FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

IN THE MATTER OF ARBITRATION	)	
	)	
Between	)	
	)	**FMCS#11-51367-3**
WIRTZ BEVERAGE MINNESOTA BEER	)	
	)	
and	)	
	)	**John Remington,**
	)	**Arbitrator**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION #792	)	
	)	
	)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the termination of Grievant Steve Dorion, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on February 25, 2005 in Minneapolis, MN at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; a stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file post hearing briefs which they did subsequently file on April 5, 2011.

The following appearances were entered:

For the Company:

Gregory L Peters — Attorney at Law
Seaton, Peters, Revnew

For the Union:

Bill Reynolds — Business Agent

THE ISSUE

DID THE COMPANY HAVE JUST CAUSE TO TERMINATE THE EMPLOYMENT OF GRIEVANT STEVE DORION AND, IF NOT, WHAT SHALL THE REMEDY BE?

PERTINENT CONTRACT PROVISIONS AND RULES

ARTICLE 3
MANAGEMENT RIGHTS

All the rights, powers, prerogatives and authority the Company had prior to the execution of this Agreement are retained by the Company and remain exclusively within the rights of management, and are not subject to negotiations or to the grievance-arbitration procedure. The rights, powers, prerogatives and authority of the Employer include, without being limited to, the right to determine qualifications for positions, to determine the number of employees, to schedule work, to determine shift times, hours worked, including overtime, and the length of the workday and week, to determine performance and quality standards, to create, combine, modify and abolish jobs, job classifications and routes, to evaluate employee's performance, to establish and modify rules and practices, including safety, disciplinary and work rules and practices, including the right to define specific penalties for specific infractions thereof, [1] to determine the location, number and types of facilities and departments, and the number and

[1] Underlined language added in 2010 negotiations.

nature of jobs, job descriptions and routes, to control and regulate the use of equipment, to establish and modify light duty programs or positions, and to direct and discipline the work force, including the right to reprimand, suspend and discharge employees for just cause and impose all other discipline. The employer shall have the right to establish and modify any lawful training programs and any lawful drug and alcohol policies, including lawful testing policies, of its choosing, whether for existing employees or for applicants for employment. The parties specifically agree that the Wirtz Corporation Code of Conduct shall be implemented, subject to lawful future modifications, by the Employer. To the extent that the rights, powers, prerogatives and authority of the Employer have been specifically abridged, delegated, granted or modified by this Agreement, the issues relating thereto are subject to the grievance-arbitration procedure.

ARTICLE 15
DISCIPLINARY ACTION

15.1 General – No regular employee shall be discharged, suspended without pay or disciplined in an manner except for just cause, provided that the Employer's rules may provide specific penalties for specific violations, if not arbitrarily imposed. …… It is specifically agreed that the Employer's work rules may provide that one (1) offense of any of the following shall constitute just cause for discharge without prior warning: Unauthorized possession, use or distribution or being under the influence of any controlled substance or alcohol while on duty or on Company property; ……

ARTICLE 18
TERMINATION

This AGREEMENT shall be effective its date of execution, subject to ratification by both parties' internal processes, and shall remain in effect through March 29, 2013. This agreement represents all the understandings of the parties and the parties waive any right to bargain over any item not included herein for the term of this Agreement. Neither party shall be obligated to observe any of the provisions of this Agreement after its expiration date. All past practices which are not specifically included in the Collective Bargaining Agreement are abolished and are

agreed to be non-contractual.[2] The parties agree to provide written notice to one another at least sixty (60) days prior to the expiration date of this Agreement of their willingness to engage in negotiations concerning a replacement Agreement.

MARK VII HANDBOOK

Section 3

Drug and Alcohol Policy for DOT Covered Employees

II. SCOPE
The Company's Drug and Alcohol Policy for DOT-Covered Employees, outlined below, applies to all full-time, part-time, and temporary employees of the Company who are "covered drivers" as defined in Section VI (a).
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IV. POLICY/ RULES OF CONDUCT
A driver who violates the DOT prohibitions of this policy (Section VIIB) will be removed from safety-sensitive function in accordance with DOT rules and regulations, and, under the Company's independent authority, will be subject to disciplinary action up to and including termination of employment. An employee/driver who refuses to submit to required testing will be immediately removed form any safety-sensitive function, and, under the Company's independent authority, will be considered to have voluntarily resigned.

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BACKGROUND

Wirtz Beverage of Minnesota Beer, Inc. f/k/a Mark VII Distributors, and hereinafter referred to as the "COMPANY" or "EMPLOYER," is engaged in the wholesale distribution of beer and soft drinks in an eleven county area surrounding the Twin Cites of Minneapolis and St. Paul, Minnesota. Company truck drivers and

[2] Underlined language added in the April 1, 2000 to March 31, 2003 agreement.

warehouse workers are represented by the International Brotherhood of Teamsters and its Local Union #792, hereinafter referred to as the "UNION."

Steve Dorion, the Grievant, was initially employed by the Company as a truck driver in 2000. As a requirement of his employment as a truck driver Grievant was required to hold a Commercial Driver's License (CDL) and was subject to random drug testing pursuant to Company and DOT requirements. In 2008 Grievant moved from his position as a truck driver to work in the warehouse. This new assignment was intended to accommodate Grievant's permanent physical restrictions. The warehouse position was also safety sensitive and Grievant was required to operate a fork lift and occasionally drive trucks. In August of 2010 Grievant took Family and Medical Leave Act leave as a result of a gunshot wound to his left hand. Grievant had hand surgery on August 10, 2010 and was subsequently returned to work with restrictions on October 18, 2010.

Following his return to work Grievant was selected for a random drug test which was administered on October 25, 2010. On October 28 the Company was notified by Advance Drug Testing, Inc., the testing laboratory, that Grievant had screened positive for marijuana. A split sample reconfirmation test conducted on November 1, 2010 also yielded a positive result. Accordingly, Grievant was discharged from his warehouse position on November 1. The Union contested this discharge through the filing of a grievance report on Grievant's behalf the following day. This grievance alleges that Grievant was discharged in violation of Articles 15.1 and 15.2 of the collective agreement and states simply: "The Grievant was unjustly terminated from his employment at Wirtz Beverage on November 1, 2010." In remedy the grievance requests that Grievant be reinstated and made whole in all respects. This grievance remained

unresolved and was ultimately advanced to arbitration in compliance with the provisions of Article 16 of the collective agreement. There being no issues of arbitrability, this matter is properly before the Arbitrator for final and binding determination.

CONTENTIONS OF THE PARTIES

The Union takes the position that the penalty of discharge imposed by the Company was too severe, particularly in light of Grievant's previously unblemished work history. In this connection the Union further takes the position that other employees who have tested positive for drugs in the past have been given a second chance and not terminated, and that there is no requirement to terminate an employee for a failed drug test, only a requirement to remove him/ her from a safety sensitive position. Indeed, the Union contends that such a second chance for employees who fail a drug test is provided for in Section 2 of the Company handbook. The Union also argues that the Company has not posted any "zero tolerance" notices with respect to drugs. Finally, the Union takes the position that Grievant ingested marijuana inadvertently at a private picnic away from the worksite and that there is no evidence to show that Grievant was ever impaired or under the influence of marijuana while at work.

The Company takes the position that Grievant was properly discharged for just cause. It argues that it promulgated and communicated reasonable rules regarding drug use and testing; that it conducted a fair and objective investigation and uncovered substantial evidence of Grievant's violation. The Company denies the Union's allegation of disparate treatment and asserts that it has the right, under Article 3 and 15 of the collective agreement, to discharge one time offenders of its drug policy. In this

connection the Company points to a recent arbitration decision by another arbitrator upholding this asserted right. While the Company concedes that it has not always terminated first-time offenders, it maintains that it has immediately terminated three other first-time offenders of the drug policy since 2006. Finally, the Company takes the position that Grievant's inadvertent consumption of marijuana defense is neither credible nor was it raised at the time of his discharge. Rather, the Company contends, this defense was concocted after the fact in an attempt to obtain unemployment compensation benefits.

DISCUSSION, OPINION AND AWARD

As a preliminary matter, the Arbitrator is compelled to respond to an objection raised by the Union Business Representative concerning the post hearing submission by counsel for the Company. The Arbitrator has carefully reviewed this submission and has determined that the Company offered no new evidence in the attachments to its post hearing brief and that all of these attachments were either proper arguments or copies of exhibits already received into the record.

The Union's argument in this matter relies heavily on its contention that the Company has, in the past, frequently imposed a penalty other than discharge to first-time offenders of its drug policy and asserts that this past leniency somehow rises to the status of a past practice. However, even if the Union had been able to establish the existence of a long standing and mutually accepted practice that has continued into the present, such a practice could not contravene the clear requirements of the collective bargaining agreement or rules of conduct that are reasonably related to the safe and efficient conduct

of the Employer's business. Here the evidence is clear that the Company has the right, under Article 3, to promulgate such rules of conduct including, but not limited, to drug and alcohol testing. Further, the Company has the expanded right under the new language of Article 3, supra, to establish specific penalties for specific violations. Accordingly, the Company has the right, in its discretion, to terminate employees who violate its drug policy. While the Company might choose to impose a lesser penalty, it has no obligation to do so. The Arbitrator must also reject the Union's contention that the requirement that an employee who violates the DOT prohibitions only has to "be removed from safety-sensitive functions" does not mean that the employee must be discharged. Again, this is a matter of Company discretion under Section 3 of the Drug and Alcohol Policy for DOT-Covered Employees. This policy subjects violators, in addition to removal from their position, to disciplinary action up to and including termination.

Grievant was well aware of the Drug and Alcohol Policy as evidenced by his signed acknowledgement of receipt of the Employee Handbook. This acknowledgement specifically references the Company's drug and alcohol policies. However, the Union contends that Section 2 of this Drug and Alcohol Policy permits employees who fail a drug test a second chance. However, Section 2 is not applicable to Grievant who continued to work in a safety-sensitive position after he was transferred to the warehouse. Any employee who regularly operates machinery, particularly vehicles, even if they are not operated on the public streets can only be deemed to be in a safety sensitive position.

In light of the foregoing discussion the Arbitrator must find that Grievant was aware of his obligations and the possible penalties for violation of the Drug and Alcohol

Policy; that he was subject to random drug testing under DOT requirements; that he provided no reasonable explanation for the positive test result reported to the Company; and that the penalty of discharge imposed by the Company was both reasonable and within the Company's discretion. Further, the record does not support the Union's contention that Grievant was disparately treated or that the Company is bound by its past leniency.

Grievant testified that his positive drug screen was likely the result of inadvertent ingestion. Specifically, Grievant asserted that he had eaten some marijuana laced brownies at a private barbecue approximately ten days before he was selected for a random drug test but that he had never knowingly used marijuana. He further testified that he was unaware at the time that the brownies contained marijuana, that he ate "five or six" of the brownies, and that he felt fine afterward. Accordingly, he testified that he was surprised when he tested positive on October 25, 2010. The Arbitrator deems it unproductive to further review or comment upon this "brownie defense" or comment in detail upon the numerous inconsistencies and missing elements in Grievant's testimony. It is sufficient to note that the Arbitrator finds that Grievant's testimony in regard to the alleged inadvertent ingestion was neither credible nor plausible.

We are left, therefore, with the assertion that Grievant's lengthy and apparently satisfactory work history should be sufficient to mitigate the penalty of discharge imposed by the Company. While it does appear from the record that Grievant's tenure with the Company was discipline free prior to the positive drug test, there is nothing within the record to show that the Company's decision to terminate was punitive or excessive given the severity of the offense. Here it is the Company that is in the best

position to evaluate Grievant's overall employment history and determine to what extent, if any, this history might mitigate the penalty. The Arbitrator has no authority to substitute his judgment for that of the Company.

The Arbitrator has made a detailed review and analysis of the entire record in this matter, and he has given thorough consideration to the post hearing briefs submitted by the parties. Further, he has determined that the critical issues which arose in these proceedings have been addressed above, and that certain other issues raised by the parties must be deemed irrelevant, immaterial, or side issues at the very most and therefore have not been afforded any significant mention, if at all, for example: whether or not Grievant was provided with the retesting procedure for his urine sample; whether or not Grievant claimed that such a retest would be "a waste of money;" whether or not Grievant completed a SAP evaluation or subsequently passed a drug test; whether or not the Union Steward (Pierce) received a copy of the Company handbook; when the past practice language in Article 18 was first adopted; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties' collective bargaining agreement, that the Company has demonstrated by clear and convincing evidence that it had just and sufficient cause to terminate the employment of Grievant. Accordingly, an award will issue, as follows:

AWARD

THE COMPANY HAD JUST CAUSE TO TERMINATE THE EMPLOYMENT OF GRIEVANT STEVE DORION. THE GRIEVANCE MUST BE, AND IS HEREBY DISMISSED AS BEING WITHOUT SUBSTANCE OR MERIT.

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John Remington, Arbitrator

May 11, 2011

St. Paul, MN