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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 GEORGIA-PACIFIC GYPSUM, LLC,

12 Plaintiff,

13 v.

14 INTERNATIONAL BROTHERHOOD
15 OF TEAMSTERS LOCAL 117 and
ARTHUR POLO,

16 Defendants.

CASE NO. C11-5497BHS

ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

17
18 This matter comes before the Court on Defendant International Brotherhood of
19 Teamsters Local 117's ("Union") motion for summary judgment (Dkt. 11) and Plaintiff
20 Georgia-Pacific Gypsum, LLC's ("GP"), cross-motion for summary judgment (Dkt. 14).
21 The Court has reviewed the briefs filed in support of and in opposition to the motions and
22 the remainder of the file and hereby grants GP's motion and denies the Union's motion
23 for the reasons stated herein.
24

25 **I. PROCEDURAL HISTORY**

26 On June 29, 2011, GP filed a complaint against the Union requesting that the Court
27 vacate an arbitration award. Dkt. 1.
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1 On September 9, 2011, the Union filed a motion for summary judgment. Dkt. 11.
2 On September 21, 2011, GP responded and filed a cross-motion for summary judgment.
3 Dkt. 14. On October 7, 2011, the Union replied to its motion and responded to GP's
4 motion. Dkt. 20. On October 14, 2011, GP replied to its motion. Dkt. 21.

6 II. FACTUAL BACKGROUND

7 The relevant facts are not disputed. Arthur Polo ("Polo") has worked for GP for
8 over 25 years. Polo has never been disciplined for violating any company policy, has no
9 history of drug or alcohol abuse, and has no record of being intoxicated on the job.

10 The weekend prior to September 27, 2010, Polo visited a family friend who had
11 been recently diagnosed with terminal cancer. Polo admits that he drank and snorted a
12 small amount of cocaine with the friend. On September 27, 2010, Polo submitted to a
13 random drug test. Polo failed the test and a subsequent retest of Polo's sample confirmed
14 the failure.

15
16 On October 12, 2011, GP terminated Polo's employment. GP contends that it was
17 contractually bound to terminate Polo pursuant to Article 19 of the Collective Bargaining
18 Agreement ("CBA") between the Union and GP, which provides as follows:

19 Georgia-Pacific is committed to providing a safe workplace for all
20 employees. It is in the interest of the employees, the Company, the Local
21 Union and the community that the Tacoma, WA facility remains free from
22 employees reporting for work or working under the influence of illegal
23 drugs, controlled substances and/or alcohol. This policy is considered a
24 living document and is subject to change as applicable with Federal and/or
25 State law. The Union will be notified of changes as they occur.

26 Elements of the Drug Testing plan include:

- 27 (1) An employee assistance plan
- 28 (2) A Medical Review Officer review of all positive results
- (3) Random testing procedure
- (4) Reasonable suspicion, for cause, and post accident testing
- (5) **All positive test results will result in termination**

Dkt. 15, Declaration of Scott G. Seidman ("Seidman Decl."), Exh. 1 at 22 (emphasis
added).

1 **C. The Parties’ Motions**

2 GP contends that the Decision must be vacated because it did not draw its essence
3 from the CBA and the arbitrator dispensed “his own brand of industrial justice.” Dkt. 14
4 at 5. The Court agrees. Although sympathetic to what the arbitrator deemed “excessive”
5 punishment, the Court finds that the Decision does not draw its essence from the parties’
6 CBA. The arbitrator’s desire to enforce a just punishment based on the facts, or dispense
7 his own brand of justice, is the only plausible explanation for the Decision and his award
8 of conditional reinstatement.

9 The arbitrator determined that “just cause” was an element of the CBA’s drug
10 policy. *See* Decision at 4–5. Under Ninth Circuit case law, an arbitrator decision “draws
11 its essence from the CBA when it is based on language in the CBA.” *SFIC Props., Inc.*
12 *v. District Lodge No. 94*, 103 F.3d 923, 925 (9th Cir. 1996). The arbitrator is deemed not
13 to have been construing or applying the CBA if his interpretation fails to qualify as a
14 “plausible interpretation of the contract.” *Phoenix Newspapers, Inc. v. Phoenix Mailers*
15 *Union, Local 752*, 989 F.2d 1077, 1083 (9th Cir. 1993); *accord SFIC Props., Inc.*, 103
16 F.3d at 924. An arbitrator’s award is reversible when the arbitrator “manifestly
17 disregard[ed]’ the contours of the agreement.” *Phoenix Newspapers*, 989 F.2d at 1081
18 (*quoting Stead Motors of Walnut Creek v. Auto. Machinists Lodge. No. 1173*, 886 F.2d
19 1200, 1205 n. 6 (9th Cir. 1989) (en banc)); *see also United Food & Commercial Workers*
20 *v. Foster Poultry Farms*, 74 F.3d 169, 173 (9th Cir. 1995) (“A court must limit its review
21 to whether the arbitrator’s solution can be rationally derived from some plausible theory
22 of the general framework or intent of the agreement.”).

24 In this case, the language of the CBA is clear and unambiguous: “All positive test
25 results will result in termination.” The arbitrator, however, found that this clause placed
26 the burden on GP to show just cause for Pope’s termination. Neither the arbitrator nor the
27 Union cite a provision of the CBA that lends a plausible explanation to the arbitrator’s
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1 amendment. Therefore, the arbitrator’s amendment is not based on any specific language
2 in the CBA.

3 The Union argues that the amendment was based on the general framework and
4 intent of the agreement. The first element of the CBA’s drug testing plan is an “employee
5 assistance plan.” With regard to this element, the Decision provides as follows:

6 The Arbitrator questions who can take advantage of the “employee
7 assistance plan” if “all positive test results will result in termination.” It
8 does not appear that a person testing positive could take advantage of the
employee assistance plan and/or being given a second or last chance.

9 Decision at 8. If the employee assistance plan was for employees who failed a drug test
10 as well as employees who voluntarily sought assistance with their problem, then there
11 would be no need for the explicit provision that “all positive tests will result in
12 termination.” Regardless, it is not a plausible interpretation of the general framework of
13 the agreement to vitiate an employer’s bargained for right, termination for positive results
14 of a drug test, by expanding the employee’s bargained for right, the assistance program.

15 The Union also argues that the arbitrator based his decision on his “substantial
16 experience as a labor arbitrator. . . .” Dkt. 11 at 14. The Ninth Circuit has held that an
17 award may also be upheld if it is based on the arbitrator’s understanding of industry
18 practices. *Federated Dept. Stores v. United Foods & Commercial Workers Union, Local*
19 *1442*, 901 F.2d 1494, 1497 (9th Cir. 1990). An arbitrator is “not confined to the express
20 terms of the contract” but may also consider the “industrial common law” which “is
21 equally a part of the collective bargaining agreement although not expressed in it.” *Id.*
22 “The arbitrator’s finding is not beyond the essence of the contract if it is derived from the
23 arbitrator’s unique expertise.” *Id.*

24
25 In this case, the only unique aspect of the matter that was cited by the arbitrator
26 was the severity of Polo’s punishment compared to his pristine work record. On this
27 issue, the arbitrator stated as follows:
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1 This Arbitrator finds this case unique. It is the first time in 39 years
2 of serving as an arbitrator that I have encountered a case where a 25 year
3 employee with an unblemished work record is being terminated. There was
4 no negative testimony with regard to Mr. Polo. There was no discipline
5 problems or absenteeism. It appears he performed his job well and valued
6 his job. It is this Arbitrator's opinion that Mr. Polo's work and performance
7 record of 25 years with the Company overrides his off-duty mistake and
8 termination in this case is excessive punishment.

9 Decision at 9. The arbitrator failed to show that his implementation of just cause was
10 even remotely based on "industrial common law" or unique employment expertise. The
11 clear intent of the arbitrator's decision was based on Polo's unique circumstance.
12 However, amending or altering the CBA based on a unique set of facts is not an action
13 that derives its essence from the CBA.

14 Furthermore, the non-precedential nature of the Decision supports the conclusion
15 that the arbitrator sought to enforce his own brand of justice. Individual justice is the
16 only plausible explanation for an arbitrator to significantly alter or amend a CBA, which
17 applies to every Union employee at GP, only to conclude that the alteration or amendment
18 is non-precedential and "shall not be used by the Union or Employer as an example at a
19 later date." If "just cause" was drawn from the essence of the drug treatment provision,
20 then it would apply to Polo, an employee with greater tenure and a pristine record, or an
21 employee with less tenure and a record of multiple violations. This was not the case as
22 the arbitrator confined the holding only to Polo.

23 Therefore, the Court concludes that the arbitrator did not draw the "just cause"
24 standard from the CBA. The only plausible conclusion is that the standard was drawn
25 from the unique facts of the matter. While Polo's punishment seems excessive, the Ninth
26 Circuit has held that an arbitrator may not provide individual justice based on unique
27 factual situations. The Court is compelled to conclude that the arbitrator "dispensed his
28 own brand of industrial justice by making an award that does not draw its essence from
the collective bargaining agreement." *S. Cal. Gas Co.*, 265 F.3d at 792

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IV. ORDER

Therefore, it is hereby **ORDERED** that the Union's motion for summary judgment (Dkt. 11) is **DENIED** and GP's motion for summary judgment (Dkt. 14) is **GRANTED**. The arbitrator's Decision is **VACATED**. The Clerk is directed to enter judgment for GP.

DATED this 8th day of November, 2011.



BENJAMIN H. SETTLE
United States District Judge