike most other commercial air carriers, the Employer does not automatically and summarily discharge its employees for a single positive drug test. As allowed for by federal regulations, the Employer allows such employees, in most cases, to retain their employment and return to work if they are able to satisfactorily pass another drug test, so long as they agree to any applicable rehabilitation program and submit for a period of five years to unannounced and accelerated drug testing.

On June 27, 1991, after having attended a meeting with Employer representatives who discussed it with her, the Employee signed what is entitled "Agreement for Rehabilitation and Continued Employment" (hereafter referred to as the "Agreement"), a document written and issued by the Employer. This Agreement indicated that due to her drug test failure the Employee was subject to immediate discharge, but the Employer was willing to forego that discharge if she signed the Agreement and complied with its terms "to the Employer's satisfaction in its sole discretion." In addition to providing a "one-time opportunity" for retaining her employment, the Agreement, in pertinent part, went on to state that she must comply with the "following requirements after being returned to active service:"

1. You will abstain from the use of medically unauthorized drugs or illegal substances.

2. You agree to undergo further drug tests, on an unannounced basis, at any time during the next five years as requested by the Employer to ensure that you remain drug free.

Finally, for our purposes, the Agreement stated that if-the Employee failed to comply with its terms or retested positive for unlawful drug usage, she would be discharged and "no mitigating factors will be considered."[2]

After successfully submitting to a number of unannounced drug tests following her reinstatement to employment, the Employee was given an unannounced drug test on March 6, 1992, which was considered as problematic by the testing laboratory. On March 11, the laboratory initially reported back to the Employer that the test sample of "urine is clear in color, no smell." Although the Employer's then-medical review officer, Person 3, instructed the laboratory to nonetheless assay the sample (which turned up negative for any of the five drugs), he also determined to have the Employee come in and be retested.

At approximately 9 a.m. on March 11, a Wednesday, Person 3's secretary, Person 4, began telephoning the Employee at home in order to have her come in to be tested again. (March 11 was the first of the Employee's two consecutive regular days off.) According to her handwritten file notes, Person 4 reached the Employee at about 9:30 a.m.-The Employee's home was in City 1, approximately two hours from the Airport 1(she worked at Airport 2, closer to her home).

[2] From the recollections of the Employee, her supervisor, Person 1, and Person 2, who was then serving as an employee relations specialist, the explanations given to the Employee concerning the Agreement centered on reading her its terms and emphasizing their importance to her continued employment. While Person 1 recalls telling the Employee she could be called at anytime to be drug tested, essentially repeating the words used in the Agreement, Person 2 recalls that she inquired about whether she needed to report for testing if engaged in an important ("hot") work assignment and that Person 1 told her she had to report for testing regardless of that work assignment. They all basically recall that the Employee expressed concerns over her privacy regarding her drug test failure, and none of them claim that any other explanation was given concerning her obligation to submit to testing "at any time."

Person 4 recalls telling the Employee that Person 3 wanted her to come to Airport 1 for an unannounced drug test and that she should be there about 11 a.m. (Person 4 gave no other explanation concerning the test to be conducted or any special reason for it.) According to Person 4, the Employee said she did not have a car to get there as it was in the shop, that it was her day off, and that she would come in on Friday, her next work day. Person 4 says she then told the Employee she would talk to Person 3, to hold, after which she went to Person 3, explained the situation to him, but when Person 3 picked up the telephone to speak with the Employee the line was dead.

The Employee recalls their telephone conversation not much differently than Person 4, and she offers up a vehicle repair bill showing she had taken her truck to be fixed on March 11. Her basic point of disagreement with Person 4 is the Employee's belief that Person 4 did not explain she was putting her on hold; rather, the Employee recalls that after she had explained she had no car and that it was her day off (the Employee claims she thought Person 4 mistakenly called her on a day off), Person 4 merely said she would talk to Person 3, after which the Employee, in a hurry to return outside to her sister's waiting vehicle, hung up and left the house, going with her sister and her friends to City 2 for the entire day and night. Person 4's notes indicate that when she repeated her call to the Employee's home only moments later, she reached the Employee's son (who also worked for the Employer), who explained to Person 4 that his mother had scheduled a trip with her sister to City 2 and that her ride had been there and she had left.[3]

[3] Of course, if Person 4 had told the Employee she was being put on hold while Person 4 spoke to Person 3, it would seem as though the Employee purposefully hung up on the call before Person 3 had the opportunity to participate in resolving the dilemma, making the Employee's conduct seem more questionable. But, it must be noted that our evidence is not so clear that Person 4 did inform the Employee she was being put on hold pending a discussion with Person 3: it is noteworthy that her handwritten notes, made contemporaneously with her conversation on March 11, indicates nothing in regard to telling the Employee she was being put on hold. Indeed, it was only in notes written six days later that she indicates she had "asked [the Employee] to hold", although even these notes do not reflect any response by the Employee. After additional questioning concerning this aspect of her testimony, Person 4 expands her recollection by saying she told or asked the Employee to please hold and, further, that it was not her practice to

As scheduled, the Employee returned to work on her next regular work day, March 13. She was then held out of service by her supervisor, Person 1. On March 20 she was given a proposed Level 5 discipline (discharge) for "VIOLATION OF THE AGREEMENT FOR REHABILITATION AND CONTINUED EMPLOYMENT." An investigative review hearing was held on April 1, and the Employee's proposed discharge was sustained.

ANALYSIS AND DISCUSSION

I. Introduction and the Parties' Basic Contentions.

There is no dispute or claim raised in this proceeding in regard to the propriety or efficacy of the Employer's drug-testing program, its laboratory's testing procedures, the federal drug-testing standards and approach, or over the Employee's problematic drug test of March 6 and the Employer's right to request her to take another test. On the contrary, our dispute is rather narrow and discrete: in essence, it asks whether the Employee's conduct on March 11 in response to the Employer's request for her to take an unannounced drug test warranted her discharge.

The Employer basically puts forth three related grounds to justify the Employee's discharge. It contends, first, that the Agreement she signed, which saved her from summary discharge after her failed 1991 random drug test, was clear and concise, required her to submit to unannounced, accelerated drug testing at "any time" during the next five years, and was clearly breached by her

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put someone on hold without telling her. None of this is to suggest that Person 4 fabricated her claim to have told the Employee she was being put on hold; clearly Person 4 believes she did so inform the Employee. But, the divergent factual concerns serve to help make unclear just what Person 4 actually told the Employee regarding Person 4's desire to speak with Person 3, just what the Employee should have understood by that, or just whether the Employee had a clear basis for knowing that their conversation was not then concluded but was awaiting further intervention from Person 3.

refusal on March 11 to submit to the unannounced drug test requested by Person 3's assistant, Person 4. The Employer also contends it acted reasonably in all respects: it acted consistently with federal drug-testing regulations in administering its accelerated drug-testing program for employees, like the Employee, who had previously failed drug tests, it reasonably requested the Employee to undergo another drug test when her test of March 6 was seen as problematic by the testing laboratory, and it acted reasonably in asking the Employee to be retested on her regular day off. Conversely, the Employer contends the Employee acted unreasonably in refusing to be tested, in avoiding a discussion with Person 3, and in refusing to come to the Airport 1 for testing despite her job being on the line.

Finally, the Employer argues it acted reasonably in deciding to discharge the Employee, since under the Agreement there is no mitigation available for her breach of the Agreement and the Employer has the sole discretion to decide whether she breached the Agreement. The Employer notes it already is more generous and liberal than most other air carriers by granting employees like the Employee, at great expense and trouble, a second chance to retain their employment when failing drug tests, suggesting it should not be penalized for such generosity by having to re-employ someone like the Employee who has refused to fully comply with its accelerated drug-testing program. In essence, the Employer says the Employee's conduct constituted a case of broken promises.

The Union, conversely, contends that the Employee should be fully reinstated to her employment and reimbursed her lost wages and benefits. The Union, basically, contends the Agreement she signed was not sufficiently clear in forewarning her that the Employer could or would ask her to take unannounced drug tests on a regular day off, that no one from the Employer had advised her of that possibility in connection with the Agreement, and that she had no experiential reason for

knowing that the Employer expected employees to honor demands that they come in for drug-testing on their days off. The Union argues that before employees lose their jobs they have to have proper and clear notice that their conduct exposes them to discharge, and in this instance the Union contends the Employee had no such notice. Employees cannot be held accountable for something they had no reason to understand, says the Union.

II. Discussion.

A longstanding notion exists in labor relations: each case of employee discharge (or discipline) must be viewed, in the final analysis, from its own facts and circumstances. In our proceeding, these facts and circumstances are quite unique.[4]

The focus of our proceeding is on the Agreement the Employee signed in June of 1991. Under that Agreement, which put the Employee into the Employer's accelerated drug-testing program, after she had failed a drug test due to a finding of marijuana, one of the conditions she was obligated to follow was to submit to unannounced testing "at any time during the next five years." While there is certainly nothing inconsistent between this condition and federal regulations pertaining to air carrier drug-testing, and the Union makes no such claim, the question remains as to whether the Employee's conduct on March 11, 1992, constituted a breach of that condition sufficient to justify her discharge.

A number of considerations come into play. First, nothing directly alerted the Employee that the term "any time" meant she had agreed to be drug-tested at times or on days when she was not at

[4] For example, one might note that our parties, themselves, have very little experience in regard to employees who purportedly refuse submission to drug testing. Despite his overseeing some ten to sixteen thousand drug tests for the Employer, and another forty thousand for another air carrier, Doctor 1, the Employer's current medical review officer at City 3, can recall only one other Employer employee accused of refusing a test and only a few employees having refused a test at the other air carrier.

work, particularly in regard to her regular days off. The Agreement, itself, did not explicitly state that. And our record clearly demonstrates that no one from the Employer explained to the Employee, during the meeting held to discuss the Agreement that testing "any time" meant or included testing on one's regular day off.

Although the Employer argues that the Employee should have inquired whether she could be tested on her days off, this argument is not persuasive. The Union makes sense in arguing that while Employer representatives may have known what the Agreement's terms meant to the Employer, since they drafted and internally reviewed them, its representatives should have informed employees of their knowledge and understanding if they wished to ensure that employees similarly understood those terms. Moreover, it is difficult to fault someone like the Employee for failing to inquire when she signed the Agreement about a potential misunderstanding under it, when she might not, and in all likelihood did not, have any basis at the time for recognizing or being aware of the potential for misunderstanding.[5]

Would the Employee have had any compelling reason to believe that drug-testing "any time" included drug-testing on regular days off? As an initial proposition, it seems abundantly reasonable for an employee to believe that a day off belongs to him or her, that it means a day away from work and away from obligations to follow directives of a supervisor. In this connection, it would appear from the parties' Bargaining Agreement that the Employee was not paid any wages while on her regular day off and that she was free from any obligation to come

[5] The testimony of Person 5, an Employer employee relations representative, fails to support the proposition that it was the Employee's responsibility to ask whether the Employer expected to subject her to drug-testing on her days off. There is no particular reason to believe it was her responsibility just because half of those employees Person 5 meets with in regard to their signing of the Agreement ask about whether testing "any time" means they can be tested on days off. Indeed, this experience of Person 5 suggests that employees regularly are unsure of just what "any time" means in regard to days off.

into work even if requested to do so for overtime work. In short, if we were to raise a "reasonable person" test in the Employee's circumstance, it would not be difficult to accept that such a person would reasonably think her obligation to submit to drug-testing from her employer at "any time" meant any time while at work, not when away from work, when in non-pay status, when at home on a day off, and when not under the supervision of superiors.[6]

An informal survey undertaken by the Union, after the Employee's discharge, also reflects a lack of empirical basis for her believing she was subject to drug-testing on a regular day off. Person 6, a Union grievance committeeman in City 4 since 1987, knew of no one in the Union's representational unit who had been drug-tested on his or her regular day off, and after checking with his Union counterparts in the Employer's operational areas of City 5, in City 6, in City 7, and in City 3, they too knew of no such testing by the Employer.

In fact, when the Employer's actual practices were examined at our arbitration it was not that clear just how it does handle drug-testing for employees who are not at work. For example, Doctor 1, the Employer's current medical review officer in City 3, is unaware of any employee being drug-tested on his day off, under duress. He acknowledges that for Monday-through-Friday employees, he knows of none who have been called back on weekends for drug testing (even though drug testing takes place on weekends). So, too, he acknowledges, as one would expect, that the Employer does not require vacationing employees to return from vacation for drug-testing; nor would he "make a case" against an employee off from work should that employee fail in responding to phone messages left for him to come in for drug testing. And

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[6] One of the general complaints regarding drug-testing at work has been that its results can and do reflect behavior engaged in by employees away from work, during their own free time. By subjecting employees to drug-testing on their days off, as well, the privacy concerns of employees are even more heightened and some might wonder just where the boundaries of free-time and privacy can be drawn.

while Person 7, a coordinator for drug testing, makes clear that Employer employees occasionally have been called in on days off for drug testing, she also describes a more normal practice for accelerated testing different from what happened to the Employee: when employees in the accelerated, unannounced testing program are absent from work on a day they are to be tested, normally they are put back into a pool of other employees for testing at another time, within the time period designated by the medical review officer for their accelerated testing.

The upshot of these various considerations is several fold. Either drug testing of an employee on his day off (or on his vacation day or on his sick day) is not a uniformly mandated practice on the Employer's part, or, when drug tests are scheduled for an employee absent from work, the employee is merely treated as absent as a general matter and his test is rescheduled, or, at least under certain circumstances, which are unclear, the Employer will recognize an employee's absence as a reason why his drug test needs to be rescheduled later.

Aside from the foregoing considerations, the Employer also cites two reasons why it was necessary to have the Employee come in on March 11 for testing: first, because federal regulations require that when an employee's drug test appears problematic, as the Employee's March 6 test had, the Employer is obligated to retest that employee as soon as possible, and, second, that any delay in retesting the Employee could allow traces of marijuana to be lost from her system. Neither of these reasons, however, is very helpful to a resolution of this dispute.

The regulation, to which Doctor 1 refers, when suggesting it was necessary for the Employer to have retested the Employee as soon as possible, does not seem applicable to her situation. Section 40.25(f) (16) of the Department of Transportation Regulations for drug testing is among the provisions requiring certain kinds testing procedures to ensure the integrity and identity of an employee's test sample. These provisions basically pertain to activity at the test site when testing

is being done. It is during that ongoing testing procedure, when "there is reason to believe that a particular individual has altered or substituted the specimen," that the tester shall obtain a second test specimen "as soon as possible." This regulation, on its face and within its surrounding framework, is not directed at what should happen when a question is raised about a test sample days after that sample is taken, as in the Employee's case, when an immediacy for retesting no longer exists.

The Employer's concern about possible dissipation of marijuana traces is mere speculation. Evidence of marijuana ingestion can remain in a person's excretory products for a substantial time; long after its ingestion and even long after it has ceased to have any psycho-motor effects. To believe a dire need existed to have the Employee retested on March 11, one need not only assume she was guilty of ingesting marijuana prior to her March 6 test, but that she did so in a quantity and at a time that would see the evidence of that ingestion disappear in another two days, at which time she would have been back at work. Such speculations are simply not called for. And, it might be noted, the Employee was not informed when the Employer called her on March 11 of either an immediate necessity to test her or that she was being retested because her previous test was problematic.

In a sense, the parties' dispute involves two different concerns, though they oddly have some similar underlying considerations. The Employer basically charges the Employee with a breach of the Agreement, and considerations thereby arise concerning just what the terms of that Agreement mean and whether the Employee's conduct violated that meaning. The Union, somewhat differently, raises considerations more typical to a disciplinary matter, pertaining in particular to whether the Employee sufficiently understood the terms of the Agreement she is

accused of breaching. In both instances a strategic consideration arises as to the clarity of the Agreement's terms the Employee promised to honor.

On the one hand, as if we were engaged in a contract interpretation question, we should note that the Agreement was unilaterally drafted by the Employer; if there is a lack of clarity to its terms that was its responsibility, not the Employee's. On the other hand, notwithstanding the Agreement, review of the Employee's discharge should not ignore some rather basic just cause notions as typically associated with the parties' Bargaining Agreement. As the Union points out, one of the broadly recognized criteria for measuring just cause for discipline is to ask whether the offending employee had sufficiently clear notice that his or her conduct was subject to the discipline in question.

As suggested in preceding paragraphs, many of our most pertinent considerations lead to a conclusion that the Employee did not have a sufficiently clear notice or understanding that her "refusal" to be drug-tested on March 11, a regular day off, would constitute a breach of or a dischargeable offense under the Agreement. In fairness and in reason, it must be said that the Agreement's unexplained requirement of testing at "any time" was sufficiently unclear and open to different meanings in the context of the Employee's employment to conclude she did not have a sufficient basis for understanding that it required her to give up her regular day off and submit to a drug test. As pointed out, not only would she have had reasonable grounds for believing that "any time" referred to any time while at work, but no empirical basis existed for her to think otherwise. She, in essence, simply did not have an adequate basis for understanding that her "refusal" to be tested on March 11 could lead to her discharge; as noted, just cause notions require that an employee have, or that there are reasons for inferring she has such an understanding before an employee's employment can be terminated. Indeed, it is not even

completely clear that the Employee's conduct on March 11, in her conversation with Person 4, constituted a "refusal" to be drug-tested that day, as opposed to an expressed resistance by her to coming in on her day off for such a test and a hurried ending to the conversation (see note 3, at pages 4-5, and surrounding text).

Inasmuch as it was the Employer that chose to use the term "any time" in the Agreement, and since it failed to explain to the Employee its intended reach of that term, to include her days off from work, it seems perfectly reasonable to hold the Employer accountable for whatever its lack of clarity has wrought. Although the Employer sees the term "any time" as clear, without condition and as including both work days and regular days off, this view implies too much. Would the Employer contend that drug testing "any time" also applies to an employee away on vacation? Would it contend that drug testing "any time" applies to an employee at home ill, or in the hospitable sick? Would it contend that "any time" applies to an employee who fails to quickly respond to a telephone message left for him at home to come in for a drug test? Obviously, if the Employer sought to enforce its accelerated drug-testing in such circumstances, most everyone would believe it quite unreasonable, unjustified, and impermissible, albeit the term "any time", if given the unlimited reach suggested by the Employer's view of its clarity, could likewise apply in such unreasonable situations. Thus, the term "any time," in the context of the Agreement, which deals with an employment environment, must mean something less than the broad, unlimited reach it is capable of meaning in the abstract. But what is that more limited reach? The Employee was not told, and given the absence of empirical knowledge on her part concerning the reach of that term she would have no way of knowing with any certainty.

The Employee's lack of adequate notice concerning the discharge exposure she faced on March 11 is just the kind of problem which shows why the Employer cannot simply allocate to itself

"sole discretion" in determining a breach of the Agreement and its consequence. Of course, no one has an interest in discouraging the Employer from pursuing its more enlightened approach regarding drug testing, by affording most employees a second chance. One does not want to make that approach more troublesome and expensive than absolutely necessary. Moreover, the Employer must be given as much leeway as possible in applying the Agreement.

But such legitimate concerns cannot be used to ignore employee rights, particularly notions of fairness, reasonableness, and just cause. If the Employer in its sole discretion could determine that the Employee breached the Agreement and warranted discharge, without further review, so too it could likewise discharge a vacationing employee for refusing to return from vacation for an unannounced drug test or a sick employee who refuses to leave his sick bed to undertake an unannounced drug test. As noted, however, it is difficult to imagine, that such extreme cases would not be found wanting by fair-minded observers, familiar with the underlying concepts of just cause. And while it is most unlikely that the Employer, itself, would discharge such employees, considerations applicable to those employees are similarly applicable to the Employee, only in a less extreme environment. The difference in degree, however, should not blind us to the underlying just cause concerns applicable in each of these variations. In each, what in essence makes a discharge unreasonable is that the employee would have no compelling reason to think that his conduct exposed him to discharge; in this concern, the Employee does not fall far behind the more extreme cases that have been cited.

Indeed, the Union raises a reasonable point that when this matter first arose, the parties could have treated it as involving a legitimate and reasonable misunderstanding of a term in the Agreement and taken steps to ensure that such a misunderstanding was cleared away, not only for the Employee's benefit but for other signatories to the Agreement as well. One can only

regret that such an approach was not taken, in view of the Employer's otherwise salient and enlightened drug testing policies. Rather than treat the situation in such a fashion, the Employer decided to discharge the Employee. While it was under no obligation to let her return to work absent a satisfactory drug test, in view of her recent, March 6 problematic test, the Employer certainly was not compelled by the circumstances to discharge the Employee, and, in fact, acted contrary to essential notions of fairness and just cause by discharging her without having provided clear and adequate notice that her conduct exposed her to such severe discipline.

AWARD

The grievance is sustained. The Employee's discharge was not just and proper. Accordingly, she is to be offered reinstatement to her former position, with no loss of seniority. In addition, she is to be reimbursed all her lost wages, as though she returned to work as of March 27, 1992, and her other benefits shall be reinstated (without deduction). Her reimbursement of wages shall be lessened by any outside earnings she received from March 27 until her reinstatement or her refusal of a bona fide offer of reinstatement.