

**IN RE ARBITRATION BETWEEN:**

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**GAS WORKERS UNION LOCAL 340**

**and**

**CENTERPOINT ENERGY**

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**DECISION AND AWARD OF ARBITRATOR**

**FMCS CASE # 110911-58672-3**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**7300 Metro Blvd. #300**

**Edina, MN 55439**

**Telephone 952-897-1707**

**E-mail: [jjacobs@wilkersonhegna.com](mailto:jjacobs@wilkersonhegna.com)**

**April 6, 2012**

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and

CenterPoint Energy Company.

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DECISION AND AWARD OF ARBITRATOR  
FMCS CASE #110911-58672-3  
Cecil Ian Brown Grievance

**APPEARANCES:**

**FOR THE UNION:**

Rockford Chrastil, Attorney for the Union  
Cecil Ian Brown, grievant  
Dan Justin Vice President of Local 340  
John Hennessey Local 340 Official  
Charles McCoy, Local 340 Official  
Karen Brown, grievant's wife  
Jon Van Steenbergen, Master Service Technician

**FOR THE COMPANY:**

Paul Zech, Attorney for the Company  
Michael Fahey, Director of Employee Relations  
Jason Hibbard, Field Operations Mgr.  
Joe Vortens, Dir. of Home Service Plus

**PRELIMINARY STATEMENT**

The hearing in the matter was held on January 5, 2012 at the CenterPoint River Office in Minneapolis, MN and on January 24, 2012 at the FMCS office in Minneapolis. The parties submitted post-hearing Briefs dated March 12, 2012 at which point the record closed.

**JURISDICTION**

The parties are signatories to a collective bargaining agreement dated May 1, 2011 through April, 30, 2015. Article 5 provides for submission of disputes to binding arbitration. There were no procedural arbitrability issues raised by either party.

**ISSUES**

The Company stated the issue as follows: Whether the grievant's acts of driving a Company vehicle and responding to customer calls under the influence of alcohol constitute absolute cause for discharge. Alternatively, whether the Company had just cause to discharge the grievant. If not, what shall the remedy be?

The Union stated the issue as follows: Did the Company have just cause to discharge the grievant on July 28, 2011? If the Company did not have just cause to discharge the grievant, what is the appropriate remedy?

Based on the evidence and arguments herein, the issues are determined to be as follows: Was there “absolute cause” for the termination of the grievant pursuant to Article 26? If not, was there just cause for the termination of the grievant? If not, what shall the remedy be?

## **RELEVANT CONTRACTUAL PROVISIONS**

### **ARTICLE 25 - MUTUAL PLEDGES**

**Section 4. Discrimination:** The Company and the Union shall continue their policy of providing equality of opportunity in matters of hiring, training, promotion, transfer, layoff, or discharge without regard to race, color, creed, national origin, sex, handicap, affectional preference or age consistent with applicable laws. Veterans and veterans of the Viet Nam Era also come under provisions of this Section. There shall be no discrimination against any employee because of Union affiliation.

**Section 5. Compliance With Law:** Nothing contained in this Agreement shall be interpreted to require either the Local Union or the Company to act in defiance of State or Federal law. It is agreed that this Agreement shall be modified in respect to any or all parties to the extent necessary to comply with the law.

**Section 6. Compliance With Agreement:** Neither the Company, nor the Union, through their officers, members, representatives, agents, or committees, shall engage in any activity of any kind for the purpose of defeating or evading the terms of this Agreement.

### **ARTICLE 26 - DISCIPLINE AND DISCHARGE**

The Company has the right to employ or promote in accordance with the provisions of this Agreement, to enforce discipline, to discharge employees for cause, including failure to recognize authority, to discharge or discipline new employees with or without cause before they shall have completed their applicable probationary period (such new employees retain the right to file grievances alleging contractual violations). Without excluding other causes of discharge, the following constitute absolute causes from which there shall be no appeal to negotiation or arbitration between the Company and the Union (except that the question of whether the employee has been guilty of the facts constituting such absolute causes shall be a negotiable controversy) namely:

1. Use of, or being under the influence of, alcohol or non-medical drugs at any time during the work day.
2. Dishonesty
3. Neglect of Duty
4. Abuse of Sick Leave

## **ARTICLE 27 - MANAGEMENT RESPONSIBILITIES**

Except as stipulated by this Agreement, the Company shall manage the property and business, direct the working forces, and plan and carry out operations. The Company has the right to establish reasonable rules covering employee conduct.

See, Joint Exhibit 1

### **RELEVANT DRUG AND ALCOHOL POLICY PROVISIONS**

#### **1990 Policy (Union Exhibit 9)**

##### **POLICY STATEMENT**

Effective April 20, 1990, Minnegasco will implement a drug testing program for some of its employees to comply with newly enacted Department of Transportation (D.O.T.) Federal Regulations, 49 CFR Part 199. The program is also consistent with applicable state laws governing drug testing. The Vice President, Human Resources and Administration, is responsible for implementing this program. Minnegasco reserves the right to alter, amend, modify or terminate this program to the extent not restricted by D.O.T. Regulations.

##### **REHABILITATION**

D. **OPPORTUNITY FOR REHABILITATION.** Employees who test positive for controlled substances shall be afforded a maximum of two rehabilitation opportunities -- voluntary or mandatory.

E. **ENROLLMENT IN REHABILITATION PROGRAM.** Employees evaluated for rehabilitation must enter an approved rehabilitation program within five working days of notification. The evaluator will provide Minnegasco with written documentation of the employee's participation in and completion of an approved program.

##### **ENFORCEMENT**

Enforcement of the Drug Testing Program will be carried out according to the following standards:

A. Employees and job applicants may refuse to submit to testing. However, refusal to comply with testing requirements when ordered to do so, or failure to cooperate fully as requested during the testing procedures will be considered insubordination and will result in non-selection for applicants and discipline up to and including discharge for employees.

D. Positive confirmed test results will result in withdrawal of the job offer for applicants and referral to the MRO for employees. Employees testing positive will not be allowed to return to duty until they pass a drug test and the MRO has determined that they may return to work.

E. The MRO will notify the Occupational Health Specialist immediately in writing when an employee refuses to cooperate or successfully complete a rehabilitation intervention program. In that event, the employee will be disciplined up to and including discharge.

F. Employees who complete rehabilitation may be retested at any time for a period of up to sixty (60) consecutive months. If, after completing a second rehabilitation, the employee tests positive for controlled substances, the employee will be disciplined up to and including discharge.

## **2010 Policy Union Exhibit 18**

### **DEFINITIONS**

**Safety Sensitive Employee** - a person who performs on a pipeline or Liquefied Natural Gas facility an operating, maintenance or emergency response function regulated by Part 192,193 or 195 of Department of Transportation (DOT) Regulation 49 Code of Federal Register (CFR); or interstate drivers of Company vehicles with a gross vehicle weight rating or gross combination weight rating of 26,000 or more pounds, or the vehicle is designed to transport more than 15 passengers including the driver, or the vehicle is used in the transportation of hazardous materials in a quantity requiring placarding under regulations issued by the Transportation Secretary under the Hazardous Material Transportation Act. Intrastate drivers of covered vehicles are also considered safety sensitive when required by state law. For the purposes of DOT testing, "employee" includes an applicant for employment.

**OT Reportable Accident** - any pipeline incident that is included in CFR 49 Parts 191.3, 193 or 195.5 or any occurrence involving a commercial motor vehicle which meets the definition of a "reportable accident" in CFR 49 Part 382.303.

### **Employee Testing**

When the Company has reasonable suspicion to believe that an employee may have possessed or used alcohol or drugs in violation of Company rules, such employee may be required and must submit to testing for the presence of alcohol and/or drugs at a time and place designated by the Company. The following factors are considered a sufficient basis for "reasonable suspicion":

A pattern of unsatisfactory performance or of unusual or erratic behavior at work; Physical signs and symptoms such as slurred speech, disorientation or smell of alcohol;

An employee who has been permitted by the Company to return to duty following failure of a required drug or alcohol test and who again tests positive for drugs or use of alcohol will be terminated.

### **Reasonable Cause Testing**

If an employee appears to be unfit for duty and/or a reasonable cause exists to believe the employee may be using a prohibited substance, CenterPoint Energy may require the employee to take a drug screen and/or alcohol test to rule out a violation of policy provisions. The decision to test must be based on specific current physical, behavioral or job performance event(s), which may indicate probable drug or alcohol abuse/misuse.

**For DOT/safety sensitive employees**, at least two (2) supervisors, one of whom is trained in detection of the possible signs and symptoms of drug or alcohol abuse/misuse, shall concur in the decision to test an employee.

### **FAILURE OF A DRUG/ALCOHOL TEST**

Employees who undergo drug/alcohol testing and are found to have positive and confirmed results on such test(s) for the presence of alcohol and/or drugs will be provided an opportunity to present information to explain such results. Employees may also request a confirmatory test of the original test at their own expense. If results are negative on such confirmatory retest the employee will be treated as if the original test result was negative.

An employee who has a positive and confirmed test result will be provided the opportunity by the Company to seek appropriate drug or alcohol counseling and/or rehabilitation treatment by a certified substance abuse professional (SAP) satisfactory to the Company. Return to duty will be subject to satisfactory completion of counseling, rehabilitation, the recommendation of the SAP, passing a return to duty test, and acceptance of other conditions for return to work established by the Company.

Company employees who are subjected to disciplinary measures as a result of the Company's drug testing procedures may avail themselves of such grievance procedures as are provided to them by the applicable bargaining agreement or other internal review procedures that may be established by the Company for non-Union employees.

An employee who has been permitted by the Company to return to duty following failure of a required drug or alcohol test and who has a second positive confirmed test for drugs/alcohol will be terminated.

### **IMPORTANT POLICY NOTICE**

Corporate policies may be terminated or changed by the Company at any time, and interpretation of these policies is solely within the discretion of the Company. All employees are governed by these policies unless there is a conflict between labor agreements or state or local law and these policies, in which case the labor agreement/state/local law governs. CenterPoint Energy business units may develop additional policies that address issues specific to their business needs. These policies may be more restrictive than those at the corporate level but they may not be more lenient.

### **COMPANY'S POSITION**

The Company took the position that there was just cause to terminate the grievant for being "unknowingly" under the influence of alcohol while on duty. In support of this position the Company made the following contentions:

1. The Company asserted that the salient facts of this matter are virtually uncontroverted. The grievant was dispatched to two calls on July 18, 2011. He drove a Company vehicle some 30 miles that day and the customer at the second call that day, who had called in because of a strong smell of gas in her home, reported that the grievant "reeked" of alcohol. This alarmed her to the point where she called Apple Valley police who came to the home administered a PBT test to the grievant and found that he blew a .122% blood alcohol level. See Company exhibit 5 and Tr. at 33 (second day). This is more than 1.5 times the legal limit in Minnesota to operate a motor vehicle yet the grievant not only drove to work and then drove a Company truck, he was working on sensitive equipment where gas and/or carbon monoxide was apparently leaking.

2. The Company pointed out that the grievant admitted that he had been drinking heavily the day before. See Tr. at 164, 186-187. He admitted that he could have had up to 15 beers the day before. The Company argued that given the alcohol in his system when he was tested by police on July 18<sup>th</sup>, his blood alcohol level must have been exceedingly high, perhaps well over .30% when he went to bed that night. The Company further argued that it matters not whether the grievant “felt” drunk the next morning; under clearly defined Company rules and Minnesota State law, he was “under the influence” of alcohol when he went to work, drove Company vehicles and went to two customer homes to perform emergency gas repair work on defective appliances. The Company argued that it is without question that his actions that day were extremely dangerous and irresponsible. The Company pointed to the grievant’s testimony regarding the number of drinks he had the day before he went to work and that he admitted being drunk but somehow did not think he was severely intoxicated. See Tr. at 16-18 (second day). The Company argued that this is a curious even unbelievable result and that the grievant’s testimony should be rejected on this point. The Company argued that he was severely intoxicated and even though he claims to be an alcoholic, he should have known that he was in no condition to drive or work on gas appliances the day after such a drinking binge.

3. The Company further argued that the grievant’s claim that he was not under the influence because he did not feel intoxicated rings hollow. As argued below, the provisions of Article 26 do not provide for someone to “feel” drunk, merely that they are “under the influence” to trigger the absolute cause provision requiring termination and taking jurisdiction away from the arbitrator to fashion a lesser penalty.

4. The Company asserted too that the grievant is a long time employee of the Company, some 23 years, and is quite familiar with the rules, especially regarding the rules found in Article 2 cited above. The grievant was at the time of his termination the Union president and thus both familiar with the rules and responsible for modeling good behavior with respect to them.

5. Once the Company was notified that the grievant had been prohibited from driving his vehicle they sent other employees to get the grievant and complete the work at the customer's home. They also were required to administer a reasonable suspicion test under federal regulations pertaining to pipeline safety and safety sensitive positions. See e.g. 49 C.F.R. § 199.215 & 49 C.F.R. 199.225. In addition, Company employees reported that the grievant had bloodshot eyes and smelled of alcohol when they arrived. Based on this, the Company had to administer a reasonable suspicion test.

6. The Company asserted that the investigation of this was fair and balanced as well as thorough. Further, the grievant admitted during this that he was under the influence of alcohol and admitted driving a vehicle and working on equipment at two customer homes on July 18, 2011. See Company exhibit 4, where the grievant admitted being "unknowingly under the influence of alcohol."

7. Based on this evidence and the evidence that was eventually garnered from the police department, See, Company exhibit 5, it was clear that the grievant was under the influence of alcohol while he was at work. The Company cited numerous appellate court decisions in Minnesota defining the statutory definition of being under the influence and argued that there was no question that the grievant was. The courts have noted that not all the "telltale" signs of intoxication need be present and that an officer need only have one objective sign of intoxication in order to show probable cause for a test or further action. Here it was clear that the officers had ample reasonable and probable cause to administer the test, apart from the grievant's agreement to take it, since they indicated that they smelled alcohol on his breath and that his eyes were bloodshot. There can be no serious question that the Apple Valley officers acted appropriately in administering the PBT test to the grievant.

8. The Company further argued that the grievant knew that being under the influence was an absolute cause for termination and admitted as much when he met with investigators. See Company exhibit 4 at page 006. The Company asserted that the grievant and Union are now being disingenuous by arguing that the grievant was either not under the influence or that he was somehow unaware of the consequences of being in that condition while at work under the clear terms of Article 26.

9. The Company noted that one simply cannot accept the notion that the grievant's lack of "knowledge" of his intoxication is a defense to the absolute cause for termination. Otherwise one could simply allege that they did not "feel" drunk or under the influence of drugs or the like and escape any culpability under the terms of Article 26. This is not only far too subjective a measure but also leads to a potentially dangerous even deadly set of circumstances to have employees working under the influence of drugs and alcohol. The prevention of this is exactly why that clause was specifically negotiated into the agreement in the first place.

10. The Company of course relied heavily on the provisions of Article 26 and asserted most strenuously that the terms of Article 26 are clear and unambiguous and require that anyone under the influence of drugs or alcohol while on duty is terminated – period. This is stated as an absolute cause for termination and there is no serious dispute about the underlying facts here.

11. Moreover, the Company relied on the Imes decision from 1988 between these same parties wherein the arbitrator sustained a discharge under very similar circumstances and dealt directly with the terms of Article 26, which have not changed in the intervening 23 years. Arbitrator Imes ruled in *Gas Workers #340 and Minnegasco, Inc.*, FMCS Case No. 88-04326 (Imes, 1988), as follows:

Although there is substantial testimony in the record regarding instances where the Company has not discharged employees who have been found guilty of drunkenness, neglect of duty and dishonesty, this evidence is not in conflict with the language in Article 26. Article 26 does not prevent the Company from deciding to impose discipline less than discharge for these types of misconduct; it only provides that discharge may be imposed for these types of misconduct and that . . . the arbitrator is prevented from having jurisdiction over the Company's decision.

12. The Company relied quite heavily on this ruling as well and argued that once the Company has made the decision to terminate an employee for being under the influence the mere fact that others may not have been discharged for something similar does not control – what does is the language of Article 26, which limits the arbitrator's jurisdiction to the determination of whether the employee was under the influence or not – nothing more.

13. The Company asserted that the clear facts and the grievant's admissions show without question that he was under the influence and according to the language of Article 26, there is no further determinations needed or allowed. The grievant must thus be discharged.

14. The Company cited several other decisions also interpreting Article 26 on several of the others listed absolute causes for termination. All have supported the Company's view that once a termination has been based on one of the listed absolute causes, the terminations must be sustained if the underlying facts leading to the terminations are found to be true. The arbitrator has no jurisdiction to change the penalty.

15. The Company countered the Union's claim that the listed causes are just examples of dischargeable offenses subject to the just case analysis. They are listed as the stated reasons for absolute causes for termination. The Company argued that to read it in the manner suggested by the Union would effectively nullify the provision and "do violence to the contract far beyond the arbitrator's authority." See Company Brief at page 17 n. 7.

16. The Company also countered the Union's claim of disparate treatment and asserted that there have not been any other employees having been found guilty of intoxication or being under the influence while at work who have not been fired. The Company noted that the one employee who was found to have had open bottles in his truck was not noted to have been under the influence. Further, the other employee cited by the Union had only a small amount of alcohol in his system, i.e. between .02 and .04, well under the legal limit to drive and well under the definition of under the influence in the parties' contract. Others cited by the Union were only perceived or believed to be under the influence but there was insufficient solid evidence of that fact in those cases; a very different scenario than was presented here. The Company even cited an example of a non-Union employee who was found to be under the influence and was immediately terminated because of it; this showing internal consistency in the administration of this clause.

17. The Company drew a distinction between testing under State law, which would be subject to the Minnesota Drug and Alcohol testing in the Workplace law, DATWA, and prohibits the Company from terminating an employee for a first-time positive result, and federal law. Here the testing administered by the Company was under federal law because of the information the Company had received about the grievant's condition and actions on July 18, 2011. It was thus not subject to the state law requirements and was not similarly constrained by it.

18. The Company acknowledged the state law at M.S. 181.953 and asserted that in the cases cited by the Union it would have violated state law had they terminated those employees for their failure of a drug test. It drew the distinction though between those cases and this one and argued that the grievant did not fail a random DOT drug screen, whereas the cases cited by the Union were cases where the employees did fail random DOT drug screens. Here Mr. Fahey testified that the Company did not rely on the DOT test result and that if the police had not been called the Company might not have taken the action it did.

19. The Company argued too that the drug policy only prohibits termination on a first positive where the employee has failed a Company test. Here the grievant was terminated for being under the influence and for driving a vehicle and working at customer homes. Further, both Company policy and DOT rules prohibit use of drugs or alcohol while performing this type of safety sensitive work. In fact the Company has a legal obligation to follow DOT regulations in this regard. See Tr. at page 108-111. See also, Union exhibit 18 and 49 C.F.R. 199.101

20. The Company vehemently denied that it treated the grievant differently based on his position as Union president and noted that he was afforded the same rights as any other employee. He was even given the right to complete alcohol treatment but this did not alter the clear fact that he was under the influence by any and all measures while at work. Under the clear provisions of Article 26 there was no question that he should be discharged.

21. Mr. Fahey strongly asserted that the Company had to hold the grievant to the same standards as it would any other employee and if the Company had done something different for the grievant it could hardly justify terminating a rank and file employee for a similar violation later on. Tr. at page 118.

22. The Company noted that even if the absolute cause provision is somehow found not to apply, there was ample just cause for the termination. The grievant drove more than 30 miles in a Company vehicle, interacted with customers while reeking of alcohol, so much so that one of them was so alarmed by it she called police, he worked on defective equipment requiring a high degree of expertise and dexterity and was called to emergencies involving leaking gas and CO. Had anything gone awry, one can only imagine the dire consequences of a mistake and the huge potential liability for the Company and the enormous cost of public confidence for allowing a person who was clearly intoxicated to work.

23. Moreover, given the egregious and dangerous nature of this violation progressive discipline should not apply. The Company simply cannot have employees working under the influence of any drugs or alcohol; whether they do it unknowingly or not. The Company asks that this case send an unmistakable message to the employees that this type of behavior cannot be tolerated by any employee under any circumstances and that working while under the influence will result in termination.

24. Finally, the mere fact of successful completion of alcohol treatment does not entitle the grievant to reinstatement under these circumstances. He certainly could have addressed this problem before getting drunk and coming to work and driving a vehicle yet he did not. See e.g., *Armstrong Furnace Co.*, 63 LA 618 (Stouffer, 1974), where the arbitrator denied reinstatement and focused on the actions preceding the discharge. Thus merely successfully completing treatment does not require reinstatement.

25. Further, as noted above, the Company asserted that the grievant's actions, not the fact of his successful treatment, are what govern the employment result. The Company congratulated the grievant on his successful treatment but asserted that the fact remains that he was under the influence while on duty and that cannot be condoned or excused.

26. The Company noted that DOT regulations require treatment and that the Company complied with that part of the law. In addition, even those regulations state clearly that they do not govern employment related decisions. See DOT Website of FAQ's. Here that decision is governed by the terms of Company policy and the collective bargaining agreement – both of which make being under the influence of drugs or alcohol an absolute cause for termination.

The Company seeks an award denying the grievance in its entirety.

#### **UNION'S POSITION:**

The Union took the position that there was not just cause for the termination of the grievant and that he should be reinstated with full back pay and benefits. In support of this the Union made the following contentions:

1. The Union noted the grievant's long and distinguished service with the Company. He has been with CenterPoint and its predecessor, Minnegasco, for some 23 years and has an exemplary record. He has never had any work related problems with alcohol or drugs and has never tested positive for drugs or alcohol in the past. See, Tr. at page 230-231. He has received promotions based on his meritorious service and is a well-respected and loyal employee.

2. The Union acknowledged that the grievant has struggled with alcoholism and that after a DUI in 2003 he got treatment but has never been drunk on the job prior to this incident and has never tested positive despite several random tests over time. He does have a high tolerance for alcohol, as do many alcoholics, and can drink quite heavily without adversely affecting his ability to function. Accordingly, while his blood alcohol level may seem high to the uninitiated, his ability to actually function is far different than a person without such a high tolerance for alcohol.

3. He was very careful not to drink and drive and always had his wife drive if he had been drinking or would find a way home without having to drive himself. The Union acknowledged though that he a large number of beers the day before he went to work on July 18, 2011 and had consumed up to 15 that day.

4. The Union argued though that he went to bed at his regular time, slept well, got up, fed his livestock<sup>1</sup> and got ready for work. He took a call to repair a dryer and went to that call, arrived on time, repaired the dryer, which required a high degree of manual dexterity with small screws, nut and bolts. He successfully fixed the problem and left without apparent difficulty or incident. When he got to the second call, he again arrived on time and immediately began working on the emergency CO leak. It was only when the police arrived and asked him to take PBT test that he had any inkling of a problem. He never “felt” impaired in any way and in fact, according to the Union, was able to perform all the essential functions of his job without difficulty. He cooperated fully with police and voluntarily took the PBT test. The Union noted that even the police, who are of course specially trained to spot drunk drivers based on their behavior and outward manifestations, were surprised by the results and did not give the grievant a DUI ticket or citation of any kind. Instead they simply told him he could not drive the Company vehicle. The grievant reported that to the Company and did exactly as he was supposed to once the police gave him that order. Tr. at page 207-210, Company exhibit 5.

5. The Union further pointed out that the grievant had not completed his testing of the equipment inside the home and certainly would have found and repaired the leak and taken all appropriate action but was prevented from doing so by the arrival of the police and the order to take the PBT test. The Union asserted that there was thus no failure to perform his job and no evidence whatsoever that he failed in any aspect of the work that day. In fact, the Union noted, Apple Valley Fire department was called to the scene but found no evidence of a gas leak or CO problem inside the home.

6. As further evidence of lack of impairment, the police report and the Company's own documents showed that the grievant's "speech was not slurred, nor did he appear to have any physical impairments from alcohol. See Tr. at page 43 and Company exhibit 5.

7. The Union further noted that the grievant was given a reasonable suspicion drug test by Company officials that same day. They had by then arrived on the scene and drove the truck back to the shop and completed the work at the customer's home. The Union argued that there is no distinction made in the language of Article 26 regarding whether the test is done under DOT regulations or under some other law or policy. It simply says "under the influence" and does not distinguish on the basis of how that is determined. As the Union argued below, the argument is whether the language of Article 26 has been effectively amended by the passage of the DATWA in Minnesota, the negotiated drug and alcohol policy and the past practice of allowing all other similarly situated employees the chance to complete rehabilitation in order to keep their jobs.

8. The Union noted that during the investigation the grievant responded that he was not under the influence of alcohol and explained that even though his blood alcohol was higher than allowed to drive a vehicle under state law he did not feel impaired and was able to do his job. Tr. at 220 and Company exhibit 4. The Union argued that under these unique facts the grievant was not "under the influence" and did not fall under the absolute cause provisions of Article 26.

9. The Union emphasized that after the investigation the grievant was offered the chance to have an alcohol assessment, which was done, and that the evaluator recommended alcohol treatment. The grievant willingly complied with this and entered treatment and has not had a drop of alcohol since July 21, 2011.

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<sup>1</sup> The grievant lives on a small farm in Cannon Falls and needs to get up early to do chores and other matters with his animals before going to work. July 18<sup>th</sup> was no different in that regard.

10. The Union also greatly emphasized statements made by the evaluator that the grievant “would be eligible to return to duty after he completed Phase 1 of the program.” See, Tr. at page 222-228 and Union exhibit 4. The grievant was led to believe that he, like literally every other Union employee who has tested positive for either a random or reasonable suspicion test since the early 1990's would be allowed to return to work following successful drug and alcohol treatment.

11. The grievant began the program immediately and was successfully discharged from Phase I of the program in mid-September and from Phase II in mid-December 2011. Instead of treating the grievant as it had all other such employees, the Company sought advice of outside counsel to determine if it could fire the grievant under these circumstances.

12. The Union argued that drug and alcohol testing is a mandatory subject of bargaining and that the parties indeed negotiated such a policy in response to DOT regulations requiring testing that were promulgated in the early 1990's. Tr. at page 281-283. That policy provided that employees who failed a drug test, regardless of whether it was a random or reasonable suspicion test, would be given two opportunities to retain their employment, but if they failed a third time their employment would be terminated. See, Union Exhibit 9. The policy was amended in 1994 to include alcohol and subjected alcohol dependency to the same requirements as the policy had for drug issues prior to the 1994 amendments. The policy also allowed employees who test positive for drugs or alcohol to have at least one opportunity to retain their jobs by following the recommendations of a substance abuse professional. The Union asserted that the grievant was not afforded that opportunity in this case.

13. The Union asserted most vehemently that the outcome of this case rests upon the negotiated drug and alcohol policies and the clear past practice of allowing Union employees to retain their jobs after a positive test by going through treatment.

14. The Union distinguished the cases cited by the Company on several bases. First, the Imes decision relied upon so heavily by the Company, was rendered in 1988; well before the passage of the DOT regulations, the DATWA in Minnesota and, most importantly, before the negotiated policies in place to give effect to the law on this subject of allowing people who test positive to retain employment by successfully competing treatment. The Union asserted that the language of Article 26 has thus been amended by operation of law, negotiation and past practice to allow at least one opportunity to compete treatment before discharge.

15. Further, the other cases deal with very different substantive issues even though they are on the same absolute cause list, such as dishonesty, abuse of sick leave or neglect of duty. There is no new state or federal law that has substantively affected those offenses nor has there been a negotiated policy based on those law changes nor is there a past practice to allow some sort of treatment before being fired for dishonesty for example based on that the Union argued that the particular clause dealing with drug and alcohol use has been changed due to the operation of these factors.

16. The Union also asserted that the language of Article 26 pre-dates the negotiated policy set forth above and should thus be interpreted as modified by the terms of the policy itself. The Union argued too, discussed below, that state law and the clear practice of the parties has also effectively amended the terms of Article 26 and that the understanding is now that employees who test positive or who may be “under the influence of drugs or alcohol” even at work are not immediately terminated but are rather given the opportunity to retain their jobs by successfully completing a drug and alcohol treatment program.

17. The Union asserted most strenuously that since at least 1990 no Union employee who failed a drug or alcohol test of any sort, random or reasonable suspicion, has been terminated without having been given at least one opportunity to seek drug or alcohol counseling and retain their employment by complying with the recommendations of the substance abuse professional.

18. The Union pointed to the sample “return to work” letters given to employees who failed tests presented at the hearing and noted that many employees have failed a drug or alcohol test on two or more occasions and have still been allowed to go through treatment and retain their jobs. Tr. at pages 126-129; 289-290; Union exhibits 2, 13, 14, 15, 16 and 17. The Union further pointed out that in many occasions, the random tests are given to employees who are already at work and who then drive Company vehicles to the testing sites. Some of them have failed the test; which of course means that they were under the influence while at work yet they were not terminated and were given the opportunity to retain their jobs by going through treatment.

19. The Union asserted that the Company’s attempt to draw a distinction between the types of testing is unfounded and specious. The Union also asserted that the grievant is being terminated, even though he was given the chance to go through treatment and even though he successfully completed it, because of his position with the Union. The Union asserted that the Company merely wanted to make an example of him and is willing to violate the contract, its own negotiated policies and arguably federal law to do it.

20. The Union pointed to several specific examples of Union employees who failed tests and who appeared to be impaired yet were not terminated because of it. In one case an employee was given a chance to go through treatment and reinstated and later arrested for DUI yet was given a second chance to go through treatment and retain his job. The only Union employee since 1990 to have failed a test who was not allowed to retain his job by going through treatment was this grievant.

21. The Union based much of its argument on the Drug and Alcohol Policy and its clear requirement to allow treatment prior to termination and slighted the Company for its failure to introduce those policies as part of its case. The Union asserted that the reason it decided not to do so was because it does not allow for termination of an employee in situations like this where the employee has tested positive and has successfully completed treatment.

22. The Union asserted that the Company's claim that the test it required of the grievant was not somehow covered by the Drug and Alcohol testing policy or by state law is without merit. As noted above, there is no difference under the policy or practice or the labor agreement for that matter as to who does the test or whether it was done pursuant to a DOT requirement or not. The Union posited the scenario whereby a Company supervisor or other employee had come by the house that morning and noticed, as the customer and the police apparently did, that the grievant smelled of alcohol and had watery bloodshot eyes. They could certainly have required a reasonable suspicion test. More to the point, the Union argued that the Company acknowledged that it would have been subject to the state law at that point and would have had to give the grievant the chance to take treatment. See Fahey testimony at Tr. at page 116.

23. The Union asserted too that the Company policy does not allow the use of a PBT test to confirm the presence of alcohol. Thus it must have relied on the test done later, which would be subject to the drug and alcohol policy in place and which gives the employee the right to treatment in order to retain his job. The Union argued that it is folly for the Company to pretend otherwise and that Mr. Hibbard's testimony demonstrated that the Company indeed relied on its Medtox test, done on July 18<sup>th</sup> and argued that the Company had all it needed before it received the police report on the 27<sup>th</sup> and that there was nothing new in any of the reports after the 19<sup>th</sup>. Tr. at 84-86. Thus, the Union argued, it is clear that the Company is trying to create the fiction that there is something special or different about the fact that there was a PBT test done by police – there is not and all such testing is subject to the negotiated policies and longstanding practices set forth above.

24. The Union further asserted that the arbitrator does have the power to fashion a remedy and that this case is subject to a just cause analysis despite the language of Article 26. The Union asserted that the language has both been amended to allow for treatment but was also never intended, nor has it been administered, to negate the clear requirement of just cause for discipline and discharge under this contract.

25. The essence of the Union's claim is thus that the Company failed to show any actual impairment as evidenced by the police report and the lack of any DUI violation, that the language of Article 26 is subject to the negotiated policy and practice of allowing treatment as a condition of keeping an employee's job under these circumstances and that the Company treated the grievant differently due to his position. The Union thus argued that these factors take the case out of the purview of an absolute cause and requires a just cause analysis, which allows the arbitrator to review the facts of each case and to fashion a remedy as appropriate based on the facts. Here, the Union argued that the grievant's actions that day were inadvertent at best and that there was no showing of a failure to perform his duty. He must be reinstated given the clear fact that he has gone through treatment successfully and can perform all of the function of his job.

The Union seeks an award sustaining the grievance and reinstating the grievant with full back pay and accrued contractual benefits. .

## **MEMORANDUM AND DISCUSSION**

### **BACKGROUND**

The operative facts giving rise to this grievance were straightforward. The parties found themselves diametrically opposed over the issue of the effect of the provisions of the contract, the application of the Company's drug and alcohol policy and how those have been impacted by past practice and state law as those applied to this scenario. There was no dispute that the grievant is a 23-year employee of the Company with an otherwise excellent work record. He is the current Union president and has been of course very active in the Union for many years as well.

He is an alcoholic and has struggled with alcohol use for several years. He was arrested for DUI in 2003 and was assessed for chemical dependency but was not required to undergo any treatment at that point. Tr. at 185-186. The Company did not assert that the 2003 driving offense was the grievant's "one shot" at rehabilitation and there was no evidence that he was ever charged with a repeat offense of this nature between 2003 and the incident on July 18, 2011 that led to his termination.

The language of Article 26 has been in the parties' contract for many years; perhaps as many as 40 or more. It was not completely clear when this was first negotiated into the agreement but it was clear that it predates the passage of the Minnesota DATWA and the negotiation of the Drug and Alcohol policy. This was a significant factor in this case and will be discussed more below but suffice it to say that the practice of how these policies have been applied has changed since the 1980's.

### **THE JULY 18, 2011 INCIDENT**

As noted above, the facts surrounding the incident itself were not greatly disputed. The grievant owns a small farm in Cannon Falls Minnesota. He went to a bar with friends on Sunday July 17, 2011. He drank several beers at the VFW that day and returned home where he continued to drink beers, perhaps as many as 15 total, until going to bed around 10:45. He claimed that he slept normally and awoke quite early the next morning and performed several needed chores with his livestock. The evidence showed that he performed these tasks without difficulty or incident.

He then went inside and got ready for work. There was no evidence that he consumed any alcohol on July 18, 2011 at all and the evidence showed that the grievant at least felt fine and did not feel drunk at all that day. He had a conversation with his wife about purchasing a vehicle and she testified credibly that he seemed quite normal and answered her questions quite lucidly and appropriately. On balance, the grievant's testimony that he "felt OK" that day was persuasive. As discussed below, how the grievant felt was not the operative fact here.

There was evidence though to suggest that this was due to his history of heavy alcohol use and that he has developed a high tolerance for it and can frankly drink more than most people without feeling the ill effects of it. That does not however change the fact that the alcohol was still in his system at a level far greater than allowed by Minnesota law to operate a motor vehicle and much greater than allowed by Company policy to perform his job.<sup>2</sup>

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<sup>2</sup> Minnesota law makes it a crime to operate a motor vehicle if the BAC level is at or greater than .08% and there was evidence to show that the Company prohibits anything above .04%. Here, as discussed below, the grievant's BAC was well above that, i.e. .122%, more than 1.5 times the legal limit to drive when he was tested.

There was no question that he went on a call on July 18, 2011 and was dispatched to a customer's home to repair a dryer. He arrived on time for the call, assessed the situation with the defective dryer and made the necessary repairs. The evidence showed that one must be able to make appropriate diagnostic assessments in determining what is wrong with the equipment and decide what is needed in terms of tools and supplies to make the repairs. He was able to repair the dryer using small screws and nuts and bolts and there was no evidence that he was impaired during this operation.

He was then dispatched to another customer's home in Apple Valley to check out a possible CO leak. He drove to the site where he met the customer and went to see where the leak was coming from and what to do. The evidence showed that the customer became concerned when she smelled alcohol on the grievant's breath. She apparently asked if he had been drinking that day and the grievant answered that he had not, saying, "I doubt it," or words to that effect.

He then went inside to continue his work but the customer called police. They arrived shortly thereafter and confronted the grievant and asked him as well if he had been drinking. See Company exhibit 5. He indicated that he had not but police also smelled alcohol on his breath and observed that his eyes were bloodshot and watery. Police officers are of course trained to spot evidence of alcohol or drug use and there was no evidence that the report submitted by police was inaccurate in any way.

They asked the grievant to take a PBT test, which he agreed to. It took several tries but eventually the PBT test, which is by Minnesota law not enough to convict a person accused of DUI but is enough to establish probable cause for an additional test, showed a BAC of .122%.<sup>3</sup> The police indicated that the grievant would not be allowed to drive any further that day. The grievant was by all accounts compliant with the officers and followed all their directives. Tr. at 206-207, 210.

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<sup>3</sup> The clear inference was that the alcohol that was unquestionably in his system at approximately 11:00 a.m. that day was likely at an even higher level earlier in the morning. For whatever reason, no one at the earlier call was alarmed by the grievant's behavior nor was there any report of alcohol on his breath at the earlier call that day.

After the PBT test came back positive and he had been told not to drive by police, the grievant contacted the Company and told them what had happened. The Company dispatched other employees to complete the work at the customer's home and to get the grievant's truck. When they arrived they indicated that the grievant would be taken to a Medtox facility and be tested there under Company policy. It was clear that at that point neither the grievant nor the Company personnel were advised of the results of the PBT test.<sup>4</sup>

The evidence showed that the customer's water heater was unvented and that this was causing an unsafe buildup of CO in the home. There was however no evidence that the grievant missed this or that the level of alcohol in his system at that point caused him to not see that. It was clear that he had not completed his survey of the home before police arrived and that he would have very likely found this and "red tagged" the appliance if he had. Thus, there was no evidence that the grievant's actions per se were in any way actually impaired by the level of alcohol in his system.

At approximately 11:30 a.m., the grievant and his supervisors arrived at the Medtox testing facility where Mr. Brown signed a DOT testing form and submitted to two Breathalyzer tests. The results of the Breathalyzer test administered at 11:31 a.m., was .103 BAC and the test administered at 11:49 was .098 BAC. In addition to submitting to the Breathalyzer test, Mr. Brown was required to give a urine sample. Upon completion of the testing, Mr. Brown and his supervisors were each given copies of the test results. Tr. 214-216.

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<sup>4</sup> It was not clear why the grievant was not issued a ticket for any sort of driving offense that day even though the PBT test came back positive and at such a high level. While the arbitrator is by no means an expert on Minnesota DUI law, the cases cited by the Company in its brief showed relatively clear that he could have been arrested and given an Intoxilyzer test, which is sufficient to warrant an arrest for DUI. The police officers indicated in their report that the grievant smelled of alcohol but apparently manifested no other outward signs of impairment that day. As noted more below though, the question of whether the grievant looked or felt OK that day is not relevant. What is relevant is his BAC at the time and whether that is sufficient to show that he was "under the influence" within the meaning of Article 26. As discussed more herein, it is clear that he was whether he thought so or not.

After completing testing at the Medtox facility, the grievant was suspended pending an investigation. He was interviewed the following day about the events of July 18<sup>th</sup> and was asked if he was under the influence of alcohol. He answered that he was not but also indicated that he was “unknowingly” under the influence of alcohol. See Company exhibit 4. There was also some evidence that the grievant understood the seriousness of the incident when he was asked if he was aware that being under the influence of alcohol could result in the loss of his job. He answered that he was unaware that he was under the influence but indicated that he was aware that such was an absolute cause for termination.

The grievant was directed to contact EAP and to follow their recommendations. He did so and on July 21, 2011 underwent an assessment for chemical dependency. As a result of the assessment, the evaluator recommended that the grievant complete an intensive outpatient treatment program. In addition, the evaluator stated, in a letter to the Company’s HR person Kathy Michels, “that [the grievant] would be eligible to return to duty after he completed Phase 1 of the program.” Tr. at pages 222-228; Union exhibit Ex. 4). There was no evidence that this statement was ever retracted or changed until the termination action taken by the Company a few days later.

On July 22, 2011 the grievant began an intensive and extensive outpatient chemical dependency treatment program and successfully completed Phase I of that program on September 15, 2011. He completed the 10-week long Phase II of the program on December 15, 2011 and was cleared to return to work by the evaluators and treating professionals at that time. See Union exhibit 11. The evidence showed that the grievant has remained compliant with the program and that he has maintained sobriety from July 21, 2011 to the present time.

The results of the police PBT test were not known by the Company until several weeks after the July 18, 2011 incident but did have the results of the Medtox test prior to that time, i.e. July 19, 2011. Company concluded based on this that the grievant was “under the influence of alcohol and intoxicated” during working hours on July 18, 2011 pursuant to Article 26. See Tr. at page at 44.

Mr. Hibbard testified that, “We terminated [the Grievant] because he was under the influence of alcohol while working.” Tr. at page at 63. In addition, Mr. Fahey testified that the basis of the Company’s actions were based on the absolute cause provision of Article 26 and because he had driven a Company vehicle, responded to a potentially deadly CO leak at a customer’s home and engaged a customer while drunk.

The Company determined that termination was warranted. The Company further took the position that it did not have to reinstate the grievant despite the DATWA and its own policies due to the absolute cause provisions of Article 26 of the agreement. Tr. at page 114-15; Company exhibit 10.

### **WAS THE GRIEVANT UNDER THE INFLUENCE ON JULY 18, 2011?**

One initial question was whether the grievant was “under the influence” within the meaning of Article 26 of the labor agreement. As will be discussed below, there was a major dispute about the applicability of that article and whether even being under the influence can be cause now for immediate termination without the opportunity for drug rehabilitation.

There was also a major dispute over whether this case is an “absolute cause” case depriving the arbitrator of jurisdiction to review the facts to determine an appropriate remedy, or one decided under a more traditional “just cause” analysis, which allows the arbitrator to determine whether termination or some other lesser penalty is appropriate given the facts and circumstances of this unique fact scenario. As a threshold issue, it must be determined if the notion of being “unknowingly” under the influence is a valid defense here.

The grievant certainly testified that he did not feel intoxicated, although he did indicate that he felt hungover on the morning of July 18, 2011. The Union and the grievant asserted that being under the influence must mean more than a mere BAC test, which showed a level over the legally allowed limit pursuant to DOT regulations.

The Union argued that under State DUI statutes and case law, one can be charged with being over the legal limit and with being under the influence separately. They assert that there is no “absolute” cause for merely being over the legal limit and that, essentially, if someone is an experienced enough drinker or drug user, they can be well over the legal limit and yet not be considered under the influence for purposes of Article 26. This argument however rang hollow here.

First, the fact that he did not think he was intoxicated cannot be an excuse. This would open the door to employees who, like the grievant, are in fact legally intoxicated to simply say that they felt OK and committed no mistakes or driving offenses and be absolved from discipline. This is far too subjective a standard and would allow a person to simply allege that they “felt OK” and avoid any accountability. This the arbitrator cannot do.

Further, the implication of this language is that the Company cannot have people working under the influence of drugs or alcohol. The obvious import of the language is to make it crystal clear that a person cannot work while legally considered impaired. It was not clear whether that legal limit is .08 or .04 or some other measure but on these facts that question does not need to be decided since the grievant’s level was well above both.

Finally, this is not a question of whether the grievant was appropriately charged with a DUI driving offense, as this is not decided strictly under State law. As discussed above, the legal limit for operating a motor vehicle in Minnesota is .08% and that threshold was exceeded here. On this record it was clear that by any measure, the grievant was “under the influence,” and that the measure of that is not under any circumstances measured by the subjective statements by the accused but rather by objective standards of intoxication or impairment. Thus, the remainder of the analysis must proceed on the basis that the grievant was under the influence; whether he thought he was or acted that way or not. As one police officer put it in a case involving a DUI arrest, “it is not how drunk you think you are but rather how drunk you really are that governs whether you go to jail or not.”

On these facts the grievant must be considered to have been “under the influence.”

## **WAS THERE ABSOLUTE CAUSE FOR THE TERMINATION ON THESE FACTS?**

The Company asserted from the outset that this is a case involving the so-called “absolute cause” provision of Article 26. The relevant portion of Article 26 is as follows:

“ ... the following constitute absolute causes from which there shall be no appeal to negotiation or arbitration between the Company and the Union (except that the question of whether the employee has been guilty of the facts constituting such absolute causes shall be a negotiable controversy) namely:

1. Use of, or being under the influence of, alcohol or non-medical drugs at any time during the work day. ...”

There are several other listed offenses but the focus of this matter was of course on the one pertaining to being under the influence of alcohol during the work day. The Company asserted that this was a very simple case and provided, in essence the following linear analysis: The grievant was at work, he was tested by police officers and Medtox and was determined to be well above the legal limit to drive and well above the legal limit under DOT regulations and Company policy. The provisions of Article 26 are clear and require that if anyone is under the influence at work the sole factor to be considered is whether those facts are true. A prior arbitrator determined that once that is shown to be the case, the arbitrator has no jurisdiction to alter the penalty and must sustain the discharge if that is the penalty meted out by the Company – end of story.

The Company cited Arbitrator Imes’ decision from 1988 wherein she ruled that this clause applied to deprive the arbitrator of any power to fashion a remedy and limits the jurisdiction merely to determine were the underlying facts are true, i.e. whether the person was in fact under the influence. Here, as noted above, it was clear that even though the grievant did not realize it due to his longstanding alcohol use, he was in fact legally “under the influence” and his subjective statements or feeling about it simply do not matter.

Frankly, if this case arose again as it had before Arbitrator Imes in 1988, that would be the end of the story; the grievance would be denied. Arbitrator Imes’ analysis of the case was completely correct when it was decided in 1988 and her interpretation of the language of Article 26 was also correct under the facts and circumstances that arose then.

This case however arose in 2011 and several significant facts have happened since. Each will be discussed in turn but there was the passage of the Minnesota DATWA in the early 1990's. There was also the negotiated drug and alcohol policy that was negotiated by the parties to apply to employees just like the grievant. More to the point, there is the longstanding practice, in place for perhaps 20+ years of allowing every Union employee who has failed either a random or reasonable suspicion drug or alcohol test, irrespective of how that test was done, a chance to retain their jobs by going through drug and alcohol treatment.

Article 26 has been in the parties' contract for perhaps 40 or more years. These subsequent events have however, amended the parties' agreement in this regard, as evidenced by the way in which it has been applied for more than 20 years, and even though the language seems clear enough on its face, these parties have in fact modified it such that under these circumstances the absolute cause provisions do not apply to warrant the grievant's immediate termination without resort to a just cause analysis.

The first matter that distinguishes this case from the earlier decision was the passage of the DATWA, which was passed into law after 1988 and certainly applies to this Company and its employees. It was clear that a great many employees have tested positive for drugs or alcohol over the course of the past 20 years and the evidence showed that every Union employee has been given the opportunity to enter treatment in order to save their job. It was quite clear that the Company certainly believed that it was subject to the DATWA and has operated since the early 1990's accordingly. It was equally clear that the understanding between the parties is that this law applied to the employees and generally allows an employee to retain their position if they went through the appropriate treatment steps and followed the directives of EAP.

The Company argued that the DATWA did not apply and that even if it did, it was still justified to terminate this employee. On this record, it was clear that the law applies; mostly because these parties have long interpreted it to apply.

Moreover, while an employee's actions may well establish just cause for termination; that would, somewhat obviously, require a just cause analysis and a more thorough review of the facts and circumstances of each situation and would thus not be a case of "absolute cause" analysis. The later renders that sort of review somewhat moot and deprives the arbitrator of jurisdiction to determine the penalty or to take any underlying circumstances into account to do so. Once the argument is made that there is just cause to discharge an employee, that requires a just cause analysis.

It should be noted that this case does not strictly rise or fall over the interpretation of state law but rather over how that law may have affected the parties' labor agreement. It is well established that collective bargain agreements may not run contrary to applicable law and that arbitrators must, and do, interpret collective bargaining agreements in light of the law. See generally, Elkouri and Elkouri, *How Arbitration Works*, 5<sup>th</sup> Ed. 525, 526-530.

There is certainly some disagreement among arbitrators as to the application and effect of external law on seemingly clear provisions of a collective bargaining agreement. Elkouri cited Arbitrator Bernard Metzger who outlined several general rules to be applied in such situations as follows: 1) where the contractual provision being interpreted or applied has been formulated loosely, the arbitrator may consider all relevant factors, including relevant law; 2) where a contractual provision is susceptible to two interpretations, one compatible with and the other repugnant to an applicable statute, the statute is the relevant factor – arbitrators should seek to avoid a construction that would make the agreement invalid, and 3) where the submission makes it clear that the parties want an advisory opinion as to the law, such opinion would be within the arbitrator's role." Elkouri at 525-526. Metzger also opined that "where there is clear conflict between the agreement and the law, the arbitrator should respect the agreement and ignore the law." Elkouri at 526-527.

The last point is not involved here at all and the first two points are at odds on this record. The language is not loosely formulated. In fact, it is quite clear. That certainly mitigates in favor of the Company's view. Further, Metzger's view on the crucial fourth point on what the arbitrator's role is with regard to ignoring the law, is not universally held. Some arbitrators feel that applicable law should control, others feel that it may permit conduct forbidden by law but not require it and others feel that they absolutely cannot allow an act that would be prohibited by law. Elkouri at 528-530.

To say that opinions range all over the map is something of an understatement. It is further apparent that the opinions expressed by some very prominent arbitrators on this point are in most cases derived from the fact scenarios with which they are presented at the time.

Here the facts showed that the language of Article 26 is in apparent conflict with the law on this subject. The law appears to require treatment prior to termination. The Company argued that it does not bar terminations for other reasons and asserted that being drunk while on the job is exactly one of those situations. As discussed herein, that fact does not control the result here – the way in which the parties have administered their labor agreement does.

Neither the State nor the Federal law requires termination either. The Union correctly pointed out that even DOT regs make it clear that a person can be reinstated once treatment is completed. See, 49 C.F.R. §40.23(c)-(d), 40.289. State law certainly does not require termination either. More to the point, once the inquiry turns to conduct as opposed to the status of being under the influence, that clearly implies a just cause analysis; thus taking the case out of the realm of the absolute cause analysis posited by the Company.

Further, the way in which it was applied here is in apparent conflict with the negotiated policy and the later non-negotiated policy. The overall record showed that the law does apply here and that the parties negotiated a policy on this very issue. That policy is consistent with the State law and allows for treatment in order to retain employment.

Finally, these parties have a long history of allowing treatment for employees who test positive before termination.<sup>5</sup> This fact too weighed heavily in this case and supported the Union's claim that at least with respect to this one provision of Article 26, the parties have allowed treatment for those who test positive for drugs and alcohol.<sup>6</sup>

There was considerable dispute about whether that latter fact was true. The Company argued that there were factual distinctions between those employees who have been allowed to return to work following treatment and this grievant. The Union argued that people have been terminated summarily for being drunk on the job were not Union employees. The Union further pointed out that in the one case of a management employee who was summarily terminated for being drunk on the job, the Company acknowledged that they may not have had the authority to do it under its own policies but "got away with it." On this record, there was some cogency in that assertion.

There are always factual distinctions between different scenarios. Here though the essential feature of the way this language has been interpreted is that employees have in fact been under the influence while on the job, i.e. those who have been tested on a random or reasonable suspicion basis and who have not been fired and who have been allowed to return to work after treatment. While this case is a bit different in that the police tested the grievant first and that he was on a job when this happened, that goes to a just cause analysis, not an absolute cause analysis. As noted herein, that part of Article 26 dealing with this limited issue has been administered consistent with allowing retreatment before termination over time.

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<sup>5</sup> On that latter point it should be noted that underlying any disciplinary determination is the notion of notice and that it is manifestly unfair to change the rules in the middle of the game by promulgating a policy and applying that policy in a certain way and then changing it without appropriate notice.

<sup>6</sup> It must also be noted that this decision in any way affects the other provisions or listed offense in Article 26. This case is limited to these facts and this clause of Article 26 and nothing more. There has not been, just as an example, no state law requiring treatment for dishonesty or abuse of sick leave prior to termination and no negotiated policy with respect to that type of offense.

On that point, the Union's argument was well taken. See Union exhibit 9. That policy calls for treatment as an option prior to termination. Further, the later policy carried these concepts forward and have certainly greatly affected the way in which this provision has been interpreted and understood among the employees and the Company alike.

Further, while the Company argued that where policy and collective bargaining language differ the contract controls. While that is generally true, here the language of the contract has been amended by a number of factors – i.e. the provisions of State law, the negotiated policy in place between the parties, the non-negotiated policy in place and most important of all, the way in which these provisions have been interpreted and applied over the course of more than 20 years. Accordingly, this case on its unique facts does not present a case of absolute cause, whereby the termination action must be upheld once there has been a determination that the grievant was under the influence. That does not end the case however; there is still the question of whether there was just cause for discipline and if so what the appropriate penalty should be.

The essential difference between the absolute cause analysis and a more traditional just cause analysis is in the limited nature of the allowable review and the power to fashion a remedy once the facts of the case have been determined. The absolute cause provision calls for a limited inquiry of whether the underlying facts are true – nothing more. Once those are determined the result follows and as Arbitrator Imes said in 1988, the arbitrator cannot change it. That was true in 1988; it is not, at least with respect to these limited facts today.

A just cause analysis calls for a more thorough examination of all the underlying facts and factors that surround a decision to terminate an employee's job, including whether there are grounds to fashion a lesser penalty due to mitigating factors. This of course is the essential difference between the Company's and the Union's position on this question.

Initially, it must be noted that the Company made much of how the test was done and asserted that it waited for the police report to come back before making the decision to terminate even though it already had the Medtox test results, which were frankly probably more accurate than a PBT test anyway but there was no direct evidence on that point. The language of Article 26 does not draw a distinction based on the type of test that is done or whether there is a test at all. It simply seeks to create an absolute cause for termination based on the notion of being under the influence.

One could quite plausibly argue that this specific clause in Article 26 does not require a test at all. If a supervisor decided someone was under the influence based on behavior or demeanor, they could presumably take termination action at that point and the role of the arbitrator would be to determine if the person was under the influence or not. Tests simply make the determination of blood alcohol content or the presence of drugs easier and perhaps more accurate. The essential feature though is that the language does not require it and does not “care” where or how the test is done nor under what statutory scheme. Here the fact that the police performed the PBT test and were called to the scene may be, and was here, a very salient fact in a just cause analysis but has no place in the absolute cause analysis. The provisions of Article 26 either apply or they do not and the question is based on a person’s status as “under the influence.”

This is important since the subsequent passage of the DATWA and the parties’ own negotiated policy have effectively changed the way this provision has been applied. Simply stated, over time the greater weight of evidence showed that the clear understanding is that every Union employee, even ones tested at work on a random basis and who drove to work or drove to the testing facility and who testing positive for illicit substances have been allowed to retain their jobs by going through treatment.<sup>7</sup>

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<sup>7</sup> The parties stipulated that no person was ever allowed to drive to the testing facility on a reasonable suspicion test however. The evidence was not completely clear if any of the employees who drove a Company vehicle to a testing facility on a random test ever tested positive. The upshot was that they certainly could have and that they would not have been fired for that. Certainly there was no evidence that such a person was ever terminated under those circumstances.

## **WAS THERE JUST CAUSE FOR DISCIPLINE/DISCHARGE?**

On this question there can be little doubt that there was just cause for some discipline even though the grievant testified that he did not believe he was drunk. He had consumed numerous beers the day before, perhaps as many as 15. Even an experienced drinker knows or should know that having that much alcohol will have a lingering effect to some degree on their ability to function the next day. Further, the grievant did testify that he felt hung over.

Moreover, he was at a customer's home and smelled enough of alcohol that she noticed it and reported it to police. While the Union attempted to characterize that customer as a chronic complainer, this too rang hollow. Perhaps she was, but it does not matter. Moreover, on this point she was right – the grievant was legally drunk and he was working on a gas appliance at her home. The dangers of that scenario are almost too obvious to mention.

As in any such analysis, each case must be reviewed on its own unique facts. It should be noted to that this case is very much limited to its unique facts and is decided on this record and this record alone. The next person who shows up intoxicated on the job may well face a very different result on different facts and may well not be allowed to rely on this result either way.

Here the grievant was clearly guilty of a very dangerous act, albeit unknowingly. He does however have a long and excellent work record and that should not be ignored. Further, he was told that he would be reinstated if he successfully completed treatment, which he did and testified credibly that he has remained sober and committed to that sobriety.

Finally, while the arbitrator cannot condone his actions, it was clear that he poses little or no continuing danger to the public or to co-workers by his reinstatement. He has successfully completed treatment and while that alone is not the determinative factor it was something that mitigated in favor of reinstatement in this case.

The remaining question then is the appropriate penalty. First, as noted above, he was not finished with Phase II of his treatment until mid-December 2011 and would not likely have been entitled to reinstatement until then even under the drug and alcohol policy. Moreover, his actions posed a potential risk to the public and that cannot be ignored.

Finally, the Company has a legitimate interest in making very certain that its employees are not impaired in any way while on the job. As such there must be a strong signal sent to employees that they cannot work while impaired and cannot drink to excess the day before coming to work, show up in an impaired state and simply skate away without some accountability by going through treatment if they are caught. The message must be clear and unmistakable that employees who are under the influence on the job may still be fired depending on the circumstances. Coming to work or becoming impaired while at work must always carry a very strong penalty.

After considering several options, it was determined that the grievant's reinstatement must be without back pay or contractual benefits. Accordingly, the grievant is to be restated to his former position within 10 working days of this award but without back pay or contractually accrued benefits.

### **AWARD**

The grievance is SUSTAINED IN PART AND DENIED IN PART as set forth herein. The grievant is to be reinstated to his former position within 10 working days of this award but without back pay or accrued contractual benefits.

Dated: April 6, 2012

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Jeffrey W. Jacobs, arbitrator