IN THE MATTER OF THE	**)**	
	)	**ARBITRATOR'S**
ARBITRATION	**)**	
	)	**OPINION**
BETWEEN	**)**	
	)	**AND**
NORTHWEST ALUMINUM	**)**	
COMPANY	**)**	**AWARD**
(The Employer)	**)**	
	)	
AND	**)**	
	)	
UNITED STEELWORKERS OF	**)**	**N--- Discharge Grievance**
AMERICA, LOCAL 9170	**)**	
(The Union)	**)**	**FMCS Case #021204-01802-7**

HEARING: March 15, 2002

HEARING CLOSED: May 6, 2002

ARBITRATOR:

Sylvia Skratek, Ph.D.
3028 Western Avenue
Suite 201
Seattle, Washington 98121

REPRESENTING THE EMPLOYER:

David Wilson
Bullard Smith Jernstedt Harnish
1000 SW Broadway, Suite 1900
Portland, Oregon 97205

REPRESENTING THE UNION:

James A. Woodward, Subdirector
United Steelworkers of America
960 East Main, Suite B
Auburn, Washington 98002

APPEARING AS WITNESSES FOR THE EMPLOYER:

P C, Phlebotomist, Mid-Columbia Medical Center
K E, Northwest Aluminum, Human Resources Assistant
R C, Jr., Med Corp, Inc.
Dr. J A. B, Medical Review Officer
J S, Northwest Aluminum, Cast House Manager
W E. B, Northwest Aluminum, Human Resources Director

APPEARING AS WITNESSES FOR THE UNION:

M L. M, Employee
R E. G, Employee, Local 9170 Officer
J N, Grievant
D G. N, Employee, Local 9170 Officer
R H, Employee, Local 9170 Grievance Chair
M K, Employee, Local 9170 President

BACKGROUND

The Northwest Aluminum Company (hereafter "the Employer") and the United Steelworkers of America, Local 9170 (hereafter "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Sylvia Skratek in The Dalles, Oregon on March 15, 2002. During a pre-hearing conference the parties agreed that the issue was properly before the Arbitrator and should be decided on its merits.

At the hearing the parties had full opportunity to make opening statements, examine and cross examine witnesses, introduce documents, and make arguments in support of their positions. A record of the proceedings was made by Marijane Simon, CSR, RDR, a court reporter with Schmitt & Lehmann, Inc. The transcript of the proceedings was provided to the Arbitrator.

The parties were provided the opportunity to submit their closing arguments in the form of post hearing briefs which were received in a timely manner. The record was closed as of May 6, 2002. The award in this case is based upon the evidence, testimony, and arguments put forward during the hearing and the arguments presented by the parties in their post hearing briefs.

STATEMENT OF THE FACTS

The Employer operates a reduction facility located in the Dalles, Oregon. James N, the Grievant, was employed at the casthouse at the facility as a casthouse assistant. The Union represents the hourly employees at the facility.

In late 1997, the Employer adopted a substance abuse policy. The Union objected to the policy and demanded the negotiation of the effects of the substance abuse policy. The parties reached agreement on a revised policy that was ratified by the Union membership and became effective December 21, 1998. (Em. Ex. #1) The Grievant acknowledged receipt of the revised policy on February 8, 1999. (Em. Ex. #3)

The substance abuse policy contains provisions by which some employees become part of a random and periodic testing pool. Grievant N was notified on February 8, 1999 that he had been "placed in the random and periodic testing pool for a period of three (3) years under the following circumstances.

3. Employees testing positive for cause or reasonable suspicion. including those employees already in a program." (Em. Ex. #6, p.4)

At approximately 10:30 AM on August 23, 2001, P C arrived at the Employer's personnel office. C is a certified drug screen collector with Mid-Columbia Medical Center in The Dalles. She had conducted random drug screens for the Employer a number of times and on this date, she followed her usual procedure. She provided K E, the Human Resources Assistant, a list of the employees to be tested. E called the supervisors of those employees and instructed them to bring the employees to the human resources office for testing. Grievant N was the first employee to arrive.

C had the Grievant fill in the appropriate paperwork, took him into the bathroom, placed bluing in the toilet, instructed him to wash his hands, provided him with a urine container, left the bathroom and closed the door. The Grievant emerged from the bathroom and stated that he could not produce any urine. Pursuant to policy, C instructed the Grievant to sit at the desk next to E. Under the policy, if an employee cannot produce

urine they are directed to drink fluids up to, but nor more than 40 fluid ounces. C gave the Grievant 32 ounces of water and instructed him to drink it and let her know when he could produce urine. The Grievant made a second unsuccessful attempt to produce urine at 1:00 PM. At the end of three hours, the Grievant made one last unsuccessful attempt to produce urine.

At the conclusion of the three hours, the Grievant spoke with R C who was employed with Med Corp, a provider of various medical services to the Employer. C reviewed the provision in the substance abuse policy that states:

> If after a period of three hours the donor is still unable to provide an adequate specimen, testing must be discontinued, and the Medical Review Officer will be notified. (Em. Ex. #1, p.9)

In the presence of the Grievant and Union Representative D N, C placed a call to the Medical Review Officer (MRO) Dr. B. B instructed C to make an appointment within five days for the Grievant to undergo a medical evaluation to determine whether there is a verifiable, legitimate medical explanation for the donor not being able to produce urine. C arranged an appointment for the next day, August 24th, however the Grievant was unavailable on that day. Another appointment was made for August 27th.

The Grievant was evaluated by urologist Dr. Michelle Smith on August 27th. Her report states:

> The patient claims dehydration as the cause of his being unable to provide the specimen. No GU issues are identified during today's exam as being a potential cause for this. (Un. Ex. #22, pp. 1-2)

Based on Dr. Smith's report, Dr. B concluded that the Grievant's failure to produce urine constituted a refusal. B could find no medical explanation that was verifiable as to why the Grievant could not produce a urine sample. B notified Human Resources Director B that the Grievant's failure to produce a sample should be treated as a refusal. (Em. Ex. #10) Relying on the negotiated language of the policy and B's conclusion that the Grievant's failure to produce urine constituted a refusal, B terminated the Grievant. (Em. Ex. #13) The reason cited for the discharge was "refusal to take a substance abuse test, which is considered insubordination".

A grievance was filed on behalf of N claiming that the Company did not have just cause to terminate his employment. (Jt. Ex. B) The parties were unable to resolve their differences and the matter was submitted to arbitration.

STATEMENT OF THE ISSUE

The parties agreed to the following statement of the issue:

Was the Grievant, J N, discharged for cause? If no, what is the remedy?

POSITION OF THE EMPLOYER

The policy negotiated and agreed to by the parties entrusts the Medical Review Officer (MRO) with the determination as to whether or not an employee's failure to provide a urine sample constitutes a refusal to test. The MRO has the medical training and knowledge to evaluate and assess the relevant medical information and, as a neutral third party, is in a position to make the decision on purely medical grounds. The Employer argues that the Union has shown no basis for challenging the MRO's conclusion that the Grievant's failure to provide a urine sample constitutes a refusal to test. The procedures contained within the negotiated policy were followed in this matter. Even if the MRO's decision is not considered conclusive, the Employer urges the Arbitrator not to disturb it absent any compelling evidence that it is wrong. There is no such evidence. Even the medical reports submitted by the Union support the MRO's position. Dr. Smith's report concludes: "No GU issues are identified...as being the potential cause" (Un. Ex. #22, pp.1-2). Dr. Carter's chart notes state: "Since he has not had any difficulty with voiding prior to this one episode and none since, it is unlikely that he has a urological problem." (Un. Ex. #20)

The Employer doubts the Grievant's explanation of dehydration for his failure to urinate and emphasizes that this is the only reason ever put forward by the Grievant. The testimony of the MRO is uncontradicted that anyone who would be so dehydrated that he could not produce any urine after three hours and 40 ounces of water would be unable to

stand up and would most likely need immediate medical care. In this case, a certified paramedic who was on sight with the Grievant on the day of the attempted testing did not see anything abnormal about the Grievant's appearance. The Grievant made no contention that he could not stand up and did not request medical attention. In fact, he declined a medical appointment for the following morning. Based upon these facts, the Employer maintains that even if the MRO's conclusion were subject to review, there is no basis for overturning or challenging his conclusion.

The Employer responds to each of the Union's arguments and urges the Arbitrator to find that all of them are without merit. First, the argument that the medical evaluation was invalid because it was conducted too long after the test is baseless. The Grievant declined an evaluation scheduled for the following day and instead chose to be evaluated on August 27th. The evaluation on August 27th was within the five-day period required by Dr. B. The evaluation was scheduled in the presence of the Grievant and his Union Representative N. Neither one of them objected to the August 27th evaluation. The Grievant cannot now assert that the evaluation is invalid when he made the choice to delay the evaluation. Second, the argument that the Grievant had no motive to refuse to test ignores the fact that a positive result would have extended for another three years his time in the testing pool and exposed him to continued random testing and to suspension pending any treatment and release to return to work. Regardless of the Grievant's motivation, the policy provides that "The refusal of an employee to take a drug or alcohol test will be considered insubordination and the employee will be terminated". (Em. Ex. #1, p.9) Third, the argument that the Grievant could not produce urine because of anxiety and stress is defeated by the Grievant's own statement to Dr. Smith that "dehydration was the only reason he was not capable of giving a sample." (Un. Ex. #22) This argument is further weakened by the fact that the Grievant was able to produce urine for at least eight other urinalysis drug tests. (Em. Ex. #6) Even the Grievant stated "he has not had any difficulty with voiding prior to this one episode and none since." (Un. Ex. #20) Fourth, the Union defies the plain language of the substance abuse policy in its argument that the Employer should have offered the Grievant another form of test such as a hair test or blood test. Fifth, the fact that there was one oversight in the hundreds of tests

administered under the policy does not provide any basis for showing overall arbitrariness or inconsistency in the application of the policy. Finally, the Employer claims the Union's three remaining arguments do not support a finding that the outcome of the Grievant's testing would have been any different if: the EAP committee had not fizzled and that the one hour of training per year were provided; the Grievant had been taken to the hospital for testing; or consideration was given to the fact that other employees had taken all or part of the three hours to produce urine.

The Employer urges the Arbitrator to find that there is no basis for disturbing the MRO's decision. The substance abuse policy states that refusal "will be considered insubordination and the employee will be terminated". (Em. Ex. #1, p. 9) This language leaves no room for any argument that discharge is too severe or that a lesser penalty should be imposed. For all of the stated reasons, the grievance should be denied.

POSITION OF THE UNION

The Union emphasizes that the substance abuse policy was intended to provide clear guidelines and consistent procedures for handling incidents of employees' use of alcohol, drugs or controlled substances that affect job performance and provide for a safe working environment. Additionally, the policy was intended to provide education, awareness and assistance for drug issues while maintaining respect for individuals. It contains definitions, prohibitive behavior, Employer and Union obligations, and enforcement. It also addresses disciplinary actions. The policy like any other new contract language, can produce issues that need to be addressed on a regular basis such as confidentiality, sample collection, positive testing levels, adulterated samples and shy bladder conditions. The fact is that the policy contains language that is flawed, nonspecific, or otherwise ambiguous.

The Union directs the Arbitrator to several sections of the policy that it believes are ambiguous and are directly relevant in this case. In Employer Exhibit 1, page 4, under the heading Enforcement, the Union cites *"refusal to cooperate may subject the employee to discharge for insubordination"*. In the same exhibit on page 5, under the

heading Testing, the first paragraph states *"If an individual refuses to submit to an alcohol and/or controlled substance test the individual will be subject to discharge for insubordination".* Later in the exhibit, at page 9, under the heading Refusal to Test, it states, *"The refusal of an employee to take a drug or alcohol test will be considered insubordination and the employee will be terminated".* According to the Union, these three areas of the policy lead to different conclusions regarding a possible penalty: an employee *may* be subject to discharge (which is not automatic), or an employee *will* be terminated. This is sufficient ambiguity to support a finding that the discharge should not be automatic. Additionally, the Union emphasizes that the policy provides for other testing options including breath, saliva, blood or other samples but inexplicably none of these tests were attempted with the Grievant. Such language is sufficiently nonspecific or otherwise ambiguous to support a finding that the discharge should not be automatic.

The Union further argues that the evaluation conducted by Dr. Smith occurred several days following the urine drug test on August 23. Her medical review only asserts that "No GU issues are identified during today's exam as being the potential cause for this". There is no evidence of a psychological review. (Un. Ex. #22) The Grievant's explanation that his inability to urinate was caused by dehydration is irrelevant since he is not a medical doctor. The fact that the medical evaluation occurred several days following the urinary difficulty leads one to question the degree of reliability necessary to sustain a discharge. The MRO's reliance on Dr. Smith's evaluation is flawed. B never directly examined the Grievant. He could not unequivocally testify that there was no reason, medical or other, that the Grievant could not provide a sample. When asked if claims of anxiety, stress or psychological issues could be identified, B testified that the rules are pretty much made as a policy matter by the DOT. The Union emphasizes that this is not a DOT policy, nor is the DOT cited in the substance abuse policy. Under the policy, at page 9, number 4, the medical evaluation is suppose to "develop pertinent information concerning whether the donor's inability to provide a specimen is genuine or constitutes refusal." (Em. Ex. #1) The Grievant did not know why he couldn't produce a sample. Dr. Smith could only verify that several days after the incident there were no GU issues. The MRO based his conclusion on information provided to him by an evaluation

conducted several days after the incident and without his direct examination. The Union argues that the only pertinent information is the fact that on August 27th, four days after the incident, no GU issues could be identified. This is not sufficient evidence to sustain a discharge.

The Union points out that the Grievant was sufficiently concerned that he might have an underlying problem to obtain a medical examination by a personal physician. In Dr. Carter's report of that examination, one finds the Grievant's explanation of the events of August 23rd which is consistent with the testimony provided by him and several other witnesses.

> The night prior to the submission request he had consumed approximately 12 beers and had had little water, went to work, and was unable to eat or drink for a period of time, eventually was allowed to drink some water but by that time was nauseated and couldn't consume sufficient water to generate a urine specimen...He states that he was relatively dehydrated and simply was unable to generate a specimen. ...He is concerned that he has some kind of urological problem because of his inability to produce a specimen. (Un. Ex. #22)

Obviously, the Grievant himself was trying to understand why he could not provide a specimen on August 23rd.

The Union emphasizes that a basic principle underlying most disciplinary procedures is that management must have just cause for discharge. In the application of just cause an employer must establish an internal consistency which is absent in this case. Testimony provided by M M established that on August 15, 2000, he was at the testing site for three hours, was unable to provide a sample and was sent back to work. M didn't even receive a warning for failing to provide a sample. He was simply listed as "not collected". (Un. Ex. #18) B became aware of the M incident at the third step of the grievance procedure but was unable to find any documentation. B does not even mention the M incident in the third step response, yet after the Union's request for information, the information suddenly appears in the files. The Union asserts that such behavior by the Employer leads to the conclusion that it failed to do a complete investigation of all of the facts and was lax in enforcement of the substance abuse policy. The Union argues

that the Employer cannot now use a change in management personnel as an excuse for lax enforcement.

In conclusion, the Union maintains that the Grievant never refused to take a substance abuse test. No one can refuse to offer something that is not in their control to give. N was simply unable to provide a urine specimen. He remained at the collection site, drank as much fluid as possible given the fact that he was ill, and when the test was terminated, he accepted the referral for a medical exam and allowed the Employer access to all pertinent medical information. The Union requests that the Arbitrator uphold the grievance and reinstate the Grievant to his position at Northwest Aluminum without loss of seniority. The Union further requests that the Grievant be made whole for any lost wages or benefits.

APPLICABLE LANGUAGE

The Collective Bargaining Agreement (Jt. Ex. A) provides in pertinent part:

ARTICLE 4 ***Seniority***

4.04 An employee will cease to have seniority and his name will be removed from the seniority list in the event that:
A. He is discharged for cause (not reinstated)

There is no dispute that the parties negotiated the terms of a Substance Abuse policy which provides discipline for policy offenders. Nor is there any dispute that the Employer must have cause for any discipline, up to and including discharge, administered under the policy. Pertinent provisions of the policy are stated below.

Northwest Aluminum

Practices and Procedures

Subject:

SUBSTANCE ABUSE **No: 3.4.1**

PROHIBITED BEHAVIOR

The following conditions and activities are expressly prohibited. Violation of the following will subject an employee to disciplinary action up to and including termination of employment.

The use, purchase, transfer, possession, storage or being under the influence of alcohol, and/or controlled or illegal substances...

1. Reporting for work after having consumed alcohol or used illegal drugs or controlled substances at a time, or in such quantities, or in a manner that may impair work performance. For purposes of this Practice and Procedure, having any detectable level, above the cut-off level, of an illegal or controlled drug or alcohol in one's system will be considered a violation.

EMPLOYEE OBLIGATIONS

2. Employees will comply with the drug-testing program

COMPANY AND UNION OBLIGATIONS

The Union will establish an Employee Assistance Committee (EAP) that will be proactive. The committee will receive initial and annual training paid for by the Company. The goal of the committee will be to provide any assistance possible for employees of Northwest Aluminum Company. In addition, the committee will be charged with arranging for and providing education and awareness programs, with the Company being the sponsor of such events and programs. Training and education activities of the Union EAP committee, which are funded by the Company, will be subject to mutual agreement by the joint Union/Company EAP committee.

COMPANY OBLIGATIONS

3. The Company will ensure that all personnel and their supervisors are given a minimum of one hour of training per year on substance abuse, the affects of drugs and alcohol on work performance, the drug and alcohol testing process and employee assistance programs (EAP).

ENFORCEMENT

Northwest Aluminum Company asks each individual to voluntarily comply with this Practice & Procedure for their own safety, for the safety of other individuals and for the good of the company. Refusal by any employee to submit to any inspection or refusal to cooperate may subject the employee to discharge for insubordination. Enforcement of this Practice & Procedure includes but is not limited to:

2. Obtaining breath, urine, saliva, blood or other samples for testing for alcohol or drugs.

TESTING

If an individual refuses to submit to an alcohol and/or controlled substance test the individual will be subject to discharge for insubordination.

2. *Random & Periodic Testing Pool*- The Company's contractor will randomly select employees from the pool...The supervisor must ensure that the employee reports for testing as soon as feasible.

Employees would be included in a random and periodic testing pool for a period of three (3) years under the following circumstances.

(a) Any written disciplinary action or higher level of discipline. *
(b) All employees with accidents, with the exception of foreign bodies in the eye, requiring outside medical treatment.*,**
(c) Employees testing positive for cause or reasonable suspicion, including those employees already in a program

*Any employee who is placed in the pool...and who requests a hair test will be taken out of the pool providing the hair test is negative for illegal substances.

SPECIFIC ISSUES

"Shy Bladder" Collections: If the donor tells the collector when he/she reports for a collection that they cannot provide a specimen, the collector will continue the process and request the donor to try to provide a specimen. If the donor demonstrates his/her inability to provide a specimen at the time the donor returns from the restroom to the collector and if he/she provides either no specimen or a specimen of insufficient quantity the collector will:

1. Mark on the original custody and control form that an attempt was made with insufficient quantity and note the time.
2. Direct the donor to drink fluids, up to, but not more than 40 fluid ounces and remain at the collection site.
3. After a reasonable time (within a three hour time limit,) direct the donor to attempt to provide another specimen.
4. If after a period of three hours the donor is still unable to provide an adequate specimen, testing must be discontinued, and the Medical Review Officer will be notified. The MRO shall then refer the individual for a medical evaluation to develop pertinent information concerning whether the donor's inability to provide a specimen is genuine or constitutes a refusal.

Refusal to Test: The refusal of an employee to take a drug or alcohol test will be considered insubordination and the employee will be terminated.

ANALYSIS

In making a final determination in this case, the Arbitrator will utilize the well-established two areas of proof involved in the arbitration of discharge and discipline cases. The first such area concerns proof of wrongdoing; a responsibility that is allocated to the employer. The second such area of proof concerns the issue of whether the penalty assessed by management should be upheld or modified. The discharge of Mr. N will be discussed within this analytical framework.

Proof of Wrongdoing

The Employer maintains that the Union has shown no basis for challenging the MRO's conclusion that the Grievant's failure to provide a urine sample constitutes a refusal to test. The Union argues that the Grievant never refused to take a test but was

simply unable to provide a urine specimen. After reviewing all of the evidence and testimony, the Arbitrator finds that none of the Grievant's explanations for his inability to produce urine and none of his claims regarding the medical evaluation provide any reason to overturn the Medical Review Officer's determination that his inability to provide a specimen constitutes a refusal to test.

First, the Grievant claims that he was dehydrated, in part because of his consumption of alcohol the night before. The Arbitrator will not contradict the finding of the MRO who stated that if the Grievant were so dehydrated that he were unable to produce urine after three hours and the intake of fluids, then he would be unable to stand. There was no indication by any of the witnesses on the date of the test that the Grievant needed any medical attention. In fact, the Grievant himself declined to have a medical evaluation conducted on the following day.

Second, the Grievant claims that he was under stress and could not produce urine however there is no dispute that the Grievant has had no difficulties producing urine for testing prior to this date, had produced urine prior to the test (Em. Ex. #14, page 1), and has had no difficulties urinating since the test. (Un. Ex. #20)

Third, the Union maintains that alternative methods of testing should have been offered to the Grievant however the Arbitrator concurs with the Employer's contention that there is no requirement to make such an offer. In fact, the policy clearly provides for the testing of urine at the section entitled TESTING, subsection 3. *Drug Testing* and at the section entitled SPECIFIC ISSUES subsection Drug Testing. (Em. Ex. #1, pp. 6 and 8) The Union is correct that the policy refers to different testing methodologies including breath, saliva, blood or hair testing (Em. Ex. #1, pp. 4 and 5) however there is nothing within the policy that mandates that the Employer must offer an alternative test to an employee who is unable to produce urine. The policy does contain a provision that enables employees to request a hair test if they have been placed in the testing pool because of "written disciplinary action or higher level of discipline" or because of an accident. (Em. Ex. #1, p.5) The Grievant however did not meet either of these placement

requirements. Furthermore, even though he did not meet the requirements and there would have been no obligation for the Employer to comply, the Grievant did not request a hair test or any other alternative testing methodology.

Fourth, the Union argues that the medical evaluation was conducted several days following the attempted testing thereby leading one to question its degree of reliability. While there is nothing within the policy that states how soon such an evaluation must be conducted, the Arbitrator found the testimony of Dr. B to be persuasive that the conduct of a medical evaluation within five days of the attempted testing is timely. He based his conclusion on the DOT regulations that provide for employees to obtain within five days, an evaluation from a licensed physician, acceptable to the MRO (49 CFR §40.193(c)). While the Union is correct that the policy does not incorporate DOT regulations, the Employer, in determining what constitutes a reasonable time period, may consider federal drug testing regulations. The Union is within its rights to argue that four days does not constitute a reasonable time period and that the DOT regulations are not controlling however the Arbitrator cannot ignore the fact that the Grievant declined an appointment on the day after his failure to produce urine. The next available appointment was four days later which he accepted. Having declined an earlier appointment, the Grievant cannot now claim that the second appointment was untimely.

Fifth, the Union emphasizes that Dr. B never examined the Grievant and testified that he could not unequivocally state that there was no reason, medical or other, that the Grievant could not produce a sample. The Arbitrator finds however that the policy provides for the MRO to refer an individual "for a medical evaluation" which is precisely what happened in this case.

Sixth, the Union's argument that the Grievant did not know why he couldn't produce a specimen and that no consideration was given to claims of anxiety, stress or psychological issues cannot prevail. According to the Union the only pertinent information developed concerning the Grievant's inability to provide a specimen is the fact that on August 27th, four days after the incident, no GU issues could be identified.

Having found that the medical evaluation was conducted in a timely manner after a delay requested by the Grievant, the Arbitrator will not substitute her judgment for the findings of the medical professionals. Neither Dr. Smith (Un. Ex. #22) nor Dr. Carter (Un. Ex. #20) indicate any medical explanation for the Grievant's inability to produce a specimen. Dr. B's reliance on the evaluation conducted by Dr. Smith is not unreasonable. She is a urologist with the Providence Hood River Memorial Hospital in Hood River, Oregon. There was no evidence or testimony that claimed she was unqualified to conduct the medical evaluation nor was there any evidence or testimony that she was in any way biased against the Grievant. She conducted her evaluation and submitted her findings to Dr. B. Dr. B is a highly credentialed Medical Review Officer. (Em. Ex. #11) He reviewed Dr. Smith's findings and concluded that the Grievant's test should be treated as a refusal. (Em. Ex. #10) The MRO's use of the medical evaluation to determine whether or not "the donor's inability to provide a specimen is genuine or constitutes a refusal" is provided in the policy. There was no evidence or testimony presented at the hearing which would compel the Arbitrator to overturn or in any way modify the MRO's determination.

The Arbitrator appreciates the Union's aggressiveness in its defense of the Grievant however the Arbitrator finds that the Employer has adhered to every aspect of the negotiated policy. The Employer properly followed all of the provisions found under the "Shy Bladder" Collections at page 8 of the policy. The Employer turned to the Medical Review Officer to make a determination regarding the inability to provide a specimen. The Medical Review Officer arranged for a medical evaluation by a urologist. After all steps were followed, there was no verifiable reason for the Grievant's inability to produce a specimen. There was no reason for the Employer to conclude anything other than the Grievant had refused to take a drug test.

The Union emphasizes that the Grievant had no motivation to refuse to take a drug test since such refusal would subject him to discharge and if he had taken the test he would not have been discharged. The Arbitrator however notes that on the day of the testing the Grievant mentioned the fact that another employee, M M, had, on a previous

occasion, not been able to produce a specimen and after three hours they just let him go back to work and nothing happened. (Un. Ex. #19) The Grievant testified to this knowledge at the hearing:

> Q. (By Mr. Woodward) Union Exhibit 19. These have been introduced as notes from K E. And at the bottom of that you talk about M M not being able to go after three hours; and after three hours, they let him go back to work and nothing happened. Did you state that?
>
> A. Yeah. I stated that after the testing was over with.
>
> Q. Because you weren't allowed to go back to work?
>
> A. Yeah. I wasn't allowed to go back to work, and I wasn't allowed to eat anything. I was stating that, yes.
>
> Q. Okay. So you knew about this other occurrence with Mr. M?
> A. Yes.

The Grievant's positive drug tests on May 14, 1998, December 8, 1998 and December 21, 1998 and his placement in the random and periodic testing pool because of these positive tests, would be sufficient motivation for him to find a way to avoid a drug test if he thought he could do so by simply claiming an inability to produce a specimen. The Grievant may have believed that M's escape from consequences would be repeated if he could simply avoid the test. The Employer has administered hundreds of tests under the negotiated policy. In one instance, an employee was not subjected to the requirements of the shy bladder provision of the policy. M may have escaped the consequences due to the Employer's oversight, but the Employer is correct that one oversight is insufficient to find that the Employer has been inconsistent or arbitrary in the administration of the policy.

Based on all of the foregoing, the Arbitrator finds that the Employer has adhered to the terms of the negotiated substance abuse policy and under the terms of that policy properly concluded that the Grievant's inability to produce urine constituted a refusal to test. The Employer has met its burden of proof of wrongdoing.

Penalty

While the Arbitrator finds that the Employer sustained its burden of proof of wrongdoing, a final question remains unanswered: Was the degree of discipline administered appropriate?

To answer this question, the Arbitrator reviewed the philosophy enunciated initially by Arbitrator Whitley McCoy in 1945 (LA 160, 165):

"If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it...The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved...".

The Arbitrator should not substitute his/her judgment for that of an employer unless the employer has acted unfairly given the circumstances of the case. Where that has happened, the Arbitrator has an obligation to modify the decision unless prohibited by the collective bargaining agreement from doing so. Failure to modify the decision would exempt all employer disciplinary decisions from review once all procedural requirements have been met.

Whitley's philosophy must be reconciled with the applicable language of the Collective Bargaining Agreement and the Substance Abuse Policy:

A. He is discharged for cause (not reinstated)

Refusal to Test: The refusal of an employee to take a drug or alcohol test will be considered insubordination and the employee will be terminated.

The Collective Bargaining Agreement provides that discharge shall be for cause. The negotiated Substance Abuse Policy clearly provides that cause may include the refusal of an employee to take a drug or alcohol test. A refusal is considered insubordination by an employee. Notice is at the heart of insubordination cases. If an employee is to be disciplined for refusing to obey an order, the order itself must be clear and specific enough to let the employee know what is expected and the employee must be

told exactly what the penalty will be if he or she does not comply. In this case, the Substance Abuse Policy leaves no doubt that a refusal to take a drug or alcohol test will lead to termination.

According to the Union there is sufficient ambiguity within the policy to lead to the conclusion that discharge is not appropriate in this case. The Union maintains that the parties have jointly addressed several issues regarding the policy since its implementation that constitutes a practice in interpretation of ambiguous language that cannot be unilaterally disregarded. It argues that it is now apparent that there are ambiguities within the shy bladder provision that must now be jointly addressed by the parties. The Union argues that the Grievant did not refuse to take the test but rather he simply was unable to provide a specimen. The inability to provide a specimen should not be treated as a refusal to comply. The Union refers the Arbitrator to several provisions within the policy that it believes are ambiguous. The Arbitrator has reviewed the cited provisions and finds that while the language is permissive in two of the three cited provisions, those two provisions place the employees on notice that any "refusal to cooperate" (page 4) or any refusal "to submit" (page 5) may subject the employee to discharge for insubordination. The third provision (page 9) clearly states that a refusal to take a drug test "will be considered insubordination and the employee will be terminated." There is no uncertainty as to what might happen to any employee who refuses to cooperate, refuses to submit, or refuses to take a drug test. That employee may be discharged. The Grievant was provided with the policy on February 8, 1999. (Em. Ex. #3) He was placed in the testing pool on that same date. (Em. Ex. #6 page 4) The Arbitrator finds that the Grievant had unambiguous and adequate notice that a refusal to cooperate, refusal to submit, or a refusal to take a drug test could result in his termination. The Arbitrator does not disagree with the Union's contention that two of the three cited provisions allow for something less than discharge and there may be mitigating circumstances under which the Employer would administer a lesser penalty. In this case, the Union would have the Grievant's inability to produce urine considered as being such a mitigating circumstance. The Arbitrator considered all of the Union's arguments regarding the Grievant's inability to produce urine and found all of them to be without merit. There is nothing in the record

that will allow the Arbitrator to find that the Grievant's refusal to test warrants anything less than discharge. For the Arbitrator to find otherwise would wreak havoc with a reasonable negotiated Substance Abuse Policy. It would open the door for others to simply claim that they were unable to produce a urine sample in the hope that they too could escape the consequences of the negotiated policy. The record in this case does not show one scintilla of evidence to support any finding that the Grievant was physically and/or emotionally unable to produce urine. He produced urine prior to and after the testing period without any difficulty. He had adequate notice of the policy and its consequences. The policy clearly states "The refusal of an employee to take a drug or alcohol test will be considered insubordination and the employee will be terminated". The policy provides that the MRO will develop the pertinent information as to whether the inability to provide a specimen is genuine or constitutes a refusal. In this case, the MRO found that it constituted a refusal which triggered the termination clause of the policy. Even if the Arbitrator were to consider the two other provisions cited by the Union as being ambiguous regarding the consequences of either a "refusal to cooperate" or a "refusal to submit" the fact remains that both of those provisions also put the employee on notice that he or she may or will be subject to discharge for insubordination. There may be occasions on which the Employer would find mitigating circumstances to administer a penalty less than discharge however this is not such an occasion. The Arbitrator cannot find any evidence that even suggests that the Employer has not acted in good faith upon a fair investigation or that the Employer in any manner was capricious and/or arbitrary. Therefore she will not disturb the penalty imposed in this case.

CONCLUSION

Based on all of the foregoing, and for the reasons set forth in the analysis above, the Arbitrator will not overturn the Medical Review Officer's determination that the Grievant's inability to provide a specimen constituted a refusal to test. The penalty imposed by the Employer will not be disturbed. The Arbitrator finds that the Grievant, J N, was discharged for cause.

The grievance is hereby dismissed.

Respectfully submitted on this 3rd day of June, 2002 by

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Sylvia P. Skratek, Arbitrator