

IN THE MATTER OF THE ARBITRATION BETWEEN:

**International Association of Machinists
And Aerospace Workers Local W-33
(Justin Briggs, Grievant)**

**ARBITRATION OPINION
AND AWARD**

And

FMCS Case 09-59630-03

Boise Cascade Corporation

Arbitrator

**Richard A. Beens
FMCS Arbitrator #3937**

Appearances

For the Employer:

**Robert R. Ball, Esq.
Boise White Paper, L.L.C.
1111 West Jefferson Street
P.O. Box 50
Boise, Idaho 83728**

For the Union:

**Robert Walls
Assistant DBR IAMAW District W3
718 Grand Ave., Suite 1
Schofield, WI 54476**

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement between Boise Cascade Corporation's International Falls, Minnesota Pulp and Paper Manufacturing Operations ("Boise" or "Employer") and International Association of Machinists and Aerospace Workers Local W-33 ("Local W-33" or "Union").¹ Justin Briggs ("Grievant") was employed by Boise Cascade and a member of Local W-33.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on January 28, 2010 in International Falls, Minnesota. Neither party raised procedural objections to the propriety of the arbitration. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written closing arguments were submitted on March 3, 2010. The record was then closed and the dispute deemed submitted.

ISSUE

The arbitrator was left to formulate the issue which is found to be:

Did Boise Cascade have just cause under a Last Chance Agreement and company policies and to terminate Justin Briggs? If not, what shall the remedy be?

BACKGROUND FACTS

Boise operates a wood pulp processing and paper mill employing several hundred workers in International Falls, Minnesota. Their operation covers the whole process from harvesting trees, creating chips, creating pulp for paper machines to finished paper

¹ Employer Exhibit 1

products.

Grievant work for Boise from September, 2008 until his termination on August 4, 2009. He was a member of Union Local W-33.

Boise requires a pre-employment drug screen. Before providing a urine sample, applicants are required to disclose any prescription or over-the-counter drugs they are currently using . The samples are sent to an independent testing laboratory for analysis.

Prior to May 1, 2007, Boise had tested job applicants for eleven (11) drugs:²

- Cannabinoids
- Cocaine
- Phencyclidine
- Opiates
- Amphetamines
- Methamphetamines
- Barbiturates
- Benzodiazepines
- Methadone
- Propoxyphene
- Methaqualone

This collection of drugs was very similar to those that are looked for in what testing labs refer to as a “9-Panel” test. The classification differences are explained by four of the substances being combined into two categories in the “9-Panel” tests. For instance, Amphetamines and Methamphetamines are lumped together as “Amphetamines (class)” in 9-Panel tests whereas there were listed separately in the former Boise test. Also, Methadone and Methaqualone in the Boise regimen were combined under Methadone in the 9-Panel test.³

During negotiations leading up to the current collective bargaining agreement,

² Union Exhibit 1.

³ See Union Exhibit 1 and Employer Exhibit 13.

Boise proposed and the Union accepted a reduction in the number of substances screened in pre-employment and random testing. The contract now contains the following language in EXHIBIT “D” , MEMORANDUM OF AGREEMENT:

- Alcohol & Drug Policy

*The Company will use the DOT lists and levels of drugs for testing. The Company will continue to use urinalysis for these tests...*⁴

The DOT (Department of Transportation) list is called a “5-Panel” test and only requires testing for the following classes of drugs:

Cocaine Metabolites
Amphetamines (Class)
Barbiturates
Benzodiazepines
Marijuana Metabolite

For reasons that will shortly become clear, it is important to note that hydrocodone is included in both “5-Panel” and “9-Panel” testing, while propoxyphene is only included in the latter. Hydrocodone is a narcotic pain reliever frequently prescribed under the brand name Lortab. Propoxyphene is also a narcotic pain reliever prescribed under the brand names Darvon or Darvocet.⁵

The Grievant, 39 year old Justin Briggs, was first employed by Boise on September 8, 2008. About four months earlier, Grievant sustain a severe bone contusion to his knee while attempting to kick-start a motorcycle. The injury has resulted in chronically recurring pain. Just after the injury and on several occasions since, Grievant’s physicians have prescribed Lortab or it’s generic equivalent, a combination of acetaminophen and hydrocodone. The latter is a narcotic pain reliever and included in

⁴ Employer Exhibit 1, p.34 and Union Exhibit 2.

⁵ Both hydrocodone and propoxyphene are also prescribed in various generic forms.

both 5-Panel and 9-Panel drug screening tests.

Prior to his pre-employment drug-screen test, Grievant disclosed two prescription medications he was taking at the time, Lortab and Chantix, . He also signed a release allowing Boise to obtain his medical records. He believes the employer obtained the records which would also have reflected his Lortab prescriptions. Grievant passed the drug screen. Boise made no mention of concerns regarding Lortab and hired him starting on September 8, 2008.⁶

As part of Boise's training process, Grievant was required to review the company's USE OF ALCOHOL AND DRUGS IN THE MINNESOTA WORKPLACE policy.⁷ He acknowledged reviewing the policy during his first day on the job.⁸

Grievant worked in the finishing/shipping department at Boise . He was a "trucker," a term designating those who drive large forklifts containing clamps used to move finished paper rolls. Depending on the product being produced, the rolls range from 11 to 138 inches in height and from 200 to 6800 lbs. in weight. On May 6, 2009, Grievant was transporting two large paper rolls that were being staged for shipment. At some point, one of the rolls was not properly secured to the clamp, rolled off the lift, and came to rest against the forklift cab. Although neither personal injury nor property damage occurred, standard company procedures categorized it as a "near miss" requiring an incident investigation and an employee drug test.⁹

Prior to giving the required urine sample, Grievant informed the then company

⁶ Neither Grievant's personnel file nor his medical records were presented at the arbitration. Consequently, only Grievant's account of the pre-employment process is in the record.

⁷ Employer Exhibit 2.

⁸ Employer Exhibit 3.

⁹ Employer Exhibit 2, p. 4, Section I, C, (3).

nurse, Mary Leper, that he was occasionally taking two prescription drugs, Lortab and Dolubid.¹⁰ The former contained hydrocodone. Leper told Grievant that he should not take Lortab at work. He responded that he only took it at home after work as needed to relieve leg pain.¹¹ Despite the labor agreement, it appears Boise inadvertently ordered a 9-Panel test on Grievant's urine sample.¹² Although no trace of hydrocodone was found, the test was positive for marijuana.¹³

As a first-time offender of the Boise's alcohol and drug policy, Grievant received a three day suspension and was offered a Last Chance Agreement ("LCA") as a condition of returning to work.¹⁴ Among the conditions in the agreement was the following:

You will be subject to random alcohol and drug testing at our discretion for period of two (2) years beginning May 18, 2009. A positive test for alcohol or drugs will be considered a violation of this Last Chance Agreement.

The Human Resources Manager at Boise's International Falls facility has the authority to decide when random drug and alcohol tests will be administered. On July 22, 2009, she ordered Grievant to report to the plant nurse's office for a drug test. Prior to giving the required urine sample, Grievant filled out a company form disclosing that he was currently taking hydrocodone and an antibiotic, Flamicore.¹⁵ After obtaining the sample, a company nurse filled out a form that would accompany it to the testing lab.¹⁶ Line E of the form instructs the author to select either a 5-Panel or 9-Panel test. Neither

¹⁰ Grievant had been prescribed Dolubid by his dentist on March 9, 2009 for relief of dental pain.

¹¹ Mary Leper no longer works for Boise and did not testify at the arbitration. Further, no written record of the conversation was produced.

¹² Employer Exhibit 6.

¹³ Employer Exhibit 7.

¹⁴ Employer Exhibit 8.

¹⁵ Employer Exhibit 10.

¹⁶ Employer Exhibit 13. Grievant later discovered he had been given the antibiotic Cephalexin rather than Flamicore on 6/10/09. See Employer's Exhibit 16.

was checked. If the selection is left blank, the testing lab defaults to a 9-Panel test.

On July 27, 2009, the testing lab's medical review officer, Dr. Stanley Callister, called Grievant and informed him the test was positive for propoxyphene.¹⁷ Sometimes sold under the brand name Darvon, propoxyphene is a narcotic pain reliever. Grievant readily acknowledged taking hydrocodone and express surprise it didn't show up on the tests. He adamantly denied taking propoxyphene. Dr. Callister verified that Grievant had a valid prescription for Lortab that had been filled about six weeks earlier. At the conclusion of his talk with the doctor, Grievant requested that a split sample be tested at another lab. Neither party presented any evidence that this was done or, if it was, the results.

During a meeting with the company Human Resources Director on August 4, 2010, Grievant acknowledge that he had taken hydrocodone on July 21, 22 and possibly on the 23.¹⁸ However, he maintained that he only took the drug after work to alleviate chronic knee pain. Grievant asserted that he had disclosed to the company his occasional use of hydrocodone repeatedly. He again denied any knowledge of, or ever taking, propoxyphene.

The Employer terminated Grievant on August 4, 2009. In doing so, the relied on a provision of his Last Chance Agreement which states:

*"A positive test for drugs will be considered a violation of this Last Chance Agreement."*¹⁹

Boise indicated the positive test for propoxyphene violated this provision. They

¹⁷ Employer Exhibit 14.

¹⁸ Employer Exhibit 16.

¹⁹ Employer Exhibit 8.

also indicated Grievant's admission of taking hydrocodone on July 21, 22 and July 23 violated the Employer's Drug and Alcohol policy.

APPLICABLE CONTRACT, POLICY AND CONTRACT PROVISIONS

Collective bargaining agreement Article 14:

Recall rights and seniority shall be terminated for any one of the following reasons:

14.4.c Discharge for just cause.

Employer drug and alcohol policy:

I. Philosophy

Boise is strongly committed to providing a safe workplace and to providing programs promoting high standards of health and safety for employees. Consistent with this commitment, the company will strive to maintain a work environment that is free from the effects of alcohol and illegal drugs.

III C. Drugs:

The sale, possession or use of illegal drugs or the improper use of other drugs during working hours or on company property is prohibited. An employee is not permitted to report to work while under the influence of any drug that could adversely affect performance...

Employees who are under a physician's care and who are taking prescribed controlled substances that could affect performance should report this treatment to their supervisors or location medical department. This information is important to the company in ensuring that safety and efficiency are maintained. Employees failing to make such a report and whose performance is adversely affected by their taking prescribed controlled substances shall be subject to disciplinary action, up to and including discharge.

Last Chance Agreement:

2) You will be subject to random alcohol and drug testing at our discretion for period of two (2) years beginning May 18, 2009. A positive test for alcohol or drugs will be considered a violation of this Last Chance Agreement.

In addition, you must understand that it is your responsibility and obligation to follow all policies and procedures. Further violations for any mill rules, including violation of our Drug and Alcohol policy, and/or failure to comply with the terms and conditions of this letter could result in your immediate termination.

APPLICABLE STANDARD

Cases involving Last Chance Agreements differ slightly from ordinary disciplinary grievances. By entering into such an agreement, the employer gives up a purported right to discharge an culpable employee in return for the latter's promise to comply with more defined conduct standards for a stated period of time. An arbitrator must place primary focus on the precise terms and conditions of the LCA rather than the CBA. The principle role of the arbitrator concerning an alleged violation of a valid LCA is generally limited to determining whether or not the employee's actions or conduct constituted a violation of the new contract. However, not all CBA rights vanish. The employee is still entitled to use the CBA grievance procedure. The employer still has the burden to prove the provisions of the LCA were, in fact, violated.²⁰ In this context, Just Cause may be defined as simply meaning the employer must produce proof showing, by a preponderance of the evidence, that the employee did, in fact, violate the LCA. I will apply that standard in considering this grievance.

EMPLOYER POSITION

The Employer states two bases for terminating Grievant: first, he tested positive for propoxyphene in a random test on July 22, 2009. Although discovery of the substance was through use of a contractually illegal test, the error was unintentional and cannot be

²⁰ *How Arbitration Works*, Elkouri & Elkouri, Sixth Edition (2003), Ch. 15.3.F.iii and *2008 Supplement*, Ch. 15.3.F.iv.

ignored as a LCA violation. Second, he admitted taking hydrocodone on July 21, 22, and possibly the 23rd of 2009. He had worked at the mill for some portion of each of the three days. The Employer deemed each of these incidents to be violations of Grievant's LCA and their underlying Drug and Alcohol Policy.

UNION POSITION

The Union contends the Employer violated the CBA by testing Grievant for a substance they have previously agreed to disregard. In 2007 contract negotiations Boise agreed to use a 5-panel test rather than a 9-panel test as part of its Drug and Alcohol policy. Propoxyphene, the substance found in Grievant's urine, is screened in the latter test, but not the former. Had Employer used the proper test, no basis would have been found to discipline Grievant. Second, Grievant had repeatedly disclosed his use of prescription hydrocodone for pain relief. He did so before his pre-employment drug test and prior to both subsequent tests. The Employer never told him he had to forego this palliative measure. Since there is no evidence that he took it at work or that it ever affected his work, it cannot be a basis for termination.

DISCUSSION

The parties' positions beg resolution of two questions. First, what is the effect of the Employer using the 9-panel test rather than the 5-panel test? Second, did Grievant's use of prescription hydrocodone violate the LCA?

There is no dispute about the basic validity of the Boise Drug and Alcohol policy. It is designed to promote the safety and health of their employees and mirrors policies that have become common in the modern workplace. Management has an important and understandable economic interest in employee health and workplace safety. Second,

neither side disputes the reason for the LCA between Employer and Grievant. The presence of marijuana in his system was a violation of company policy and would have been detected by either a 5-panel or 9-panel test.

Finally, there is no dispute the current CBA obligates the Employer to use DOT (Department of Transportation) lists and levels of drugs for testing.²¹ In this case, a company nurse failed to designate a 5-panel test, the DOT standard, when forwarding Grievant's random sample for testing in July, 2009. Consequently, the laboratory defaulted to a 9-panel test and discovered the presence of propoxyphene in Grievant's urine. According to Employer's expert, propoxyphene is the active narcotic ingredient in Darvon or Darvocet, prescription pain killers that have virtually the same effect as hydrocodone, a substance Grievant repeatedly disclosed.

What is the consequence when the Employer administers a test excluded by a specific provision in the CBA? The Employer argues that this is not a criminal case giving rise to "fruit of the poisonous tree" sanctions. Granted, but employer's use of evidence obtained in direct contravention of a CBA provision is problematic.²² Here, the Employer proposed and the Union accepted a contractual change from 9-panel to 5-panel testing. This procedure was incorporated into the current CBA which went into effect May 1, 2007. Despite that change, the Employer tested Grievant using 9-panel tests twice, first in May, 2009 and, later, in July, 2009. While, the Employer's actions probably resulted from negligence, I can think of no reasonable way to discipline the process other than excluding evidence thus obtained. First and foremost, arbitral

²¹ Union Exhibit 2.

²² *How Arbitration Works*, supra p. 399.

decisions must be rooted in the CBA. Allowing use of the evidence under these circumstances would render a specific contract provision meaningless. Under the facts before me, I find that the Employer may not deem the results of an improperly administered drug screen as a violation of the LCA and basis for terminating Grievant.

The Employer proffers a secondary argument. They assert Grievant has ingested an illegal drug in violation of Minnesota Criminal Law. Propoxyphene is a scheduled substance for which Grievant had no prescription. I reject this argument on two grounds. First, it ignores the fact that the evidence was obtained in direct violation of the CBA. Second, even if the evidence could be used, it is not at all clear that Grievant committed a criminal act. He clearly believed he was taking prescription hydrocodone on July 22, 2009. He produced appropriate prescription vials and readily disclosed use of hydrocodone to relieve periodic knee pain. Nevertheless, propoxyphene rather than hydrocodone was revealed in the sample given later the same day. While using an illegally obtained drug is one possibility for the resultant drug screen, it is equally, if not more, likely that a pharmacist either intentionally or accidentally substituted Darvon for Lortab when filling one or both of his prescriptions. Both are commonly prescribed pain relievers. Their effect would be indistinguishable to the patient. Employer's own expert, Dr. Callister, acknowledged these similarities.²³ Employers proof of criminal conduct is insufficient under these facts.

It is axiomatic that a LCA must clearly and unambiguously define the conditions

²³ Transcript, pp. 29-30.

for employment and the grounds for immediate termination.²⁴ If ambiguity is found, we must examine the parties' intent when the LCA was formed.²⁵ With that principle in mind, we turn to the pivotal document.

The LCA between Boise and Grievant obligated the latter to comply with the company Drug and Alcohol Policy and states, "*A positive test for alcohol or drugs will be considered a violation of this Last Chance Agreement.*" An obvious question is immediately apparent: what drugs are included? Over-the-counter drugs? Prescription drugs? Only illegal drugs? Employer's lengthy Alcohol and Drug policy²⁶ contains conflicting clues. In a preamble, they state, "*...the company will strive to maintain a work environment that is free from the effects of ...illegal drugs.*" In a later section, the policy provides, "*An employee is not permitted to report to work while under the influence of any drug that could adversely affect performance.*" The Employer maintains no list of drugs that might violate either section. Any substance that causes drowsiness could theoretically "...adversely affect performance." It could include everything from cocaine to cough syrup. The employee is left to self-regulate compliance. However, a small exception is carved out for those under a physician's care and who are taking a controlled substance that could affect performance. The Alcohol and Drug policy obligates them to report to the company. "*Employees failing to make such a report and whose performance is adversely affected by their taking prescribed controlled substances shall be subject to disciplinary action, up to and including discharge.*" (emphasis added).

²⁴ *How Arbitration Words*, supra pp. 972-973.

²⁵ *Boise Cascade Corp. v. Paper Allied-Industrial, Chem. & Energy Workers, Local 7-0159*, 309 F.3d 1075 (8th Cir. Minn. 2002)

²⁶ Employer Exhibit 2.

We now come to the final question: Does Grievant's admission that he took painkillers on July 21, 22, and 23 constitute a violation of the LCA?

There is no dispute that Grievant reported use of prescription hydrocodone during his pre-employment physical and on two subsequent occasions. He was given no admonitions regarding its use when hired. He again disclosed it in a conversation with the company nurse in May, 2009. Grievant provided the only non-hearsay, first hand account of the complete conversation. He relates being told he couldn't take the drug while at work. He assured the nurse he only took it after work as needed for relief from knee pain. The fact that he again disclosed use of prescription hydrocodone prior to the July 22 drug screen lends credibility to his version of the conversation. Grievant clearly believed he was allowed to use prescription hydrocodone without violating company policy. He also clearly believed he was in compliance with company policy so long as he only took it immediately after work. The nurse did not testify at the arbitration. No written record was made of her conversation with Grievant. Grievant's testimony on the issue appeared forthright and credible.

The company messages to Grievant were, at best, mixed. They were either aware or should have been aware of his occasional use of hydrocodone at the time the LCA was drafted. Its use was not clearly prohibited by any provision in the LCA or the underlying Alcohol and Drug policy. Grievant testified that he only took painkillers after his shifts at the mill. He strongly denied ever using painkiller just prior to or during work hours. More importantly, there is no evidence that Grievant ever reported to work under the influence of a painkiller. Employer's argument to the contrary is speculative at best. His direct supervisor, Eric Walls, and his department superintendent, Sandi Keeney, denied

seeing any behavior indicating drug influence. In order to find a violation of the LCA, the Employer has to show Grievant was either “under the influence” of the drug or that his performance “is adversely affected.” They have not done so.

Based upon the evidence before me, I find the Employer did not have just cause to terminate Grievant for violation of the Last Chance Agreement.

AWARD

The grievance is sustained. The Employer is directed to reinstate the Grievant and to make him whole for any resulting loss in pay and benefits less any compensation he earned in mitigation. However, Grievant shall remain subject to the terms and conditions of the Last Chance Agreement he entered into with the Employer on May14, 2009. The time between Grievant’s termination on August 4, 2009 and his reinstatement shall not count toward satisfaction of the two-year term of the Last Chance Agreement.

Jurisdiction is retained for a period of sixty (60) days from the date of this award to address any remedial issues as may be necessary.

Dated: March 8, 2010

/s/ Richard A. Beens

Richard A. Beens, Arbitrator