BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
OUTAGAMIE COUNTY (HIGHWAY DEPARTMENT)	
and	Case 166 No. 40976 MA-5244
OUTAGAMIE COUNTY HIGHWAY DEPARTMENT EMPLOYEES UNION LOCAL 455, AFSCME, AFL-CIO	

Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, WI 54901, appearing on behalf of the Union.

Lindner & Marsack, S.C., Attorneys at Law, 10th Floor, 411 East Wisconsin Avenue, Milwaukee, WI 53202, by Mr. Roger E. Walsh, appearing on behalf of the County.

ARBITRATION AWARD

Outagamie County Highway Department Employees' Union Local 455, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Outagamie County (Highway Department), hereinafter referred to as the County or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission, hereinafter the Commission, to designate a member of its staff as arbitrator to hear and determine the instant grievance. The Commission designated Coleen A. Burns, a member of its staff, as Arbitrator. Hearing in the matter was held on December 1, 1988 in Appleton, Wisconsin. The hearing was not transcribed and the record was closed on April 5, 1989, upon receipt of the parties' post-hearing briefs.

STATEMENT OF THE ISSUE:

The parties have stipulated to the following statement of the issue:

> Did the County have proper cause for the two (2) days' suspension of John Scully for the May 20, 1988 incident? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

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ARTICLE I - MANAGEMENT

1.01 - Except as herein otherwise provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote, or suspend or discharge or otherwise discipline for proper cause, and the right to relieve employees for duty and to layoff employees is vested exclusively in the Employer. In keeping with the above, the Employer shall adopt and publish reasonable rules which may be reasonably amended from time to time. The Employer and the Union will co-operate in the enforcement thereof.

> 1.02 - Proper cause shall be defined to include the drinking of alcoholic beverages while on duty or loitering while on duty. In the above cases, a first offense shall be discharge and dismissal from the service. The Employer agrees that any conference or reprimand regarding an employee's job performance or any matter which will become a part of the employee's personal file shall be done after working hours to permit an employee union representation if so desired by the employee.
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BACKGROUND:

John Scully, hereinafter the Grievant, was hired into the County Highway Department as an Equipment Operator I on March 4, 1968. The Grievant was promoted to his current position, Equipment Operator II, in April of 1969. On May 20, 1988, the Grievant and another County Highway Department employe, Terry Stephani, were assigned to haul sand from the Zitzelberger pit. To accomplish this task, each operated a front end loader to remove sand from the piles at the pit and to load it on to a truck. The truck was then driven to another location where the sand was unloaded. On the morning of May 20, 1988, the Grievant and Stephani worked in an alternating sequence, while one was loading the other was hauling. There were no unusual incidents during the morning work operation.

After lunch, Stephani was assigned to perform work at another work site. The Grievant remained at the Zitzelberger pit to continue loading and hauling sand. While loading the first truck load after lunch, the Grievant became concerned that he was too close to the water. The Grievant stopped the front end loader and left the work site to ask the owner of the pit, Mr. Tony Zitzelberger, to assist him in backing the end loader away from the pit. When the two men returned to the work site, the right side of the front end loader had slid into the water.

Realizing that the two men would not be able to remove the front end loader without further assistance, Tony Zitzelberger contacted the County Highway Department. Cliff McCarthy, another Highway Department employe, was sent to the pit site with a grader to pull the loader out of the water. When the grader got stuck prior to hooking onto the loader, a Highway Department wrecker was dispatched to the area. Eventually, both the grader and the front end loader were freed.

The Grievant was suspended from work without pay for two days. The report of the disciplinary action described the incident as follows:

> John was loading sand out of the Zitzelberger pit and drove too close to the edge. The loader was half in the water and half on top of the ground. If it would have slid any more, it would have been in the water and on the bottom.

The report also described the effect of the incident on services, operations, safety and other as follows:

> If the loader would have went over into the water, John could have drowned. It took the wrecker, another loader and a grader an hour and one-half (1-1/2) to get the loader out.

The report indicated that the Grievant had had previous counsel on this matter as follows:

> 12/19/86 - Written discipline; 9/16/87 - Written discipline; and 10/20/87 - One day suspension.

On June 6, 1988, a grievance was filed challenging the suspension. Thereafter, the grievance was denied and submitted to arbitration.

POSITIONS OF THE PARTIES

Union

Section 1.01 of the Agreement provides the Employer with the right to suspend employes for "proper cause". The record clearly shows that the Employer did not have proper cause to suspend the Grievant.

In disciplinary cases, management has the burden to prove the guilt or wrong doing of the accused employe. The Employer has failed to meet its burden of proof and, therefore, has failed to establish proper cause for the suspension.

The uncontested testimony demonstrates that several other County Highway Department employes have had vehicles stuck and were not disciplined. The County's own witness, Stephani, testified that he had been stuck before and had never been formally disciplined, but rather had been rather merely "chewed out" by a supervisor. While Highway Commissioner Marsden claims that others had been disciplined in the past for vehicles being stuck, no exhibits were entered into the record to support his claim. Marsden, in fact, could recall only two oral reprimands, one of which was issued to an employe who was stuck one half mile away from where he was supposed to be working. Clearly, this is not a comparable situation.

As Marsden testified at hearing, he does not believe that the Grievant drove the loader into the water on purpose. Therefore, the County admits that the Grievant's actions do not involve willful misconduct. While the County alleges that the Grievant's conduct was negligent to such a degree as to warrant a two day suspension, the Grievant's conduct does not constitute negligence.

The Grievant was following instructions and it was his first day on the job. The Grievant had never worked at the Zitzelberger pit prior to May 20, 1988 and had not previously been required to work near water. The Grievant's only work instruction was to remove all the sand. He was not told to leave the sand next to the water for last. Since the County failed to give the Grievant instructions as to the manner in which the sand should be removed, the Grievant was left to remove the sand in the way in which he felt was appropriate. The fact that his actions lead to the outcome it did is unfortunate, but does not constitute negligence.

The County's improper site preparation and the set up of the work site contributed to the Grievant's vehicle being stuck. As the record demonstrates, there was only one direction from which the sand could be loaded. This required that the loader be driven parallel to the pond to remove the sand.

Kenny Pluger, the employe who piled the sand, testified that he felt that the site had been poorly prepared. According to Pluger, if the berms had been moved, a loader could have more easily and safely approached the sand piles in a direction perpendicular to the water. Pluger further stated that this is how the work site had been prepared at a pond at the Van Stratten pit. Pluger further testified that he had informed two supervisors, Ziegler and Weisler, that the conditions near the pond were unsafe and the sand was unstable. The supervisors made no response except to instruct him to be careful.

Zitzelberger, the owner of the pit, testified that other groups had previously hauled sand from his pit. According to Zetzelberger those groups would make a ridge of sand next to the water to prevent the type of accident that happened in this case. Even if the Grievant's actions constitute misconduct, the County must share in the blame by its lack of instructions as to how it wanted the job done and its preparation of the work site.

The Grievant's actions were reasonable given his instructions to clean up all the sand and the conditions at the site requiring him to be near the water. There is a dispute as to the size of the work area between the pond and the berms. According to Employer witnesses, the distance was anywhere from 40 to 60 feet. The Union witnesses, however, claim that the area was 20 to 25 feet. In either case, it was tight quarters to maneuver a piece of equipment the size of the Grievant's front end loader. When the Grievant realized that his front end loader was close to the ponds edge he could have attempted to drive it out without any assistance. The Grievant's decision to leave the loader and seek assistance was a reasonable action. As it turned out, there was no damage to any equipment. While the Employer argues that there was substantial down time, there was no evidence submitted as to why four supervisors were needed at the site to free one loader. Additionally, the lack of a drawbar pin on the loader added a substantial delay to the procedure.

The Grievant's version of what happened is credible. The pictures do not show that the loader was driven into the water. Rather they indicate what the Grievant has contended all along, that the sand gave way under the loader causing the right side of the vehicle to slide into the water. All the testimony regarding the stability of the sand near the water supports the Grievant's claim. To dispute the Grievant's claim, the Employer relies solely upon some pictures of questionable value taken by McDaniels, a supervisor who

was last to arrive on the scene.

In conclusion, the County did not have proper cause to suspend the Grievant. The Arbitrator should sustain the grievance, make the employe whole for any and all losses and remove any and all references to the discipline from his records.

County

As Highway Commissioner Michael Marsden, stated at hearing, he imposed the two day disciplinary suspension because of the Grievant's careless and negligent operation of the front end loader on May 20, 1988, and because of the Grievant's prior disciplinary record. Supervisors who were present at the pit when the Grievant's loader was pulled from the water testified that there was absolutely no reason for the Grievant to have driven the loader so close to the water. Jim McDaniels, a Highway Superintendent, who has operated equipment, including front end loaders, for over 30 years, testified that it was his opinion that the cause of the incident was the Grievant's carelessness and negligence. Steve Ziegler, a Highway Foreman, who has operated front end loaders for over 12 years, testified that there was no reason for Scully to have driven next to the edge of the water, either going forward or backward. Stephani testified that when he was loading sand that morning, he never got closer than four to five feet from the water. Stephani also did not feel that it was necessary to get the small pile of sand that was close to the edge of the water.

Tony Zitzelberger, the owner of the pit, testified that at no time during the eighteen years that various private and public contractors were loading and hauling sand from the area next to this pit filled with water did any one get a front end loader stuck in the water. Zitzelberger also stated that there was no need to drive along the edge of the water to get the sand near the water. It is evident that to get the sand near the waters edge, the Grievant should have driven his loader straight toward the water, stopped with the front tires four or five feet from the edge of the water, lifted the bucket of sand, tipped the bucket down and pulled the sand back to sturdier ground where it could be picked up with another maneuver.

While the Union claims that the area next to the sand pile was too cramped to allow the Grievant to safely load the sand into his dump truck, it is evident that there was adequate room to perform the loading operation. The Grievant had already loaded and hauled five loads of sand before getting his front end loader stuck in the water. Stephani had also loaded and hauled six loads of sand in the morning. Apparently, therefore, there was plenty of room to perform the loading operation.

While there is differing testimony as to the distance between the water and the dirt berm, the record, as a whole, supports the testimony of the owner of the pit and the supervisors. While witness Wenslow claims that there was not enough room to load the sand with a front end loader, eleven truck loads of sand were taken from the pit the same morning without incident. Even the Grievant testified that he had had no trouble loading from the sand pile in the morning. Union witness Nejedlo, who operated the large front end loader that eventually pulled the Grievant's front end loader out of the water, admitted that even though the area was a bit cramped, there was enough room for the operator to be able to back the loader away from the sand pile and turn it around to drive it toward the dump truck.

The Grievant was an experienced equipment operator and there was no need for any special instructions regarding possible problems connected with driving to close to the water. As the Grievant testified, he was aware of the fact that the ground in front of the sand pile was somewhat soft and that it was even less stable close to the waters edge. Even a novice would realize that to drive a large, heavy piece of equipment on a sandy base within one foot of the waters edge may not be the wisest thing to do, unless the object is to put the piece of equipment into the water. Under the circumstances, common sense would tell a person to stay a safe distance away from the water. If the Grievant could not have figured out for himself how to safely pick up the sand that was close to the waters edge, he should have left a small amount of sand next to the water and later asked a supervisor about it.

Union witness Pluger testified that when he was pulling the sand from the pit and piling it into the area next to the water he complained to Foreman Ziegler that the edge of the water was very unsafe and had a tendency to cave in. However, Pluger did his work in the early spring of 1988, when the frost was still in the ground near the water. The top of the bank was still frozen, while the sand underneath was lose. The water would wash away the lose sand underneath leaving a ledge of frozen sand. When any weight was put on this ledge, it caved in. This was not the situation in May. There was no frost and all the sand next to the water was of the same or similar consistency. Cave ins would not occur, but it was obvious that the closer you got to the water, the softer the sand became.

Both the Grievant and Stephani worked all morning loading sand from the

area. At no time during the morning did either of these employes raise any concerns to the supervisors, or any one else for that matter, about any safety problems in the area. The Unions contention that the work site was unsafe is nothing more than a Red Herring.

The Union advanced a similar claim in a recent case involving employe discipline. In rejecting the Unions argument, the Arbitrator stated "common sense and the obviousness of the improper loading made it unnecessary to consider the lack of prior instruction on proper loading. Employes are expected to have certain basic skills to perform the job and it is not necessary to instruct an employe on every detail such as how to put gas in the tank when the gauge says empty or to pump up a tire that is obviously low on air." Keeping a safe distance from the water when operating a front end loader is one of the "obvious matters" referred to by the Arbitrator. As an experienced equipment operator who knew or should have known how to operate a front end loader, the Grievant clearly should have realized that it was improper to drive so close to the water. Since the Grievant admitted that he was afraid of water and did not like to go near it, he, more than any one else, should have had enough common sense to stay away from the water. The only conclusion to be drawn from this situation is that the Grievant was careless and negligent in his operation of the front end loader at the Zitzelberger pit on May 20, 1988.

The Grievant's prior disciplinary record warrants the imposition of the two day suspension. The disciplinary action report notes three prior disciplinary incidents: a written discipline on December 19, 1986, a written discipline on September 16, 1987 and a one day suspension on October 20, 1987. Marsden stated that the December 19, 1986 incident did not weigh heavily into his decision regarding the extent of discipline. However, Marsden did indicate that the December 19, 1986 was another example of carelessness and negligence on the part of the Grievant. In the December 19, 1986, the Grievant pulled down a telephone wire when he drove under it with the box of his truck in the up position. The box should have been lowered by the time the Grievant reached the telephone wire. On September 16, 1987, the Grievant was driving his truck on the highway. The Grievant applied his brakes, skidded, and ended up tipped over in a ditch. The police report of the accident indicated in-attentive driving and failure to have control on the part of the Grievant. Marsden told the Grievant that he was driving too fast for conditions and gave the Grievant a written disciplinary action. On October 20, 1987, slightly over a month after his previous written warning, the Grievant pulled his truck into the Highway garage to change the oil. Although the Grievant was aware of the overhead door mechanism above the truck, he continued to raise the box until the box hit the shaft on the overhead door opener, damaging the shaft and the pulley. At that time, Marsden told the

Grievant that because of the two previous incidents of this type, i.e., negligent and careless operation of his equipment, Marsden had no choice but to continue with the progressive discipline and, thus, suspended the Grievant for one day.

The Grievant's prior disciplinary record really warrants a more severe penalty than the two day suspension. Marsden clearly had "proper cause" to impose the two day suspension which is in dispute herein.

The Union's claim that others were not disciplined for similar conduct is unfounded. Pluger, who became stuck while cleaning out a ditch filled with wet mud, admitted that it was not unusual to become stuck in wet mud while performing this type of operation. Another of Pluger's incidents involved sliding off a narrow road way into a ditch while plowing snow. At the time, the road was slippery and narrow. A third Pluger incident involved running a scraper at the landfill. It is so common for a scraper to get stuck that a bull dozer is stationed at the landfill for the purpose of freeing the scraper. McCarthy indicated that, in 1965, he became stuck in sand while digging out an area for a swimming pool. In this situation, however, Mccarthy was digging in a place he was supposed to be in. Wenslow became stuck in mud while hauling stone in the bottom of the landfill. Again, this happens often and the truck was being operated in a place where it was supposed to be operated. Heenan's incident involved snow plowing. None of the incidents described by the Union witnesses came close to being similar to the Grievant's situation. Further, none of these employes have the same Grievant's abysmal prior disciplinary record for negligent and careless operation of equipment.

In the previous arbitration case referred to above, the Union also claimed that others were not disciplined for similar conduct. The Arbitrator, recognizing that there was no evidence that facts similar to the case in dispute had ever occurred, rejected the Union's argument. The Arbitrator's conclusion was consistent with the great majority of arbitral sentiment.

Marsden's decision to impose a two day suspension was neither arbitrary, capricious nor discriminatory. The County had proper cause for the two day suspension and the grievance should be denied.

DISCUSSION

At hearing, the Grievant acknowledged that it was possible to have loaded sand from the middle of the sand pile, rather than the edge near the water. Stephani stated that when he loaded sand in the morning, he never went closer than four or five feet from the pond's edge. Thus, regardless of the exact dimension of the area between the berm (a/k/a "dirt piles") and the edge of the pond, 1/ the Arbitrator is satisfied that there was sufficient space for the Grievant to have loaded sand without driving the loader along the edge of the pond.

While the Union argues that the Grievant was instructed to remove all the sand, including the sand which lay along the edge of the pond, the Union's argument is not supported by the record. The Grievant did not claim to have such a work instruction, but rather, made the comment that "obviously we were supposed to get all the sand". It was not so "obvious" to Stephani, who stated at hearing the he "didn't worry about getting sand near the water because there was enough sand". The undersigned is satisfied that the Grievant was not instructed to remove the sand along the edge of the pond, but rather, made an independent decision to "clean up on the water's edge".

It is not evident that the Grievant received any work instruction other than to keep the bucket six inches off the ground to preserve the purity of the sand. The Grievant, however, was an experienced equipment operator and, by his

1/ The County's witnesses (McDaniels, Zitzelberger, Hank, Ziegler and Fisher) gave varying estimates of between 40 to 60 feet, while the Union's witnesses (Nejedlo, Pluger, McCarthy and Wenzlaff), gave varying estimates of between 20 to 30 feet.

own admission, knew how to operate the end loader. Given the Grievant's years of work experience, the Grievant knew or should have known that it was not safe to drive a piece of equipment of the size of the end loader along the sandy edge of a pond which, according to the testimony of Union witnesses, was obviously unstable. By choosing to drive the end loader along the edge of the pond, the Grievant was negligent and careless in the operation of the end loader. To be sure, the Grievant's conduct did not result in any damage to the end loader. However, by operating the end loader in this careless and negligent manner, the Grievant not only jeopardized County equipment, but more importantly, risked injury to his own person. Accordingly, the County had a reasonable basis to discipline the Grievant for driving too close to the edge of the sand pit. Having determined that discipline is appropriate, the Arbitrator turns to the question of whether the level of discipline, i.e. a two day suspension, is appropriate.

As the County argues, an Employer may consider an employe's prior disciplinary record, or lack thereof, when determining an appropriate level of discipline. According to the written notice of suspension, the County considered three previous disciplinary actions when making the decision to suspend the Grievant for two days, i.e., written warnings on December 19, 1986 and September 16, 1987, and an one day suspension on October 20, 1987. At hearing however, Highway Commissioner Marsden stated that he did not consider the December 19, 1986 written warning because he has a policy of limiting consideration of prior disciplinary actions to those which occurred in the previous year.

The written warning of September 16, 1987 was issued for driving too fast for conditions. The disciplinary report, which indicated that there had been damage to the County's truck, described the incident giving rise to the discipline as follows:

> Employee stated that he was traveling south on STH "76" when he noticed a car stopped approximately 600' ahead, he hit the brakes which caused the truck to start sliding and tip on its side in the ditch.

The one day suspension of October 20, 1987, which indicated that there was damage to the pulley and shaft of the automatic door opener, described the incident giving rise to the discipline as follows:

> Mr. Scully raised the box on Truck 170 too high and he hit the overhead door opener.

As the record demonstrates, within the year preceding the incident on May 20, 1988, the Grievant engaged in two separate incidents of misconduct, each of which may be characterized as involving careless and negligent operation of County equipment. Given the nature of the Grievant's misconduct on May 20, 1988, as well as the Grievant's previous written warning and suspension for engaging in similar misconduct, the Grievant's two day suspension is not unreasonable. 2/

As the Union argues, Union witnesses McCarthy, Heenan, Wenzlaff, and Pluger, as well as the County's witness, Stephani, stated that, in the course of their employment, they have operated County vehicles which have become stuck. As the Union further argues, none of these employes were disciplined for "getting stuck". The Grievant, however, was not disciplined for "getting stuck", per se, but rather, for operating the end loader in a careless and negligent manner. It not being evident that any of the other employes became "stuck" as a result of the careless and negligent operation of County equipment, the fact that these other employes were not disciplined does not warrant the conclusion that the Grievant's discipline was arbitrary, discriminatory, or otherwise not for "proper cause".

2/ It not being evident that either the suspension of October 20, 1987, or the written warning of September 16, 1987 were overturned in grievance arbitration, the disciplines must be considered to be valid.

Based upon the above and foregoing, and the record as a whole, as well as the arguments of the parties, the undersigned issues the following

AWARD

1. The County had proper cause for the two days' suspension of John Scully for the May 20, 1988 incident.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 28th day of June, 1989.

By _____
Coleen A. Burns, Arbitrator