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In the Matter of Arbitration Between:)
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MITTAL STEEL COMPANY)
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and)
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UNITED STEELWORKERS OF AMERICA, Local 1010.)

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Grievance No. 20-W-147
Award No. 1025

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. This hearing was held on Friday, November 4, 2005 at the Company's offices in East Chicago, Indiana.

APPEARANCES

UNION

Advocate for the Union:

Dennis Shattuck	Grievance Committee Chairman

Witnesses:

John Sessa	Grievant
L. Aguilar	Vice-Chair Grievance Committee
M. Beckman	Griever 4 BOF
William Durham	Witness
Randy Hood	Witness

COMPANY

Advocate for the Company:

Patrick Parker	Section Manager of Arbitration and Advocacy

Witnesses:

J. Stahl	Manager – MEU Shops
D. Jimenez	Plant Protection Officer
J. Bean	EAP Counselor

Background

This is a case involving the discharge of a long-term employee for violating Rule 2(b) which prohibits "[r]eporting for work under the influence of drugs not prescribed by a licensed physician for personal use while at work; being in possession of, or use of, such drugs while on company property, or bringing such drugs onto company property." The Grievant also was charged with being out of his workplace.

Division Manager of Shops and Services Mr. Jim Stahl testified that he supervises 380 employees. He testified that on June 21, 2005 the Grievant, a Sheet Metal Worker, and Mr. Randy Hood, Planner in Shop Services, were assigned to work the 7:00 a.m. to 3:00 p.m. Mr. Stahl stated that sometime after 8:00 a.m. that day he walked through the Sheet Metal Shop and its break area, and did not see anyone. He testified that he walked out the door in the shipping area and saw the hood of a red pickup truck parked behind a dumpster about 30 feet away, backed up against the shipping door. As he came around the dumpster, he said that he saw two people sitting inside the vehicle in the front seat with the doors closed and the windows up. According to Mr. Stahl he saw the Grievant in the passenger seat smoking, and then he saw the Grievant lean forward, as if to extinguish what he was smoking. Mr. Hood was in the driver's seat.

Mr. Stahl testified that as soon as he arrived at the truck the door was opened and smoke came out, along with the "remarkable" odor of marijuana. He asked the two men what they were doing and the Grievant responded that he was having a cigarette. Mr.

Stahl said he told the men that they would have to go for a fitness-to-work evaluation and he asked someone else to take them.

Mr. Stahl had the truck inspected five minutes later and a small marijuana cigarette butt was found. Cigarette rolling papers also were found. The Grievant's van also was inspected and the butt of another marijuana cigarette was found there.

Mr. Stahl said that he was not qualified to determine whether the Grievant was under the influence and so sent him for a fitness-to-work evaluation. A fitness-to-work test was administered to the Grievant and Mr. Hood and they both passed it. Both employees were discharged and Mr. Hood resigned. Under questioning from the Union Mr. Stahl acknowledged that he was not aware of any instance in which an employee had been considered under the influence if he passed the fitness-to-work test.

Mr. Stahl denied that he "had it in" for the Grievant or made up this incident as retaliation because he had found the Grievant a week earlier in the break room at 8:30 a.m. taking a break. He also took issue with the Union's argument that the two men were discussing a work assignment in the truck when he came upon them. According to Mr. Stahl, the Grievant had no work-related reason to be in Mr. Hood's truck at that time. He said that Mr. Hood could have parked in one of five parking spots that were next to the door. He acknowledged that part of Mr. Hood's job was to go to the Sheet Metal Shop. According to Mr. Stahl, however, there is an office and tables upon which work projects can be laid out and discussed. The Union noted that he had been running the Shop for only a short time at the time of this incident, and questioned whether he knew how the employees had discussed work projects in the past.

Mr. Stahl testified that smoking marijuana in the plant merits discharge because an employee who is under the influence presents a serious safety concern for employees working with torches, shears and welding machines. He stated that it also presented significant performance problems, because the Grievant's job is to form duct work for the plant, which employees rely upon to safely perform their jobs.

Mr. Diego Jimenez, a Lieutenant with the Company's security firm, testified that he searched Mr. Hood's and the Grievant's car on the day in question. He stated that he found butts in both cars that were sent to the East Chicago Police Department for testing. The Company presented reports from the Police Department that the butts tested positive for marijuana at .1 gram. Mr. Jimenez also testified that he found no tobacco cigarette butts in Mr. Hood's car.

Mr. Luis Aguilar, Vice Chairman of the Grievance Committee, testified that the Sheet Metal Shop used to be in the Boiler Weld Shop, where he worked for many years. He said that the shop is very cold in the winter and very hot in the summer, and that it was not unusual for employees to stand or sit outside in the summer to get some relief from the heat. Stepping out of the shop would not be considered being out of one's work area, according to Mr. Aguilar, and he said that he never has heard of anyone discharged for being out of their work area. Mr. Matt Beckman, Griever for the area, testified similarly about the heat in the shop and also stated that some employees go to their cars to smoke in air conditioning. Mr. Aguilar presented evidence that on June 21, 2005 there was a high temperature of 90 degrees.

Mr. Aguilar testified that he has been involved in other cases where employees have been accused of using drugs in the plant. He said that he had never seen another

incident where an employee had passed the fitness-to-work evaluation if the employee had been using drugs in the plant. He also testified about a similar case in which rolling papers and a small amount of marijuana were found in an employee's (Pope's) car during a car check. The Union presented its notes from the suspension hearing, reporting that a Company representative stated that "a person with an incidental amount of drugs would not automatically be discharged but will go through the program." That employee was reinstated under a Last Chance Agreement that required him to enroll in the Inland Problem Drinker/Substance Abuse Program and to stay in touch the Union's Members Assistance Committee.

The Union also presented the Last Chance Agreement of another employee (Rhodes), who had been given a three-day suspension for reporting under the influence of alcohol and who was found a second time to be under the influence of alcohol at work. His car was searched and several bottles of gin as well as two partially smoked marijuana cigarettes were found. He was discharged and reinstated under a Last Chance Agreement requiring him to enroll in the Inland Alcohol and Drug Program. He also had had discipline in the past for absenteeism and sleeping on the job, the Union noted. Mr. Aguilar acknowledged that in both of the other cases raised by the Union the grievants had not been found using marijuana on the Company premises, and he could not recall any such cases.

Mr. Aguilar testified that he saw the marijuana butts allegedly found in this case and said that they were very small, too small for a person to smoke without burning one's fingers. Mr. Beckman also testified about the small size of the butts.

Mr. Randy Hood testified that as a Planner for the Company he frequently physically delivered jobs to the "Tin Shop" and that it was usual for him to go there at least once a week. He stated that on the day in question two purchase orders came in and he drove around to the back of the Shop, parked and went to talk to the Grievant. He said that there were parking spaces closer to the door but that they are often in use by the employees who work there, and that he typically parked where he did on that day.

Mr. Hood testified that he walked into the Shop, found the Grievant, and told him that he had two "hot" jobs for him. He said that he told the Grievant that he had to go back and asked him to walk through the Shop with him and discuss the more difficult project. He said that the Grievant accompanied him out to his truck to look at the plans.

According to Mr. Hood, the inside handle of the passenger door of the truck was broken and had been fixed only three weeks before the arbitration hearing. If the Grievant had closed the door of the truck, the only way for him to get out would have been for Mr. Hood to go around and open the door, he testified. He said that the Grievant had been talking to him through the open door of the truck, had dropped his cigarette on the ground and had turned to leave when Mr. Stahl came up to him. He said that Mr. Stahl came up and asked him if this was his normal break time, Mr. Hood responded that he was not on break, and Mr. Stahl then said, "I smell something funny," and said that he wanted to call Plant Protection. Mr. Hood said that the guards took him to the clinic, and had him "walk the line" and do other physical aspects of a "fitness-to-work" test. He passed the tests.

Mr. Hood said that the marijuana cigarette butt in his truck was there because on the previous weekend his club had been landscaping and someone had borrowed his truck

and later admitted to him that he had smoked marijuana in the truck. This occurred about 12 hours before the marijuana was found in his truck by Security, according to Mr. Hood. He said that the rolling papers in the truck were his and that he had smoked marijuana before, but not in the plant. He also said that the marijuana butt that was found in his truck was so small, about the size of 1/10 of a normal marijuana cigarette, that it could not have been held in the hand easily for smoking or mistaken for a cigarette.

On cross-examination Mr. Hood acknowledged that the distance from where his truck was initially parked to where he parked it to go to the Shop could be walked in a few minutes. He said that he retired because he takes daily medication and he did not want to be off work without medical insurance. He was warned by the Union that it might take some time to resolve his case. Mr. Hood testified that after 33.5 years, he believed that the Company was trying to force him out, and he did not like some recent changes.

The Grievant testified that he had worked for the Company for more than 35 years and as a Lead Sheet Metal Worker for 6 years before his discharge, distributing jobs, tallying them and lining up materials. He also would contact "customers," the internal Company departments that wanted work done, to check specifications. In addition, he said that he would help other Sheet Metal Workers with difficult jobs or do them himself, about 1-2 hours per day. He said that before his discharge he would normally talk to Mr. Hood a couple of times a week, mostly about priority orders.

The Grievant presented information that he was building a shed at the time of the incident in the plant. He presented plans for the shed and a building permit issued by the City of Munster, Indiana on May 4, 2005, which expired on June 4, 2005. He said that he

was assisted in this project by his ex-girlfriend's brother Jeremy and his friend Bill Durham. Mr. Durham testified that while working on the project he used the Grievant's van to pick up materials from Menards, he smoked marijuana in the van, and put the butt in the ashtray. Receipts from Menards were presented. The Grievant testified that he knew that the two had been smoking marijuana that day because he smelled it on them. He also testified that he had not smoked marijuana since before September 2004, because he did not want his ex-girlfriend to be able to use drug use as a factor in a custody order over their daughter, especially since he was planning to use her drug use in the custody dispute.

The Grievant stated that on the day in question he and Mr. Hood had a discussion about whether the jobs he was dropping off really needed to be done immediately, since other priority jobs that his crew had rushed to do had been sitting completed and not picked up. He said that he was telling Mr. Hood that he needed to tell the departments that they could not do all these rush jobs, especially since the workforce in the Shop had been cut from 17 to 3 people. On cross-examination the Grievant said that even if Mr. Hood did not have the authority to tell other employees that they should not put through so many rush orders, he would do that type of thing. The Grievant suggested that Mr. Hood would not stay to talk to him because the Grievant had been "cussing him out." He said that he followed Mr. Hood out to the truck to apologize for "getting on his case" and spoke to him through the open door of the truck with one leg up in the cab, the other on the ground, smoking a cigarette. He said that he finished the cigarette, flicked the butt out, closed the door of the truck, and then Mr. Stahl came up to him and said, "What are you doing here?" and then "I smell something funny." The Grievant said that he told Mr.

Stahl that he had just put out a cigarette, and Mr. Stahl grabbed him by the arm and told him he was going to a fitness-for-duty exam.

The Grievant denied smoking marijuana at the time and was put through the fitness-for-work test, responding to questions and "walking the line." He said that he passed the test and that no urine test was done. He also said that the marijuana butt that was shown to him at the suspension hearing was so small that he could not have held it like a cigarette. The Grievant testified that he was aware of the problems with Mr. Hood's truck door.

The Grievant testified that he had had several recent run-ins with Mr. Stahl in the weeks before June 21st. He said that he was taking a break at 8:30 a.m. one morning because he ordered a special breakfast for employees who had been working through their breaks on rush jobs, and Mr. Stahl gave him a hard time for taking a break that early in the shift. He also testified that Mr. Stahl had talked to him several times during the same week about the Grievant's failure to wear a hardhat; the Grievant said that he took off his hat because it was so hot. On cross-examination he acknowledged that he received no discipline for either infraction. However, he stated that Mr. Stahl began walking through his area between 8:00 and 9:00 every morning after the incident regarding the break.

Mr. John Bean, Coordinator of the Employee Assistance Program, testified that when Paramedics in the Medical Department conduct a fitness-to-work evaluation they note things like the employee's temperature, skin, blood pressure, behavior, thinking and physical activity. If abnormalities show up on the assessment, a urine screen is collected. He said that an employee could smoke some marijuana and still pass the assessment,

depending upon how much the employee had smoked, the quality of the marijuana and the employee's size. He noted that a smell of marijuana may or may not be present on the clothing of someone who had smoked recently. He stated that he thought the Grievant was sent to Medical at about 8:30, but not tested until 9:50 or later, and that the effects of the drug may have diminished by then. The Arbitrator was taken to view the scene where the truck was parked on June 21, 2005.

The Company's Position

The Company argues that the facts in this case support its conclusion that the Grievant was smoking marijuana in the plant on the day in question. There was no reason for Mr. Hood to drive such a short distance or to park his truck as he did. The truck was set up, the Company argues, so that the employees could smoke in it and see someone coming, if they were paying attention.

The Company also argues that it is not clear why the Grievant would be sitting in the uncomfortable position he described, in order to talk to Mr. Hood. Also, if Mr. Hood did not have time to discuss the Grievant's complaint with him in the Shop, it is not clear why they would have time to be sitting in the truck cab, according to the Company. The Company argues that the door might have been closed, but not latched, and if the Grievant had thrown out a cigarette butt, Mr. Stahl would have seen it. Mr. Stahl testified credibly that he saw the Grievant smoking and put something down, according to the Company and no tobacco cigarette butt, only the remains of a marijuana cigarette were found.

The Company also argues that there would be no reason for Mr. Stahl to send the two men for a fitness-to-work evaluation unless he saw the Grievant smoking and smelled marijuana smoke. The evidence regarding past incidents involving Mr. Stahl and the Grievant show that he could have disciplined the Grievant on those occasions, but did not do so.

In addition the Company argues that the Grievant was responsible for the marijuana found in his car. He knew that Mr. Durham borrowed his van and he and his friend came back smelling of marijuana. The Grievant at least had the obligation to ask if they had left anything in his van before he took it to work, the Company argues. In addition, the Company questions the evidence provided by the Grievant about his construction project. The Company argues that the penalty of discharge is warranted in this case because it is extremely dangerous for an employee to be consuming drugs on plant property.

The Union's Position

The Union argues that the evidence shows that the Grievant was not out of his work area on the day in question. Mr. Hood and he were doing their jobs, extending their conversation about work matters as they exited the shop. Because they were doing their jobs the Company's argument that the Grievant was out of his work area is specious, the Union contends. Even if the Arbitrator were to find that the Grievant should have stopped at the door, the Union argues, the violation is so minimal that serious discipline would not be warranted for this offense, and surely not discharge.

As for the marijuana found in the Grievant's van, the Union relies upon evidence it provided that someone other than the Grievant put it in his van. The Grievant was not aware that it was in his van and cannot be considered guilty, the Union asserts. Even if he is held responsible, the Union argues, having that small an amount of marijuana in his car is not grounds for discharge.

As for the incident on June 21, 2005, the Union argues that the Grievant passed the fitness-to-work assessment, and is therefore entitled to a presumption of innocence about him smoking marijuana at work. Furthermore, the Union contends that several witnesses testified that the marijuana cigarette butt that was found in Mr. Hood's truck was too small to be smoked like a cigarette, as Mr. Stahl said. Furthermore, the Union argues that it would not be likely that the Grievant and Mr. Hood would set themselves up as they did, if they did wish to smoke marijuana. They were in a closed truck cab, it was a hot day, and the cab would have filled with smoke, which would have looked suspicious, and not provided any escape route. The Grievant knew that Mr. Stahl was coming around to check between 8:00 and 9:00 every day.

Even if Mr. Stahl was not "out to get" the Grievant, he may have jumped to conclusions, based upon his recent altercations with the Grievant, the Union contends. The Union argues that the evidence against the Grievant is too flimsy to support the discharge of a 35-year employee.

Findings and Decision

This is a case involving the discharge of a very long-term employee for violating the Company's rule against possessing or using drugs on Company property. The discharge arises out of the incident of June 21, 2005, which is discussed in detail in the Background section of this Award.

The Union argues that the Grievant passed the fitness-to-work evaluation and is therefore entitled to the presumption of innocence. The Grievant did pass the fitness-to-work evaluation conducted by the paramedics, and no urine test was performed. During the fitness-to-work assessment the paramedics check for typical signs of drug use. They found none of those signs in this case – no bloodshot eyes, smell of marijuana, distortion of the pupils, or problems with speech, walking, coordination or thought. The Company argued convincingly that it is possible that an employee could smoke part of a marijuana cigarette, especially if he smoked only a little bit, and still pass the fitness-to-work evaluation, especially if the assessment were delayed, as was suggested here. However, the Grievant's passing the fitness-to-work evaluation and the fact that he was not required to take a urine test both add something to the argument that he was not smoking marijuana at the plant on that day. Part of the reason for sending an employee for a fitness-to-work evaluation is to determine whether less reliable evidence, such as observation by a supervisor, is accurate. If the urine test had been conducted, this case probably would have been resolved short of arbitration. An important piece of evidence that could have been obtained to help determine whether the Grievant was smoking marijuana on that day was not obtained.

Thus, the case against the Grievant turns largely upon the observations of Supervisor Stahl. The Arbitrator has considered the Grievant's suggestion that Mr. Stahl "had it in" for him because of several earlier incidents. However, the Grievant was not disciplined for those earlier incidents. Neither Mr. Stahl's comments nor behavior on the day in question or during the earlier incidents suggest that he "had it in" for the Grievant and therefore made up the story that the Grievant was smoking marijuana.

The record suggests, however, that Mr. Stahl's visual observation of the Grievant lasted only a few moments, as he was walking up to the truck. The Union has argued strongly that the marijuana butt found was too small to have been smoked easily by anyone, and far too small to be smoked as or mistaken for a regular cigarette. The Union contends that it was so small that it would have had to be held between the thumb and forefinger in order to be smoked at all. The Company did not dispute that the butt found was very small. Mr. Stahl did not testify that he did observe the Grievant smoking it like a regular cigarette. However, even after the Union raised this issue, he did not testify as to how he saw the Grievant holding the butt. His silence on this issue raises doubt in the Arbitrator's mind that Mr. Stahl clearly saw the Grievant smoking.

The Company places significant weight on the fact that the marijuana was found in the truck, and that a similar amount (a single butt, weighing less than 1/10 of a gram) also was found in the Grievant's truck at work. The Arbitrator does not find very convincing the evidence put forth by both men that they had nothing to do with the marijuana remnants found in their vehicles. However, the Union introduced convincing evidence that employees have not necessarily been discharged for the finding of an incidental amount of marijuana in their cars on plant property, and the evidence shows

that what triggered the Grievant's discharge was Management's conclusion that he used marijuana on plant property.

The presence of the marijuana in Mr. Hood's vehicle does not prove that the Grievant was smoking marijuana at the plant on that day, but does add some support to the Company's conclusion that he was smoking marijuana. The explanations given by Mr. Hood and the Grievant about why they were in the truck are not very convincing. Furthermore, the presence of marijuana in the Grievant's van at least raises the possibility that he was still an active marijuana smoker.

The Company also relies upon the supervisor's testimony that he smelled marijuana in the truck. He testified credibly that he smelled marijuana smoke. Nevertheless, the Grievant has worked for the Company for 35 years. The Company did not introduce any evidence of past discipline against him. His extremely long service and good record are entitled to significant weight in assessing whether it is likely that he engaged in this serious misconduct. In addition, the Company's position that the Grievant was smoking marijuana on plant property was not supported by the fitness-to-work assessment. The case against the Grievant rests largely on the observations of his supervisor, and his observations raise some doubt.

Using drugs at work is very serious misconduct, as this behavior poses an immediate and significant risk of affecting the employee's perceptions, judgment and actions, endangering himself, co-workers and the Company's operations and property. Although the Company's conclusion that the Grievant was smoking marijuana is plausible, more than that is needed to end the career of a 35-year employee. There is

sufficient doubt in this record to conclude that there is not just cause to sustain the discharge of the Grievant for using drugs on plant property.

However, the Grievant has violated the Company's substance abuse rule, as marijuana was found in his vehicle. As discussed above, finding marijuana in the Grievant's van suggests that he may still have been an active marijuana smoker. Furthermore, even if the Grievant's version of the events is true, i.e. that his associate had left the marijuana butt in his van, he stated that he knew that someone smoking marijuana had been using the van, and his failure to make sure that none was left in the van indicates at least that the Grievant did not take the Company's rule about drugs on Company property very seriously. The Union presented evidence that in similar cases other employees have been reinstated without backpay under Last Chance Agreements. Given his long service and good record the Arbitrator concludes that the Grievant here should be reinstated under similar conditions.

AWARD

The grievance is sustained in part. The Grievant is to be reinstated without backpay and under a Last Chance Agreement, similar to the terms of Last Chance Agreements given to other employees who have had marijuana found in their vehicles on plant property.

Jeanne M. Vonhof
Labor Arbitrator

Decided this 27th day of March, 2006.