

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 JACKSON COUNTY HIGHWAY DEPARTMENT :  
 EMPLOYEES, LOCAL 2717-C, AFSCME, : Case 82  
 AFL-CIO : No. 45491  
 and : MA-6613  
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 JACKSON COUNTY :  
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Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40,  
 AFSCME, AFL-CIO, appearing on behalf of the Union.  
Ms. Kerry Sullivan-Flock, Corporation Counsel/Personnel Director, Jackson  
 County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to resolve the grievance of George Lewis. A hearing was held on September 18, 1991, in Black River Falls, at which time the parties were given the opportunity to present their evidence and arguments. The parties filed post-hearing briefs by October 25, 1991.

ISSUE:

The parties stipulated that the following issue is to be decided by the Arbitrator:

Did the County have just cause to suspend the Grievant, George Lewis, for three days with pay for the incident that occurred on September 12, 1990? If not, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE 5 - DISCIPLINE AND DISCHARGE

SECTION 1. The employer shall not discipline or discharge any employee without just cause. If, in any case, the Employer feels there is a just cause for suspension or discharge, the employee and/or his/her steward will be notified, in writing, that the employee has been discharged or suspended and the reasons therefore by the close of the first full working day following the date of discharge or suspension. Deposit of notification by certified mail within said period shall be deemed satisfactorily notice pursuant to this section.

SECTION 2. The Procedure for discipline and discharge may include, but is not limited to, oral reprimand, written reprimand, suspension or discharge. These remedies may be applied in any order at the discretion of the Employer. The number of oral and written warnings and length of suspension shall be determined by the Employer.

BACKGROUND:

The Grievant is George Lewis, an employee with the Highway Department for

20 years. The grievance is over a warning and three day suspension with pay given to Lewis following an accident on September 12, 1990. 1/

On September 12, Lewis was working on Robert Haag's section, where a four-man crew was clearing out a ditch. Eric Hanson was working on the back hoe, Jerry Reschel was the flagman, 2/ and Haag and Lewis were hauling dirt to different dump sites. The flagman was needed at the stockpile or pickup site, because there was a sharp hill and curve nearby, and the crew was loading material in the middle of the road. Haag told Lewis that he was to dump his loads at a site on Highway 54 about a mile south of Melrose, where there was a washout from a heavy rain the night before. County crews have dumped dirt in this particular spot many times in the past. A flagman was not assigned to the dump site, but signs warning of road construction ahead were set up, with three signs in each direction.

Lewis was making his second trip to the site to dump dirt when the accident happened. He drove his truck up on the top of a hill to make sure no traffic was coming, put his emergency lights on, and started backing up. He saw another truck coming toward him while he was backing up in the middle of the road, but he was not able to get his truck completely across the road and was struck on the driver's side of his truck by the other truck. The truck that hit him was also hauling dirt, and it was driven by Robert Koss and owned by Brown Trucking, Inc. Lewis had seen Koss driving that stretch of highway earlier in the day.

Lewis used the radio in the truck to call the Highway Department and report that he had been hit. Highway Commissioner Roger Huber arrived at the scene about 20 minutes after the accident. Emergency personnel were already on the scene, although neither Lewis nor Koss was injured. A deputy from the Sheriff's Department filled out an accident report, which indicated that Lewis had started to back across the road, intending to dump a load of dirt over an embankment when Koss saw him, and that Koss thought Lewis had stopped and would let him drive by, but Lewis backed into his path causing a collision. Lewis was given a traffic citation which was later dismissed in court.

The dump site was located in a dip in the road, where traffic in the east bound lane would have the greatest visibility problem due to a curve about 125 to 250 feet from the accident site. Koss was travelling east bound when he hit Lewis. Signs warning of road construction were set at 500 feet from the dump site, and Lewis estimated that those signs were about half the distance from the curve. Had Lewis been able to get his truck backed up far enough across the road, Koss could have gotten around him.

When Lewis reported for work for next day, he saw that the schedule said "off" by his name, and was told by the Union steward that he was to meet with Huber, Highway Patrol Superintendent Robert Gabriel, and the Union officers in the Highway Department office. Huber asked him what happened at the accident.

Huber told him that he would be suspended for three days with pay, and Lewis went home, serving September 13th and the next two work days on suspension. Huber wrote a warning, checking boxes for substandard work and safety, with the following remarks: "Involved in an accident. Received a ticket for unsafe backing. You work on the inter-state and I cannot have you making decisions of this nature."

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1/ All dates refer to 1990 unless otherwise stated.

2/ The County prefers the term "flagpersons" but this writer finds it awkward and prefers the term "flagmen" as used in the generic sense.

According to Huber, Lewis should have called for a flagman to help at the dump site. It was necessary for Lewis to block the road to dump his load, and it is a common practice to block roads to perform duties. Standard operating procedure calls for putting up signs for the motoring public to see, which was done, or using a flagman, which was not done in this case. Huber thinks a flagman should have been used because the sight distance was not good. The trucks all have radios to call for a flagman, and it's up to the drivers to call for a flagman if conditions are not safe, and it is common to have to wait for a flagman. Where there is a straight section of state highway with low volume of traffic, the County can get by with one flagman, but procedures are stricter when the crews work on the interstate road. Huber has discussed safety with employees, and expects employees to make the decision to have flagmen or not. If only one flagman had been assigned, Lewis could have radioed in for more help, and the Department would have to get someone out there.

Lewis agrees that there probably should have been a flagman at the dump site, but they did not have enough help assigned that day. He stated that the crews usually use the flagmen that are assigned, and it was more important for the flagman to be working at the pick up site rather than the dump site, because the pick up site was more dangerous. He stated that when they need a flagman, they do the best they can, they dump by themselves, and that's the way they have done it for the past 20 years. Lewis thinks that it should be up to management to put a flagman at the job sites, as management designates the number of employees on a job, and one flagman cannot be in two places at once.

#### THE PARTIES' POSITIONS:

The County asserts that a penalty imposed by management can only be overturned is where management has been capricious or arbitrary, discriminatory or unfair, or abused its discretion. The County notes that in other similar cases where employees have erred in judgment in operating equipment, discipline has been upheld. The County asserts that it was justified in taking disciplinary action, and the bargaining agreement gives complete discretion on this issue to the County under Article 5, Section 2. The accident that led to the discipline was a serious one that resulted in extensive property damage and could have resulted in serious physical injury. There is no evidence that the County's actions were discriminatory, unfair, capricious or arbitrary. The discipline was based solely on a previous warning and the seriousness of the accident and safety violation at hand.

The County argues that Lewis committed a serious safety violation by not having a flagman to notify oncoming traffic that his truck was blocking the highway. While Lewis argues that there were not enough people on the crew to have a flagman at two different places, the lack of people on the crew is no reason for an employee to disregard the rules of safety. Commissioner Huber expects employees to radio for flagging help, and employees know that they have that option. The court records showing that the traffic ticket was dismissed are not relevant, as traffic proceedings have different standards than arbitration proceedings and they do not deal with violations of departmental procedures. Due to the severity of the situation, and as shown by other cases where employees caused serious accidents by not following standard safety procedures, the County maintains that it was justified in disciplining Lewis.

The Union asserts that Lewis was not afforded the opportunity to present his side of the story, and therefore, the County has not given Lewis due process and the grievance should be sustained on this ground alone. The Union believes Lewis acted appropriately within the scope of his employment and in accordance with well practiced procedures. He was performing duties as

assigned to him by the section leader. The warning signs were appropriately posted on the highway where Lewis was to dump dirt when the accident occurred, and Koss must have been aware of the construction area as Lewis saw Koss driving on that road earlier.

The Union notes that the County apparently is holding Lewis responsible for not requesting an additional flagman, even though the initial job assignment was made by a supervisor who was aware that there was only one flagman on the crew. There was no clear policy outlining when a flagman was to be used. The County is attempting to shift the blame for the accident on Lewis, when supervisory employees may be blamed for not assigning sufficient personnel to particular work sites.

The Union points out that although Lewis received a traffic citation, the charges were dismissed. The only previous discipline Lewis received was a written warning for tardiness, which was to be removed from his file after one year and has no relevance to the instant case. The Union submits that the County did not have just cause to suspend Lewis and asks that all references to this incident be deleted from his personnel files.

DISCUSSION:

In this case, the County essentially argues that Lewis violated standard operating procedures and safety procedures by not calling for a flagman on the day of the accident, and that Lewis abused his discretion in the performance of his duties. While the County states that employees were aware of safety procedures, the County fails to point to any particular rule when flagmen are to be used. The record shows that for decades, the highway crews have operated without flagmen in certain situations. There is no definite rule about when employees must use flagmen when performing work on the highway. 3/ Therefore, Lewis did not violate any rule.

Nor did Lewis violate standard operating procedures or safety procedures. Huber indicated that it is standard operating procedure to put up signs for the motoring public to see, which Lewis did, or to use flagmen, but that it is up to the employees driving the trucks to use flagmen or not. Huber has given them the latitude to decide when to flag or not. Also, the testimony indicated that the crews try to get by with the number of people assigned to a crew and not to call for extra help. Therefore, Lewis' conduct appears to have been within the standard operating procedures of the County and within the range of discretion given to employees.

Crews have operated for many years without flagmen in the same manner as Lewis did on the day in question, and there is no evidence on the record that employees have ever been disciplined for not calling for flagmen. On the day of the accident, it appears that the County had no particular concern about not using a flagman at the dumping site before the accident. Haag, the section leader, told Lewis where to dump dirt, and Haag was aware that Lewis had no flagman working with him, as the only flagman assigned to the crew was needed at the pickup site. Also, Highway Patrol Superintendent Gabriel made the original job assignment, and Gabriel would have known what manpower was available for the job.

Therefore, the Arbitrator finds that the County would not have disciplined Lewis for failing to call for a flagman but for the accident. Where an employer has given an employee a certain amount of discretion in the performance of his duties, and the employee then exercises that discretion in a reasonable manner (including making a judgment based on the amount of manpower made available by the employer), and that exercise of discretion would be satisfactory but for the actions of a third party stranger on the scene, the employer then lacks just cause to discipline the employee for the exercise of that discretion. After all, the employer here could have limited the discretion allowed to employees by determining when flagmen would be used and by assigning flagmen to protect its employees and its equipment. If the County expects employees to maintain the highest safety standards when it comes to the use of flagmen, it must make that known to them and take the responsibility for assigning the appropriate manpower. Otherwise, employees are left in a situation where they "get by" with what help is available, as they are also expected to get the job done. And ordinarily, that is not an unreasonable

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3/ Different standards are used by the County when work is performed on the interstate highway. The accident in this case occurred on a state road, where, according to Huber, employees make a decision regarding the necessity for a flagman.

exercise of their discretion.

It was only after Lewis's truck was hit by someone that the County disciplined him. This is Monday morning quarterbacking -- it's easier to criticize the game plan once you know the results. If there were no accident, there was no problem with the procedure used by the crew -- the procedure of doing the best they could with the help assigned to them.

Lewis could have been disciplined for operating the equipment in a negligent manner. However, the County does not claim that it was negligent for Lewis to back a dump truck across the highway, as it knows it has done this procedure many times and considers it a common practice to block a road to perform duties. In fact, the highway crews have dumped dirt in the very spot of the accident several times. The County did not discipline Lewis for negligent operation of the equipment -- it disciplined him for making the wrong judgment call, in hindsight. Lewis has been employed by the County for 20 years and has no prior record of negligence in operating equipment.

The County has failed to show that it had just cause to discipline Lewis where he did not violate any rule or standard operating procedure, and he was conducting his duties within the County's standard operating procedures and within the amount of discretion given to him which had been acceptable at all other times. Accordingly, the Arbitrator concludes that the County did not have just cause to suspend Lewis with pay, and that the appropriate remedy is for the County to remove all references to the suspension from his personnel file.

AWARD

The grievance is sustained.

The County did not have just cause to suspend the Grievant, George Lewis, for three days with pay for the incident that occurred on September 12, 1990, and the County is ordered to remove all references to the suspension from his personnel file.

Dated at Madison, Wisconsin this 26th day of December, 1991.

By \_\_\_\_\_  
Karen J. Mawhinney, Arbitrator

