

between the parties when it discharged the grievant, Richard P. Aguirre. The last of the parties' post-hearing written argument was received by the arbitrator on September 1, 2011.

FACTS

The Employer, a large multi-national manufacturer, operates several of its facilities in and near Minneapolis, Minnesota. The Union is the collective bargaining representative of the Employer's non-supervisory employees who are engaged in production and maintenance at the Employer's facilities in the Minneapolis area, including those employed at its Golden Valley Plant.

The grievant was hired by the Employer on January 9, 1978. He has worked at several of the Employer's Minneapolis facilities, starting in Assembly classifications and then in Machinist classifications. For about fourteen years before September 27, 2010, the date of the grievant's discharge, he worked at the Golden Valley Plant. At the time of his discharge, he was classified as a Group Leader in Machine Repair, and he worked in the Die Cast Department, maintaining and repairing machinery used to cast metal and plastic parts.

On September 27, 2010, Nicholas W. Phillippi, Supervisor for Machine Services, issued the following Notice of Discharge to the grievant:

Upon completion of a formal investigation and after discussion with you and your union representative such that you could offer refuting or mitigating evidence on your behalf, you are hereby discharged from employment with Honeywell. This discharge is effective immediately. This discharge is based upon your violation of Minneapolis

Factory Rules and Policies. Specifically, you committed the following offenses:

- Failure to properly lock-out/tag-out equipment per protocol
- Knowingly place oneself or another in physical danger
- Violation of drug and alcohol policy by testing positive for drugs

Via evidence gathered, we conclude that on the morning of September 21, 2010 you entered the safety envelope of a die cast machine, while it was operating, to do repairs without following proper lock-out/tag-out equipment protocol. By doing this you injured yourself and knowingly placed [yourself] in physical danger.

When given a drug test the morning of September 21, 2010 you tested positive [for] drugs.

A letter concerning your benefits and other separation data will be sent to your home address from Honeywell's corporate offices.

The events that led to the grievant's discharge occurred on September 21, 2010, at a die cast machine the parties refer to as "Machine 198." The Die Cast Department at the Golden Valley Plant is equipped with seven large die cast machines that are used to cast aluminum parts. Each of these machines covers many square feet, and each is designed to produce castings in continuous operation.

The following is a description of the process by which Machine 198 produces aluminum castings. In the first step of the machine's process, an automated, continuously moving apparatus (hereafter, the "Ingot Loading Mechanism") grasps twenty pound aluminum ingots one at a time from a rotating supply rack, lifts and carries them to a large electric crucible and lowers them into the crucible, where the ingots are melted. The time taken by the Ingot Loading Mechanism to grasp each ingot, lift, carry and lower it into the crucible is automated to permit gradual melting of each ingot before another ingot is placed

into the crucible -- thus to optimize the temperature of the melting metal in the crucible. At the next step in the machine's process, when the crucible has melted a sufficient quantity of aluminum, the machine elevates the crucible and pours molten aluminum into casting molds. In the final step of the machine's process, after initial cooling of the newly made castings, the machine extracts them from the molds and places them in racks for further cooling.

All of the mechanisms used to complete these processes are enclosed behind fencing -- for most of the machine's perimeter, behind chain-link fencing, but in isolated areas, behind a a metal-mesh grid. The enclosure of Machine 198 is designed to prevent human contact with the moving parts of the machine as it is operating or with parts of the machine that operate at high temperatures; hereafter, I sometimes refer to the fencing that encloses Machine 198 as its "safety envelope." The machine is equipped with controls located outside the enclosure that allow its operations to be stopped -- either serially, so that, for example, the crucible's melting process and the castings-extraction process can continue even though the stop-control for the Ingot Loading Mechanism has been activated, or by an emergency-stop control that permits all its processes to be stopped by pushing a button.

Employees can enter the enclosure around Machine 198 through a gate, but, as I explain more fully below, the Employer has adopted safety rules that require stopping the machine and disabling the control that restarts it before making such an entry ("lock-out/tag-out" rules).

Electricity is the primary source of power used to operate the mechanisms of Machine 198. At the Ingot Loading Mechanism, electricity powers a pump -- as the source of hydraulic pressure that flows through seven or eight hydraulic hoses. The flow of hydraulic pressure causes the mechanical movements in the Ingot Loading Mechanism, including the movement of its metal parts that, in an automated cycle, grasp ingots one at a time, lift them, carry them and lower them into the crucible. The hydraulic flow from all of the hydraulic hoses is converted to mechanical movement at a place where the hoses end, referred to by the parties as the "solenoid bank" or the "valve bank."

Just above the solenoid bank, a metal armature moves in cycles as part of the apparatus that continuously grasps ingots and lifts, carries and lowers them into the crucible. This armature maintains a horizontal aspect throughout its cycle, but rises through part of the cycle, remains stationary through parts of the cycle (pauses that permit gradual addition of ingots to the crucible), and descends through part of the cycle. (Hereafter, I refer to this armature as the "cycling armature.")

A metal-mesh grid covers most of the Ingot Loading Mechanism in the area around the solenoid bank -- as part of the machine's safety envelope, intended to prevent human contact with its automated moving parts. An opening of several square feet, however, exists at and near the solenoid bank. At this opening (the "grid opening"), it is possible for an employee to reach inside the machine's safety envelope and access the

solenoid bank and surrounding equipment, including the cycling armature and some surfaces of the hydraulic hoses -- even when the Ingot Loading Mechanism is in operation.

When the cycling armature is at its highest position in the cycle, it rises above the grid opening, leaving a space of about six inches between the grid fencing above and the solenoid bank just below. When, however, the cycling armature descends to its lowest position, it drops below the grid fencing, leaving a space between the cycling armature above and the solenoid bank just below of just over four inches. Timing measurements taken the morning of September 21, 2010, showed that the cycling armature took about twelve seconds to travel from its lowest to its highest position, then paused for about twenty-four seconds, and then took about twelve seconds to travel from its highest to its lowest position, which, as I have described, placed the cycling armature just over four inches above the solenoid bank.

The grievant arrived at the Golden Valley Plant on the morning of Tuesday, September 21, 2010, at about 5:00 a.m., the scheduled start of his shift. Soon after his arrival, Alford McMillan, a Machine Operator who was operating Machine 198 and one other die cast machine that morning, told the grievant that hydraulic fluid from a hose on Machine 198 was leaking. At about 5:30 a.m., the grievant approached Machine 198 to begin its repair.

It is undisputed that, during the next few minutes, while the Ingot Loading Mechanism was still operating and, thus, the cycling armature was still cycling, the grievant put his head

through the grid opening and into the space between the grid fencing above and the solenoid bank below -- at a time in the cycle when the cycling armature was above the grid fencing. After the grievant did so, the cycling armature descended below the grid fencing in its automated cycle, thus narrowing the space available for the grievant's head. The descent of the cycling armature caused it to impinge on the grievant's head, pinning his head to the solenoid bank with a force sufficient to prevent him from removing it. The grievant yelled for help from McMillan, who was nearby at the other die cast machine he was operating that morning. McMillan went to Machine 198, activated the emergency stop button and manually raised the cycling armature, thus releasing the pressure on the grievant's head.

At about 5:40 a.m., the grievant used a two-way radio to contact Phillippi, his supervisor, and he told Phillippi that he had been injured. In the following description of Phillippi's investigation of the incident, taken from his testimony and from notes he made on September 28, 2010, I have used quotation marks to identify language taken directly from his notes.

During their radio conversation, Phillippi asked the grievant if he had been injured, and the grievant replied that he was fine and had a few scratches on his face. The grievant said he did not need medical attention. Phillippi and Michael B. Graham, a Machine Engineer, went promptly to Machine 198. As they approached, they saw the grievant coming from a men's room "holding a slightly bloodied paper towel" to the right side of his face. The grievant appeared to be "fully coherent." He

said he "got his head stuck" in Machine 198, and, when Phillippi asked him how that had happened, he responded that "he was trying to tighten down a hydraulic hose he had noticed was leaking." When Graham asked the grievant why he had put his head "into a running machine," the grievant made no response.

Phillippi told the grievant that he should see the Occupational Health Nurse for the Golden Valley Plant, Jennifer J. Hastings, and the grievant refused, saying he was all right and did not want to "cause any attention." Phillippi noticed a bruise around the grievant's eye and when asked by the grievant to feel the back of his head, Phillippi noted a "small bump." The grievant said he had "fucked up." He continued to refuse to have medical attention. Phillippi, Graham and the grievant went to Machine 198, and the grievant pointed out the grid opening. Phillippi's notes state:

[It was] a small opening on the aisle side of the ingot loader on #198. The hose was on the inside of the valve bank. It would have been easily accessible through the gate 1 foot away that would have killed the power. I asked if he turned off the machine he said no, he thought he could tighten the fitting through the small opening.

Phillippi decided that, though the grievant refused to go to Hastings for medical attention, he would have Hastings go to the grievant. Phillippi also notified other management employees who would do further investigation -- Mark E. Friske, Health Safety Environmental Leader, Dale A. Hoglum, Health Safety Environmental Engineer, and Larry Pederson, Factory Manager for the Golden Valley Plant, Photographs and video pictures were taken of relevant parts of Machine 198. At several times during

the investigation, the grievant remarked that he should not have reported the incident to his supervisor and that, if there were a future similar incident, he would not report it.

Hastings came to the Die Cast Department to visit the grievant. Her examination of the grievant found that he had abrasions below the eye, some bleeding and some swelling. She was concerned because the injury suffered by the grievant was to his head. The grievant refused medical treatment, and Hastings asked him to come to her office to sign a form indicating that he refused medical treatment. Hastings returned to her office, while she waited for the grievant to finish his scheduled work break. Hastings called Union Chief Steward, Linda M. Gilreath, and, after giving her a general description of the accident, informed her that she was making arrangements to have the grievant undergo a drug and alcohol test, something required after an accident, under the Employer's Drug and Alcohol Testing Policy (the "Drug Testing Policy"). The grievant came to Hastings' office and signed the refusal of medical treatment form. As he waited for the drug-and-alcohol-test sample collector to arrive at the Plant, the grievant spoke to Gilreath and another Union representative, Lori Deling, just outside the door to Hastings' office.

The sample collector arrived and took from the grievant a breath sample at 9:05 a.m. and a urine sample at 9:11 a.m. on September 21. On September 24, 2010, Hastings received a report from the laboratory that analyzed these samples indicating that the breath sample showed his blood alcohol level to be "negative," but that his urine sample showed a "positive" level in

his blood of the metabolites of marijuana, measured in nanograms per milliliter.*

Linda M. Gilreath testified that she is the Area Chief for the Union at the Golden Valley Plant -- the equivalent of Chief Steward, as I understand the title. She attended a meeting on September 27, 2010, where Phillippi gave the grievant the notice of discharge set out above. Gilreath testified that she thought management had done no investigation before the discharge and that when she asked for the Employer's investigation, she was told to talk to the Human Resources Department. She testified that later she asked Patrick Terry, a Human Resources representative, for those investigative materials and that he told her to "file your grievance."

The grievant testified that, after working at several of the Employer's other Minneapolis facilities in manufacturing classifications, he started working at the Golden Valley Plant in March of 1996 as a Machine Repair Machinist. He became Group Leader for Machine Repair in 2000, and at the time of his discharge, he was a member of the Plant's Medical Emergency Response Team and its Safety Team. He testified that, as such he takes safety seriously. He received a First Degree Demerit, the equivalent of an oral warning, in 2001 for driving a flat-bed cart with two employee-passengers on it. His discipline record includes no serious offenses and several warnings for tardiness.

* I discuss below several challenges the Union makes to use of the results of the drug and alcohol test as a basis for the grievant's discharge.

The grievant testified as follows about the occurrences on September 21, 2010, that led to his discharge. After he arrived for the start of his shift at about 5:00 a.m., McMillan told him he thought a hydraulic hose on Machine 198 was leaking. A short time later, as the grievant approached Machine 198, McMillan was busy at the other die cast machine he was operating that morning. Machine 198 was running. The grievant decided that, before beginning its repair, he would wait for McMillan to shut it down because McMillan, as the machine's operator, was aware of what sequence in its processes would be best for its shut down.

The grievant testified that, as he waited for McMillan to be free, he was just looking around Machine 198 to try to find the source of the leak of hydraulic fluid. He tried to see if the leak was coming from a connection of one of the hydraulic hoses behind the bank of solenoid valves. To do so, he moved his head into the grid opening, but then felt the cycling armature come down and pin his head to the solenoid bank. He yelled for McMillan, who came to Machine 198, hit its emergency stop button and lifted the cycling arm manually to free the grievant's head. The grievant testified that his head was pinned for about thirty seconds -- when the cycling armature was at the bottom of its cycle. He did not intend to put himself in harm's way and would never repeat what he did.

The grievant testified that, as he looked into the machine, he did not lock out its controls because he was only "trouble-shooting" -- a pre-repair process during which he

thought lock-out-tag-out rules did not apply. He explained that discovery of the source of a hydraulic leak required maintaining hydraulic pressure so that the leak would continue as he looked for its source. The grievant denied that he was trying to do an actual repair of the machine when he put his head through the grid opening, and he denied that he told anyone that he was "trying to fix" the machine, as described by Phillippi and Hastings. The grievant distinguished what he called "troubleshooting" from "inspection."

Though the grievant conceded that just after the incident he said he should not have reported the accident and would not do so in the future, he testified that he did not really mean what he said, that he was "just talking" and that he had never failed to report an accident in the past.

For many years, the Employer has had in place safety rules that require an employee who intends to enter an area where a dangerous machine is operating 1) to activate the control that stops the machine's operation, 2) to apply a lock to the control that prevents the machine from being restarted, 3) to take the key to the lock with that employee and 4) to tag the lock with information identifying the employee who has locked out the machine's stop-start control. Hereafter, I refer to these rules as "lock-out-tag-out rules" or as "LOTO rules." Employees, including the grievant, are routinely given training in the lock-out-tag-out rules.

The Employer has adopted "Factory Rules & Policies" that apply to its Minneapolis facilities, including the Golden Valley

Plant. The version of those rules and policies in effect on September 21, 2010, was adopted by the Employer on June 1, 2007 (hereafter, the "Red Book," as the parties refer to it). Below are excerpts from the part of the Red Book, entitled, "Safety":

The following Cardinal Safety Rules represent minimum safety standards for all the facilities. Individual sites may impose additional expectations specific to the machinery/materials involved. Each rule must be followed to prevent workplace accidents or illnesses. Each of us is ultimately responsible for our personal safety and for the safety of those around us. For the above stated reasons, all employees are prohibited from:

- 1) Bypassing, defeating, or removing safety or environmental safeguards including, but not limited to, interlocks, light curtains, environmental monitoring devices, valves, controls, and other health, safety, and environmental devices.
- 2) Performing maintenance on equipment without properly de-energizing and safeguarding all power sources according to the facility's lock-out/tag-out protocols.
- 3) Knowingly placing themselves or others in physical danger, concealing a known hazard, or failing to immediately report or obtain attention for a work-related injury or incident. . .
- 8) Disregarding safety rules and common safety practices or otherwise acting in an unsafe manner. Violating a life safety permit procedure (confined space, hot electrical work, line breaking, etc.).
- 9) Possessing or being under the influence of illegal drugs or alcohol while on a customer site, company-owned and/or company-operated facility.

The actions listed above have been found to have such a great potential for serious injury that any employee engaging in such action will be subject to elevated disciplinary action up to, and including, termination.

The Red Book also includes a section entitled, "Penalty Guidelines For Offenses," excerpts from which are set out below:

The Company has implemented the following demerit guidelines to ensure consistent and equitable consequences

for infractions of plant rules. These are guidelines only; the actual discipline imposed may fluctuate depending upon the facts of the matter at hand, the employee's history of committing that offense, the employee's work record as a whole, and the existence of any aggravating or mitigating factors. . .

FIRST DEGREE DEMERITS are equivalent to an oral reprimand and are defined as those acts of omissions of a minor nature such as:

- Smoking in non-designated area that does not pose serious safety hazard
- Unauthorized use of bulletin boards . . .
- Disregarding established safety practices of a minor nature . . .

SECOND DEGREE DEMERITS are equivalent to a written reprimand and defined as those acts or omissions of a moderate nature such as:

- Substandard performance
- Inefficient performance of duties
- Distracting the attention of others by engaging in disruptive behavior . . .

THIRD DEGREE DEMERITS are to be accompanied by an unpaid disciplinary suspension between 1-4 working days and defined as those acts or omissions of a serious nature such as:

- Smoking in non-designated area that does pose serious safety hazard
- Sleeping on the job . . .

FOURTH DEGREE DEMERITS are to be accompanied by an unpaid disciplinary suspension of 5 or more working days and defined as those acts or omissions of an intolerable nature such as:

- First offense Drug and Alcohol policy violations
- Exhibiting coercing or intimidating behavior toward others
- Indecent or immoral conduct on the premises . . .
- Serious safety violations such as:

- Engaging in horseplay or conduct that endangers or injures employees
- Failing to follow a safety permit procedure

ACTIONS NORMALLY RESULTING IN DISCHARGE IRRESPECTIVE OF CURRENT DEMERIT STATUS INCLUDE, BUT NOT LIMITED TO:

- Willful and malicious damage to Company property or that of others

Stealing property belonging to the Company or others
Committing an overt act of violence such as the
striking of another
Intentionally falsifying employee records or
committing payroll fraud
Providing false testimony during a Company
investigation
Second offense Drug and Alcohol policy violations
Conviction of a crime involving moral turpitude
Extremely egregious safety violations such as:

Bringing a weapon into a Company facility
Failure to properly lock-out/tag-out equipment per
protocol
Knowingly place oneself or another in physical
danger
Concealing safety hazard or unlawful chemical
release
Bypassing or removing safety or environmental
safeguards without authorization

DECISION

Preliminary Issues. The parties' arguments raise several issues relating to procedure. First, the Union points out that the notice of discharge alleges only three specific violations of the Red Book's Factory Rules and Policies -- "Failure to properly lock-out/tag-out equipment per protocol" (violation of Subparagraph 2 of the safety section of the Red Book), "Knowingly [placing] oneself or another in physical danger" (violation of Subparagraph 3 of the safety section of the Red Book), and "Violation of drug and alcohol policy by testing positive for drugs" (violation of Subparagraph 9 of the safety section of the Red Book). The Union notes, however, that in his testimony, David T. Hanson, Labor Relations Manager for the Employer's Minneapolis facilities at the time of the grievant's discharge, described two additional violations by the grievant -- that the grievant also violated Subparagraph 1 of the safety section of the Red Book, which prohibits "bypassing, defeating, or removing

safety or environmental safeguards" and Subparagraph 8 of the safety section of the Red Book, which prohibits "disregarding safety rules and common safety practices or otherwise acting in an unsafe manner."

The Union argues that the failure of the notice of discharge to cite the two additional violations of the Red Book safety section, as described in Hanson's testimony, resulted in a denial of due process because the notice of discharge did not fully inform the grievant of all bases for his discharge, thereby preventing him from mounting a full challenge to it.

I rule as follows with respect to this argument. As I interpret Hanson's testimony, his description of the grievant's conduct as violating Subsections 1 and 8 of the safety section of the Red Book, in addition to the three specific violations listed in the notice of discharge, added nothing to the reasons given in the notice. Describing the grievant's conduct as a failure to properly lock-out/tag-out equipment (a violation of Subparagraph 2) or as knowingly placing himself in physical danger (a violation of Subparagraph 3) is substantively the same as describing his conduct as bypassing safety safeguards (a violation of Subparagraph 1) or as disregarding safety rules (a violation of Subparagraph 8). The two additional Subsections cited by Hanson in his testimony are nothing more than broadly redundant restatements of the more particular violations of Subparagraphs 2 and 3 alleged in the notice of discharge. Because those additions are not substantively new, I rule that the grievant was not denied due process by Hanson's reference to them, and, in my consideration of this case, I treat those

additions as redundant, and consider only the more particular allegations made in the notice of discharge.

A second due process argument is implied in Gilreath's testimony that she was unable to obtain the details of the Employer's investigation when she asked for them at and just after the meeting of September 27, 2010, where the grievant received the notice of discharge. The evidence does not show that the Union was unable to obtain that information during grievance processing or that its later acquisition by the Union caused any prejudice to the ability of the Union to prepare a challenge to the discharge. Accordingly, I rule that the failure to provide immediate access to the information was not a denial of due process.

A third due process argument is also implied in Gilreath's testimony that the Employer did not notify a Union representative that it was investigating the circumstances of the accident (clearly a disciplinary investigation) until Hastings called Gilreath several hours after the grievant was injured to inform Gilreath that the grievant was about to undergo a drug and alcohol test. The evidence shows that the grievant did not ask for Union representation before, or even at the time of, Hastings' notification to Gilreath. As the Employer points out, its duty to provide an employee with the opportunity to have Union representation does not arise unless the employee asks for such representation.

Violation of Safety Rules. A primary substantive issue is whether the grievant violated Subsections 2 and 3 of the safety section of the Red Book -- i.e., whether he failed to

lock out and tag out equipment properly per protocol or knowingly placed himself in physical danger. In order to sustain discipline for violation of these rules, the Employer must show that the grievant had knowledge of the rules, through training or experience.

The Employer presented evidence that the grievant has received, as have all factory employees, substantial safety training, repeated at least annually and augmented with monthly and more frequent training classes that emphasize the requirement that an employee must "de-energize" equipment by using lock-out-tag-out procedures before performing maintenance or other tasks that would place the employee in physical danger.

The evidence shows that the grievant had serviced Machine 198 many times and that, accordingly, he knew the location of the shut-down controls and how to operate them. Indeed, the Union makes no argument that the grievant lacked that knowledge.

The Employer has established a machine-specific written instruction entitled, "Zero Energy Procedure," for each of its die cast machines, including Machine 198. The grievant received instruction in the "Zero Energy Procedure" for Machine 198 before September 21, 2010, and he knew of its requirements on that date. The following excerpt from that written instruction states the occasions when Machine 198 must be locked out and tagged out:

Scope of Procedure. This machine specific zero energy procedure establishes the minimum requirements for the control of energy that could cause injury to personnel who service or maintain the machine identified in this procedure. All employees who service or maintain this

machine shall comply with this procedure. Servicing activities include installing, set-up, un-jamming, cleaning, lubricating, adjusting and inspecting. Authorized employees must also comply with general requirements in the site's LOTO policy.

Purpose. This procedure establishes the minimum requirements for the lockout of energy isolating devices whenever maintenance or servicing is done on the equipment identified in this procedure. It shall be used to ensure equipment is stopped, isolated from all potentially hazardous energy sources and locked out before employees perform any servicing or maintenance where the unexpected energization or start-up of the machine or equipment or release of stored energy could cause injury.

The Union argues that, notwithstanding these and other safety instructions, it was not clear to the grievant that, during the tasks he was performing at the time of the accident, he was required by safety rules to shut down the machine and lock-out-tag-out its stop-start controls. Thus, the grievant testified that he was merely "trouble-shooting" when he placed his head inside the grid opening and between the cycling armature and the solenoid bank while Machine 198 was still running. The Union argues that neither the Red Book nor other material used to train employees in lock-out-tag-out procedures requires the use of those procedures during "trouble-shooting."

As I understand this argument, the Union and the grievant would distinguish the activity of "trouble-shooting" from the activity of "inspecting" -- an activity clearly identified in the Zero Energy Procedure for Machine 198 as part of the servicing process during which the machine must be locked out and tagged out. The Union argues that trouble-shooting is different from inspecting and that the Employer failed to inform the grievant about what activities are trouble-shooting activities exempt from lock-out-tag-out requirements.

The Union presented the testimony of Joseph M. Witzmann, its Secretary-Treasurer, that a Group Leader (a Union employee) at the Stinson Plant (another Minneapolis facility operated by the Employer) had been told by the Safety Director at that plant that trouble-shooting was permitted even though a machine was running. This testimony did not describe the activity identified as trouble-shooting either by the Union employee or by the Safety Director, and it did not describe other relevant circumstances.

The Employer argues that there is no valid distinction between inspecting and trouble-shooting. I understand this argument to mean that whenever an activity is done to determine the extent of needed servicing or maintenance, whether it is characterized as trouble-shooting or inspecting, that activity is subject to lock-out-tag-out requirements if it cannot be done by mere observation from outside the protective envelope of the machine. The Employer presented evidence that the grievant attended an annual lock-out-tag-out training on May 29, 2008, in which those in attendance were given the following instruction, at least by the following text of a power-point slide, if not by the trainer's oral statements accompanying the slide:

Employees doing maintenance, service, set up, trouble shooting, etc. on machines or equipment where the unexpected release of energy could cause injury must use lockout tagout.

The Union also presented the testimony of James G. Eby, a Group Leader Machinist A, who maintains and services production machines at the Golden Valley Plant. Eby testified that trouble-

shooting is different from repair, that it consists of visual inspection and that when a hydraulic hose is leaking, it may be necessary to perform the visual inspection of the hose while the machine is running. He testified that he disagreed with the power-point slide presented in the 2008 annual lock-out-tag-out training, which included trouble-shooting in the activities for which those requirements apply, and he testified that the annual training in 2009 did not include a similar slide making trouble-shooting subject to lock-out-tag-out requirements. Eby testified that about a month before the hearing in this case he asked Phillippi if the Employer had a policy covering trouble-shooting and that Phillippi responded, "we're working on it." On cross-examination, Eby conceded that, even a trouble-shooting employee must not place himself at risk of physical injury and that an employee putting his body into a machine must use lock-out-tag-out procedures.

I rule that the grievant violated Subsections 2 and 3 of the safety section of the Red Book on the morning of September 21, 2010 -- that he failed to lock out and tag out Machine 198 as required and that he knowingly placed himself in physical danger. At that time, he had the training and experience clearly to inform him that he was undertaking substantial risk of injury by placing his head inside the grid opening and between the cycling armature and the solenoid bank and that, if trouble-shooting was ever exempt from the Employer's lock-out-tag-out requirements, that exemption did not cover dangerous conduct such as his conduct that morning.

Disparate Discipline. The Union argues that the Employer's choice of discipline for violation of the safety rules has been inconsistent and that the Employer's decision to discharge the grievant was unfairly disparate treatment. Union witnesses described the following cases as examples of lock-out-tag-out violations for which the Employer did not select discharge as the appropriate discipline:

On March 8, 2006, Michael McGee, an Electrician, was seen during a safety audit by OSHA representatives as he was working on a machine. Though the machine was locked out, the lock had been placed by another employee, and it bore the tag of that employee rather than McGee's. McGee received a Third Degree Demerit, and a ten-day suspension.

On November 9, 2009, Michael Schommer, received a Second Degree Demerit and a written warning for having "removed a plastic safeguard without authorization." The evidence about this incident does not show more about the circumstances related to Schommer's conduct -- whether lock-out-tag-out requirements applied.

On April 26, 2010, two employees, Clifford Jarson and Mark Walerius, received Fourth Degree Demerits for failure to wear protective equipment while working with caustic-acidic chemicals, without conforming to lock-out-tag-out requirements and thereby knowingly placing themselves in physical danger. Hanson testified that these cases would ordinarily lead to discharge, but that, because the employees maintained that they were following the directions of a non-Union Engineer when they did the work, the penalty was reduced. According to Hanson, the penalty was reduced because the evidence did not clearly show their account to be true or false. Both employees had the discipline removed from their record about a year before the usual two-year life of this kind of demerit, for "improvement in your daily safety practices and [demonstration] of a cooperative attitude."

On June 8, 2010, Jeff Loisell received a Fourth Degree Demerit and a ten-day suspension for failure to lock-out-tag-out a machine he was working on. Hanson testified that Loisell was not discharged, even though he had failed to lock out the machine because the machine had been de-energized while he was working on it.

In July of 2009, Marcus Varnum, an Electrician, suffered an electrocution, non-lethal but causing serious injury,

from a high-voltage wire that had not been properly de-energized. According to the Employer, he was not disciplined because he was following the directions of his supervisor, Al Kozlak. The Employer presented evidence that Kozlak was discharged for his actions, but the Union argues that the delay between the time of the incident and Kozlak's departure from employment in April of 2010 shows that he was not discharged, but that he retired.

The Union presented testimony that no employee, other than the grievant, has been discharged for a similar violation of the lock-out-tag-out requirements. The Employer argues that this testimony is a broad assertion that assumes that other employees have engaged in dangerous conduct similar to that of the grievant.

I rule that the evidence, at least in the particular examples of other discipline listed above, does not show significant disparity in discipline when the circumstances in those cases are compared to the present case. Either sufficient similarity in conduct is lacking, or other factors in those cases justified mitigation of the discipline imposed.

Use of Drug Test Result as a Basis for Discharge. The following provisions of the Minnesota Drug and Alcohol Testing in the Workplace Act, Minnesota Statutes, Section 181.953 (hereafter, the "Act") are relevant to arguments made by the parties:

Subdivision 10. Limitations on employee discharge, discipline, or discrimination.

(a) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test.

(b) In addition to the limitation under paragraph (a), an employer may not discharge an employee for whom a positive test result on a confirmatory test was the first

such result for the employee on a drug or alcohol test requested by the employer unless the following conditions have been met:

(1) the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the employer after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency; and

(2) the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

Paragraph 8.0 of the Employer's Drug Testing Policy expressly recognizes that its provisions are subject to the laws of the jurisdictions in which the Employer operates, including the laws of the State of Minnesota.

The Union makes two arguments that the discharge of the grievant violated the Act because the notice of discharge listed "violation of drug and alcohol policy by testing positive for drugs" as one of the grounds for the grievant's discharge. I discuss those arguments and the Employer's response to them below.

The evidence relevant to those arguments shows 1) that the initial screening of the grievant's urine sample taken on September 21 showed a "positive" level of the metabolites of marijuana in his blood, 2) that on September 24 agents of the Employer learned of the positive reading on the initial screening, 3) that on September 27, the notice of discharge was given to the grievant, 4) that the notice of discharge listed "violation of drug and alcohol policy by testing positive for

drugs" as one of the three particularly specified bases for discharge, 5) that a confirmatory test of the grievant's urine sample verified a positive reading for marijuana metabolites, 6) that the report of the confirmatory test was received by agents for the Employer not earlier than September 28 and not later than October 4, 7) that the grievant's positive test result was his first positive result on a drug or alcohol test requested by the Employer, and 8) that the grievant was discharged without having first been offered an opportunity to participate in a drug or alcohol counseling or rehabilitation program.

Before addressing the Union's arguments that the Employer has violated the Act, I note that the Employer objects to my consideration of those arguments, urging 1) that a grievance arbitrator should not rule on issues relating to interpretation of the Act and 2) that such statutory interpretation should properly be done by the Minnesota District Court.

My authority as an arbitrator derives from the parties' arbitration agreement, which is established in Article 8 of their labor agreement. Relevant provisions of Article 8 are set out below:

Section 1. A grievance is any controversy between the Company and the Union as to the interpretation of this Agreement, a charge of violation of this Agreement . . .

Section 2. Grievances as defined in Section 1 shall be settled in the following manner . . .

Step 3. [If the parties cannot settle the grievance in the first three steps of the grievance procedure, it may be referred to arbitration in Step 4.]

Step 4. . . . The authority of the Arbitrator shall be limited solely to the determination of the written issues(s) as submitted by the parties, provided that

the Arbitrator shall refer back to the parties without decision any matter not a grievance under Section 1 of this Article or which is excluded from arbitration by the terms of Section 3 hereof. The Arbitrator shall have no power to add to, or subtract from, or modify, any of the terms of this Agreement, or any agreement made supplementary thereto. . .

Section 3. It is agreed that the following shall not constitute issues for arbitration: (a) supervision and direction of the working force, (b) schedules of production, methods and processes of manufacturing, (c) the terms of a new agreement.

The parties have agreed in writing that the issue presented in this case is whether the grievant was discharged for just cause, as is required by Article 19 of the labor agreement. In Article 8, as I interpret it, the parties have agreed that a grievance arbitrator has authority to decide relevant arguments they make that bear upon the written issue they have submitted. The notice of discharge lists "violation of drug and alcohol policy by testing positive for drugs" as one of three grounds justifying the discharge. Because the Drug Testing Policy is subject to the requirements of the Act, the Union's two arguments that the Employer has violated the Act by discharging the grievant for "violation of drug and alcohol policy by testing positive for drugs" are relevant to the issue before me -- whether the grievant was discharged for just cause. Accordingly, I rule that I have authority under Article 8 of the labor agreement (the parties' arbitration agreement) to decide the two statutory issues raised by the Union.

The Union argues, first, that the Employer discharged the grievant on September 27, the day before the earliest time it received a confirmatory test report showing a positive reading for marijuana metabolites, and that this premature discharge

violated Subdivision 10(a) of the Act, which provides that an employer "may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test."

I rule as follows with respect to this argument. The grievant's discharge on September 27 preceded notice to the Employer that a confirmatory test verified the positive initial screening test -- a failure to conform to the requirements of Subdivision 10(a) of the Act. The remedy, however, for this violation of the Act should be reasonably appropriate to the consequence of the premature discharge. The protection afforded by the provision is to disallow discharge based on an unverified positive initial screening. In this case, in which the initial screening was verified by a confirmatory test (though the Employer learned of the verification the day after the discharge) the proper remedy is to direct that the discharge be considered effective on the earliest date the Employer received that verification, September 28.

Second, the Union argues that the grounding of the grievant's discharge on a first violation of the Drug Testing Policy violates Subdivision 10(b) of the Act, which provides that an employer "may not discharge an employee for whom a positive test result . . . was the first such result" unless 1) "the employer has first given the employee an opportunity to participate in . . . either a drug or alcohol counseling or rehabilitation program" and 2) the employee has refused to

participate or has failed successfully to complete the program. The Union also argues that, because the discharge was based upon a first violation of the Drug Testing Policy, the discharge violated the Policy itself, which provides that employees who have a first positive test will be referred to the Employer's Employee Assistance Program for assessment and rehabilitation. The Union urges that, because the grievant was discharged in contravention of the Policy and of the prohibition in Subsection 10(b) of the Act, the Employer lacked just cause to discharge him. The Union seeks his reinstatement, and it notes that, as the grievant testified, he is willing to participate in a drug counseling program.

The Employer argues that, as Hanson testified, the grievant's violation of the lock-out-tag-out requirements was so egregious that discharge is the appropriate discipline, irrespective of whatever consideration might be given to the length of his employment or to his record of previous discipline. Hanson testified that the grievant's conduct could have led to his death. He noted that during the investigation the grievant made statements that he regretted having reported the accident to Phillippi, and Hanson testified that he thought those statements imply the grievant's future non-reporting of accidents if he is reinstated. In response, the grievant testified that he did not really mean those statements, that he has never failed to report an accident, that he did so promptly on September 21 and that he would do so in the future if reinstated.

Hanson testified that, if the grievant's only misconduct on September 21 had been violation of the Drug Testing Policy,

the discipline selected would have been a Fourth Degree Demerit rather than discharge. He also testified that the grievant would have been discharged for his violation of the lock-out-tag-out safety rules, even if there had been no violation of the Drug Testing Policy. In addition, Hanson testified that reinstatement of the grievant may lessen the incentive for other employees to abide by the Employer's safety rules.

On cross-examination, Hanson conceded that the notice of discharge specified the positive drug test result as one of the three reasons for the grievant's discharge, and he conceded that even though violation of a Red Book safety rule may be a basis for discharge, discharge is not mandatory for that kind of violation. Hanson explained that, in making the decision about discipline, management considered the positive drug test result insofar as it gave context to the safety-rule violation. Hanson conceded that the grievant had no incident in his record of failing to report an accident and that he had reported the incident of September 21, as required.

I rule that the notice of discharge must be read for what it says -- that one of the reasons for the grievant's discharge was his positive drug test result. The discharge notice makes the express statement that "this discharge is based upon your violation of Minneapolis Factory Rules and Policies" and that "specifically, you committed the following offenses" -- violation of two safety rules and "violation of drug and alcohol policy by testing positive for drugs." This express statement that violation of the Drug Testing Policy was one of the reasons for dis-

charging the grievant is reinforced by the last substantive sentence in the discharge notice -- "when given a drug test the morning of September 21, 2010 you tested positive [for] drugs."

Hanson's testimony that the drug test violation was considered for the "context" it gave to the safety-rule violations implies a determination that the grievant's dangerous behavior occurred because his judgment was impaired by the influence of marijuana -- certainly, a reasonable conclusion. It may be that the Act's exemption from discharge for a first positive drug test should not apply when, as here, drug use is alleged as a contributing cause of other behavior also alleged to be a cause for discharge. Subsection 10(b) of the Act, however, does not so limit the exemption. Therefore, because the first positive drug test was one of the causes for discharge listed in the notice of discharge, and, because the Act prohibits a discharge based on that cause, I rule that the Employer did not have just cause to discharge the grievant.

Remedy. Subsection 10(a) of the Act limits the right of an employer to impose any discipline without a confirmatory test that verifies a positive initial screening test. I have ruled above that there was such a verification and that, even though the Employer did not learn of the verification until the day after the September 27 notice of discharge, the appropriate remedy is not to void the Employer's action, but to consider it effective on September 28.

Subsection 10(b) of the Act limits the right of an employer to discharge for a first positive drug test, but it does not limit the right to impose other discipline for such a

first positive test result. The Union seeks an award reinstating the grievant to employment with back pay and benefits, but the Union also suggests, "in the alternative, any remedy the Arbitrator considers appropriate." I consider the following remedy appropriate.

The grievant should be reinstated -- something required to provide relief under Subsection 10(b) of the Act. Nothing in the Act prohibits discipline less than discharge for a first positive drug test. The grievant's behavior -- the safety violations as well as his use of drugs -- was clearly the primary cause of his loss of employment. It would not be appropriate in these circumstances to award him back pay and benefits. The period from September 27, 2010, till he is reinstated should be considered a long-term disciplinary suspension without pay.

In addition, though I recognize that the grievant is not an employee "returning to work following self-disclosure of substance abuse issues or pursuant to a last-chance agreement following a positive test result," it is appropriate that he be subject, at reasonable but random frequency, to "Follow-up Testing" as defined in Paragraph 4.3.2.7 of the Employer's Drug Testing Policy, thus:

The Company may also conduct unannounced, follow-up drug and/or alcohol testing of employees returning to work following self-disclosure of substance abuse issues or of employees returning to work pursuant to a last-chance agreement following a positive test result.

It is, of course, also appropriate that the grievant comply with the assessment, counseling and other remedial requirements of the Act and of the Drug Testing Policy.

Though Hanson testified that reinstatement of the grievant may lessen the incentive for other employees to abide by the Employer's safety rules, I note first, that his reinstatement is predicated on a limited circumstance -- that Subsection 10(b) of the Act requires it -- and second, that employees who become aware of the disposition of this case should, nevertheless, remain deterred from similar conduct by the grievant's loss of employment since September 27, 2010.

AWARD

The grievance is sustained in part. The Employer shall reinstate the grievant to his employment without loss of seniority and without back pay and benefits. The time between his discharge, on September 27, 2010, and his return to work shall be considered a long-term disciplinary suspension.

In addition, the grievant shall be subject to the Follow-up Testing provisions of Paragraph 4.3.2.7 of the Employer's Drug Testing Policy, and he shall comply with the assessment, counseling and other remedial requirements of the Act and of the Drug Testing Policy.

November 13, 2011


Thomas P. Gallagher, Arbitrator