BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MARATHON COUNTY HIGHWAY EMPLOYEES, LOCAL 326, AFSCME, AFL-CIO	Case 201 No. 46421 MA-6977
and	
MARATHON COUNTY	

Appearances:
Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, appearing on behalf of the Union.
Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, appearing on behalf of the County.

ARBITRATION AWARD

Marathon County Highway Employees, Local 326, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Marathon County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a suspension. The undersigned was so designated. Hearing was held in Wausau, Wisconsin on April 27, 1992. The hearing was not transcribed and the parties submitted post-hearing briefs which were exchanged on June 24, 1992. The parties retained the right to file reply briefs and agreed that any submitted be postmarked on or before July 8, 1992. The County timely submitted a reply brief and the Union did not file one.

BACKGROUND

The grievant began his employment with the County on October 8, 1979 and on December 31, 1986 was promoted to Equipment Operator III holding the position of dryer operator at the asphalt plant. 1/ On March 26, 1990, the grievant became the Plant Operator (Crew Chief) at the asphalt plant. 2/ The Plant Operator duties included loading gravel on trucks and loading hot-mix asphalt on trucks. On August 6, 1991, the grievant was performing these duties. The loading procedure for the hot-mix asphalt is for the receiving truck to be driven under a silo which contains the hot-mix at a temperature of about 250 - 300 degrees fahrenheit. When the truck is in position and stopped, the grievant, who is situated in a control trailer about 70 - 80 feet away, pushes a button which releases the hot asphalt from the silo into the truck box. On August 6, 1991, John Reed was driving his truck into position to receive a load of hot-mix, but 8 to 9 feet before he reached the loading position, the grievant pushed the button to load the truck and the blacktop fell on the hood, windshield and cab of the truck. 3/ The grievant immediately

1/ Ex. - 2.

2/ Id.

3/ C. Ex. - 24.

stopped the loading and the truck was driven out of the loading area to get cleaned up. There was a loss of some hot-mix asphalt and the windshield of the truck was broken which allowed hot-mix to get inside the cab. 4/ The driver, John Reed, was not injured. The grievant reported this incident to the Highway Operations Superintendent who later inspected the truck and checked the loading tickets. The incident was then reported to the Highway Commissioner. After checking the truck and speaking with the driver, the grievant was given a one-day suspension for carelessness that caused an accident. 5/ The grievant filed a grievance which was processed to the instant arbitration.

ISSUE

The parties stipulated to the following issue:

> Whether the County violated the labor agreement when it issued a one-day suspension to the grievant for the incident that occurred on August 6, 1991?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

> ARTICLE 2 - MANAGEMENT RIGHTS
>
> Public policy and the law dictate clearly the Department's primary responsibility to the community as being that of managing the affairs efficiently and in the best interests of our clients, our employees, and the community. The employer's rights include, but are not limited to, the following, but such rights must be exercised consistent with the provisions of this contract.
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> . . .
>
> 5. To suspend, demote, discharge, or take other appropriate disciplinary action against employees for just cause.

COUNTY'S POSITION

The County contends that it had just cause to discipline the grievant for the incident on August 6, 1991. It notes that the Union concedes that some discipline is warranted, and the Union takes issue only with the severity of the discipline imposed, a one-day suspension. The County submits that the one-

4/ C. Exs. - 21 & 22.

5/ Ex. - 3.

day suspension is appropriate and it had just cause for the one-day suspension. The County claims that the evidence established that the grievant was solely responsible for ensuring that the truck was in the proper position before releasing the hot-mix. It insists that the grievant through carelessness or inattentiveness failed to properly perform his duties. The County maintains the grievant's assertion that his actions should be excused, as his view of the loading area was partially obscured, is not supported by the evidence. It points out that the grievant operated the plant for two years without incident nor did he ever report this problem to his supervisor. It further notes that the prior operator in the six years he operated the hot-mix plant never dumped a load on the cab or windshield of a truck. The County asserts the grievant's claim is just not credible. The County also alleges that the grievant's excuse that he was very busy that day is without merit. It submits that the evidence establishes that the amount of truck traffic was not any different from normal operations. The County also takes issue with the grievant's testimony that he thought the truck had stopped. It notes that the driver testified he was still moving when the blacktop was released. It submits that the incident was clearly the grievant's fault and his careless or inattentive conduct endangered the well-being of a co-worker and damaged the truck.

The County contends that deference should be given to its judgment as to the proper penalty to be imposed for the grievant's misconduct. It cites authorities for the proposition that unless the County has been unreasonable, arbitrary or capricious in imposing discipline, the arbitrator should not substitute his judgment for that of the County. It asserts that a finding of bad faith or abuse of discretion or discrimination is required to change the penalty imposed. The County argues that the grievant's past record and safety concerns must be taken into account in determining the discipline imposed. The County claims that the one-day suspension of the grievant for his conduct on August 6, 1991 was appropriate in light of the facts and the safety concerns brought to his attention in performance evaluations and the counseling given him after various incidents from 1987 through 1990. The County maintains that the incident could have resulted in injury to the truck driver and was a serious safety matter due by to the grievant's negligence. It asks that the one-day suspension be upheld and the grievance dismissed.

UNION'S POSITION

The Union contends that the discipline was too severe for the infraction. The Union points out that the conditions at the work site were not ideal and the position of the control trailer made it awkward to properly view the positioning of the truck, a situation which was acknowledged by the repositioning of the trailer. The Union asserts that there were constant production pressures placed on the grievant and the evidence supports a finding that traffic was far heavier than usual at the asphalt plant on the day of the accident. It submits that similar accidents had occurred in the past and no discipline was meted out. The Union points out that other accidents had occurred and employes were not disciplined. The Union insists that both driver and plant operator are responsible for the proper operation of the loading with the driver stopping in the proper location and the load triggered at the proper time. The Union points out that the driver's truck was not the vehicle he normally operates on the day in question.

The Union admits that the grievant made a mistake in releasing the asphalt prematurely, but inasmuch as the grievant has a clean record and never made a similar mistake before, an oral or written warning would have been more

appropriate. It claims that a single mistake can be made by anyone. The Union asserts that the grievant made safety suggestions to management on a number of occasions and most were not adopted and he believed he was ridiculed on occasion for making such suggestions and any charge that the grievant was not safety conscious must be tempered by the "deaf ear" turned to his suggestions.

The Union concludes that anyone can and does make mistakes; however, the loss of a day's pay for an honest mistake is unreasonable. Also, according to the Union, other necessary elements of just cause are absent such as no work rule broken, similar infractions treated less severely, an investigation that left much to be desired and mitigating circumstances. It asks that the grievance be sustained and the grievant be made whole for his losses.

COUNTY'S REPLY

In reply, the County contends that the Union has mischaracterized the evidence with respect to the grievant's performance evaluations, and by alleging the grievant "peered" out of the control trailer's window to check the truck's position, by minimizing the amount of damage to the truck, by referring to the "awkward" arrangement of the control trailer, by implying production pressures support that traffic was heavier than usual that day and by claiming that "other accidents" went unpunished. The County submits that the grievant's evaluations in regard to safety were far less than generally satisfactory. The County claims that "peering out" implies the grievant had to stick his head out of the trailer's window which was not the case. It maintains the damage to the truck was more than slight and the contention about the location of the trailer overlooks the two years plus that the grievant operated the plant without incident and the additional six years his predecessor had operated the plant without an incident all with the trailer in the same location. The County maintains the evidence established that traffic was not heavier than normal and that prior "accidents" involved a different hot-mix operation.

The County insists that the suspension was warranted because of the grievant's repeated disregard of safety concerns. It brands the grievant an unsafe worker who must be made to understand the importance of safety and a suspension is more appropriate than a written reprimand to drive home that safety is an absolute priority. It repeats it request to dismiss the grievance.

DISCUSSION

The evidence established that on August 6, 1991, the grievant prematurely pushed the button which released hot-mix from the silo onto the moving truck driven by John Reed when it was still 8 to 9 feet from the loading position. The grievant was an experienced operator having performed his duties as asphalt plant operator since March 26, 1990. 6/ The release of the asphalt was within the grievant's sole control and it was his decision when to press the control button to release the hot-mix asphalt. The evidence establishes the grievant was negligent by prematurely releasing the hot-mix onto the truck driven by John Reed. The Union acknowledges that the grievant was responsible for the incident and its main contention is that the discipline was too severe. It offered a number of reasons the penalty should be mitigated.

6/ Ex. - 2.

The location of the control trailer required the grievant to bend around to peer out the window to verify the position of the truck. The evidence indicated that the grievant had not prematurely dumped hot-mix before and his predecessor for 6 years had no problem with seeing trucks in loading blacktop. Thus, the evidence fails to demonstrate the location of the trailer should be a mitigating factor.

The grievant testified that he was under production pressure on August 6, 1991 as that was a very busy day. The evidence with respect to the tickets on the loads that day failed to establish that traffic was heavier than usual.

It was argued that others dumped blacktop and were not disciplined. The evidence related to other dumps involved the old hot-mix plant which had a timing sequence so that the mix was automatically dumped after a certain time and the operator could not control the dumping, and thus the facts and circumstances differ from the present situation where the operator has complete control over the dumping of the hot-mix. Another argument was that John Reed was not driving his normal truck. Reed has been employed by the County for 31 years and was as familiar with this truck as his regular truck. Besides there was no evidence presented that Reed did not operate the truck properly. In short, the fact that this truck was not Reed's normal truck had absolutely nothing to do with the incident.

Finally, the grievant has asserted that others have had accidents and have not been disciplined or disciplined as severely for a simple offense. The County in the past has not disciplined employes who have been involved in accidents which were unpreventable. Many of these involved the wing of a snow plow where the wing hit an unseen object or hooked the ground. Given the circumstances, these are accidents which could not have been avoided so no discipline was meted out. On the other hand, verbal and written warnings were given where the accident could have been prevented and one-day suspensions were given where the accident could have been prevented and extensive damage was done or was caused by carelessness. 7/

In the instant case, the grievant was negligent and this caused damage to the truck and could have caused injury to Reed. The County has the right to expect that experienced operators will perform in a manner that will not result in damage to equipment or endanger fellow employes. The serious nature of the misconduct here warrants a stronger penalty for the first offense. The grievant has a clean disciplinary record but the grievant's negligence here could have resulted in injury to Reed and the County cannot deal lightly with such negligence. The undersigned adopts Arbitrator Marion Beatty's 8/ reasoning in this case that unless an employer's decision or disciplinary penalty is arbitrary, capricious or unreasonable, it will not be disturbed and that the boundaries of reasonableness should not be so narrowly drawn by arbitrators that management's judgment must coincide exactly with the arbitrator's judgment. The undersigned concludes that the County did not act in an arbitrary, capricious or unreasonable manner in imposing a one-day suspension for the grievant's negligence where it was reasonably within the control of the grievant to have prevented the occurrence of the incident and such negligence could have had dire consequences.

7/ C. Ex. - 23.

8/ Trans World Airlines, Inc., 41 LA 142 (1963).

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

AWARD

The grievance is denied in all respects.

Dated at Madison, Wisconsin this 4th day of August, 1992.

By _____
Lionel L. Crowley, Arbitrator