BEFORE THE ARBITRATOR

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In The Matter of The Arbitration of a Dispute Between

**TEAMSTERS LOCAL UNION NO. 43**

and

**WILMOT READY-MIX**
**A.K.A. THELEN SAND AND GRAVEL**

Case 1
No. 54956
A-5567
(Gale Oldenburg Discharge)

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Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Post Office box 12993, Milwaukee, WI 53212, by **Ms. Andrea F. Hoeschen**, Attorney at Law, appearing on behalf of the Union.

Murphy, Smith & Polk, Twenty-Fifth Floor, Two First National Plaza, Chicago, IL 60603 by **Mr. Dwight D. Pancottine**, Attorney at Law appearing on behalf of the Employer.

## ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement, Teamsters, Chauffeurs and Helpers Union No. 43 (hereinafter referred to as the Union) and Wilmot Ready-Mix (hereinafter referred to as the Employer or the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator to hear and decide a dispute concerning the discharge of Gale Oldenburg. The Commission designated Daniel Nielsen. A hearing was held on June 11, 1997 in Antioch, Illinois, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A stenographic record was made of the hearing, and a transcript was received on June 27th. The parties submitted post-hearing briefs, which were simultaneously exchanged through the arbitrator on August 13th. Thereafter the Company filed a response to portions of the Union's brief, which was received on September 25, 1997.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the arbitrator makes the following Award.

## ISSUE

The parties stipulated that the following issue should be determined herein:

Was the grievant terminated for just cause?

The parties further stipulated that, should the arbitrator determine that there was just cause, the effective date of the termination should be 24 hours after the January 10, 1997 notice of intent to terminate.

## PERTINENT CONTRACT PROVISIONS

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ARTICLE 13. DISCHARGE OR SUSPENSION

Section 1. The Employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension shall give at least two (2) warning notices of the complaint against such employee to the employee, in writing, and a copy of the same to the Union and job steward affected, provided however, that if the Employer considers the conduct of the employee to be so serious that repetition of it should lead to discharge, the Employer may state on the warning notice that it constitutes a first final notice, subjecting the employee to discharge or suspension upon its repetition, provided further, however, that if the Union disagrees that such misconduct warrants a first final notice, it may take the matter up under the grievance procedure. . . .

. . .

Section 5. In the event an Employer intends to discharge an employee, the Employer shall notify the Union Office, the steward and the employee affected. Discharge shall not take effect for a twenty-four (24) hour period following notice to the Union Office, during which time the employee shall be suspended.

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ARTICLE 31. GRIEVANCE PROCEDURE

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Section 3. The impartial arbitrator shall have the sole and exclusive power and jurisdiction to determine whether a particular grievance, dispute or complaint is arbitrable under the terms of the Agreement. The decision of the impartial arbitrator on any matter submitted to him shall be final and binding of (sic) all parties. The impartial arbitrator shall issue his decision no later than thirty (30) days after the case has been submitted to him.

Section 4. The time limits set forth in the Article (except for the time in which an arbitrator must render his award) shall be strictly enforced, and failure of either party to comply with these time limits shall constitute a default and resolve the particular grievance, dispute, or complaint in favor of the other party. 1/

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## BACKGROUND FACTS

There is relatively little dispute of fact. The Company is in the business of mining

and delivering sand and gravel, and delivering ready-mix concrete. It operates plants in Antioch, Illinois and Wilmot, Wisconsin. Between the two plants, the Company employs 160 production and delivery employees and 35 office staff. The Company's drivers in Illinois are represented by Teamsters Local 301, while the Wilmot employees



are represented by Local 43. The grievant, Gale Oldenburg, started with the Company on May 15, 1995 as a driver. He went through a two week training period to refresh him on the operation of gravel trucks and ready-mix trucks. During that period, he spent four days riding along on the gravel truck, and three days riding along on the ready-mix truck. At the end of that time, he took a driving test with Mike Bednar, the Operations Manager. The test was taken in a gravel truck.

On May 28, 1996, the grievant struck another gravel truck while backing his gravel truck in the Company's yard in Wilmot. He was issued a one day suspension and a warning letter by Bednar, which concluded:

> This letter is a written notice of warning and of what action was decided upon. Further incidents of this nature may be cause for discharge. Please use you abilities so incidents like this will not happen again.

The grievant was involved in another accident on October 31, 1996, when he hit a pickup truck while backing his ready-mix truck off a delivery site, causing $1,047.06 worth of damage to the pickup. He received a second one day suspension and another letter from Bednar. Neither the May nor the October suspensions were challenged.

On December 17, 1996, the grievant struck the truck wash rack in the Antioch yard straight on with ready-mix truck R48. This was not his regular truck, although he had driven it on a number of occasions, including the day before. The grievant later explained that his foot had slipped off the metal clutch pedal common to Oshkosh trucks of that vintage, and the truck lunged forward. The truck was rendered undrivable and was towed to the Company's garage for repairs. Taking account of the time the Company's mechanics put in and the cost of parts, repairs totaled $2,698.38. The wash rack was damaged, and required eight man hours of work from the Company's welding shop to put back in order.

Corporate Secretary Mary Beth Varak was in the office when the accident occurred, and was summoned by one of the dispatchers. She arranged to have the truck towed away, and had photographs taken of the truck, the wash rack and the yard. After looking at the photos and getting a report from the mechanics, she met with the grievant and Union steward Bill Pierce. She issued a letter to the grievant, suspending him for three days:

> Tuesday, December 17, 1996 you ran into the wash rack causing damage to the rack and to the truck. This was a preventable accident. You must remain in control of your vehicle at all times. This is the second accident in a two month period. You were involved in another accident October 31, 1996

causing damage to a third party's vehicle. We expect out drivers to exercise control of their vehicles at all times.

Due to the seriousness of this incident you are being assessed three days off work without pay, effective December 18, 1996 to December 20, 1996.

You must exercise a greater degree of care while performing your duties if you wish to continue your employment at Thelen Sand & Gravel, Inc. Further incidents will result in additional disciplinary action up to and including termination.



At the time she wrote the letter, Varak was not aware of the May accident. She learned of it the next day and, reviewing the progressive discipline provision of the contract, concluded that the Company was faced with a potential termination. She met with Bednar and Company President Steve Thelen on December 20th, and discussed the grievant's work history. They concluded that, while he was an otherwise fine employee, his record suggested that he was a safety hazard. Varak arranged to have the grievant and Bill Pierce come to the Antioch office on December 23rd.

Varak met with the grievant and Pierce on the 23rd, and handed the grievant a letter of termination:

Your employment at Thelen Sand & Gravel, Inc. has been terminated due to three incidents where you caused damage.

May 25, 1996 you were involved in an accident in the Wilmot yard.
October 31, 1996 you caused damage to a third party vehicle.
December 17, 1996 you caused damage to company property including the vehicle you were driving.

You must turn in your employee card to receive your salary check.

The grievant asked why she had terminated him when she had already suspended him for three days the week before. Varak explained that she had been unaware of the May accident when she issued the suspension.

A grievance was filed challenging the discharge:

On December 17, 1996, I Gale E. Oldenburg had an accident in the Antioch pit. I was leaving the loading area with truck R48 when I missed a gear. I then shifted to a lower gear when my foot slipped off the clutch pedal. There

> was no rubber pad on this pedal, due to age of truck and its [unintelligible]. The truck lunged forward and struck the wash rack! I was not speeding in this high traffic area. I then reported this accident. A dispatcher came out of the office and took pictures of the accident. Then I helped get the load of redi-mix off the truck and reported to Mary Beth's office. She gave me a second notice which we signed. After conversation I was taken for a drug and alcohol test. My Union was present at the meeting in Mary Beth's office. At this time I Gale E. Oldenburg am requesting my job back with my seniority rights, full benefits and also back pay.

At the Joint Construction Grievance Hearing Committee on January 10th, the grievant explained that his foot had slipped off the clutch, which was not equipped with a rubber pad. This caused the truck to lurch forward unexpectedly and strike the wash rack. In response, the Company noted that none of the Oshkosh trucks have rubber pads on the clutch pedal. The Company also noted that its safety handbook called for termination after three violations of safety rules, and that one of the Driver Safety Rules in the Company handbook provided: "Intentional damage, misuse, abuse, or improper handling of any vehicle driven during the conduct of company business will not be tolerated." The Company notes that the grievant had attended two safety training sessions conducted by the Company, during which the safety rules were reviewed.



The Committee deadlocked on the grievance and the case was referred to arbitration. After the Committee meeting, the Company concurred in one allegation made by the Union, that it did not provide the twenty-four hour advance notice of discharge required by the contract. The notice was sent and the parties agreed that if the termination was upheld in arbitration, it would be treated as having been effective on January 11th.

At the arbitration hearing, the grievant explained that the metal clutch pedal was worn from years of use, and was slippery when wet. As there was water on the ground which he had to walk through to get to the dispatch office, his rubber galoshes were wet when he got back in the truck. He said that his foot had slipped off the clutch pedal in this truck before, but that there had been no damage done, so he didn't mention the problem to the Company.

Additional facts, as necessary, are set forth below.

## POSITIONS OF THE PARTIES

### The Company

The Company takes the position that the grievant was discharged for just cause. This is a case of progressive discipline as required by the contract and the Company's safety rules.

The safety rules caution that "Employees are expected to use equipment and vehicles with care." They also prohibit "Intentional damage, misuse, abuse, or improper handling of any vehicle. " The grievant, having been twice disciplined for unsafe operation, was well aware of the rules. Furthermore, Bednar warned him after the October accident that three accidents in one year would lead to discharge. Thus he was amply put on notice of what was expected of him, and what the consequences of additional unsafe acts would be.

The rule against unsafe operation of vehicles is reasonable on its face. It has also been reasonably applied. There is no evidence of discrimination or unfairness in the record. Although the Union brought up another case in which an employee was not disciplined for hitting an overhead door, the evidence shows that the cause of that accident was a malfunction in the door, not unsafe operation by the driver. Significantly, the grievant himself had an accident caused by a malfunctioning warning indicator that failed to let him know his hopper was up. He was not charged with that accident, because he was not at fault. The Company has been reasonable in only assessing accidents which were preventable.

The grievant's claim that his foot slipped because there was no rubber pad, and his elaboration on this at the hearing to the effect that the grooves in the pedal were worn, is not excuse for his carelessness. None of the Oshkosh trucks have rubber pads on the clutch pedal, and neither the grievant nor any other driver has ever complained about the condition of the pedals on this or other vehicles.

The accident on December 17th was clearly preventable. The grievant claims that the truck "lunged forward" when his foot slipped off the clutch. Yet the approach to the wash rack is 50 to 60 yards long, and he hit the wash rack straight on with the left side of the truck. He was obviously not properly lined up to enter the rack, and he admits that he was not in control of the direction of the truck at the time of the accident. The evidence



suggests that he had no idea of his location relative to the rack at the time of this accident. That is clearly unsafe operation of a vehicle.

The Union's claim that additional training should have been provided to the grievant is not supportable. Unlike the employees in the cases cited by the Union, the grievant was not given improper instructions. Moreover, in the VULCAN case, the arbitrator found no negligence or carelessness. In this case, the entire problem is the grievant's inattention to what he is doing. The Employer cannot train the grievant in how to pay attention.

The grievant is a very short term employee who was given clear notice of the safety rules, was subjected to progressive discipline, and yet was not able to safely operate his truck. The Company has the right to enforce its rules, and it has the obligation to protect the safety of its employees, customers and the public at large. The grievant has three preventable accidents in seven months, demonstrating that he is a risk to others, and unfit to continue as an employee. For all of these reasons, the grievance should be denied.

**The Union**

The Union takes the position that the grievant was innocent of misconduct, and that his discharge was wholly unjustified. The grievant was discharged solely for being involved in an accident. No work rule was cited in the letters he received from the Company, and it appears that none apply. There was no element of intent involved in the grievant's collision with the wash rack, and there is no evidence that the truck was not used with care. The Company cannot simply say that an accident equals just cause for discharge. It must prove some sort of misconduct by the grievant. As it has failed to do so, the grievance should be granted.

The Company appears to argue that the December 17th accident was somehow "preventable." Yet the Company offers no explanation for how the accident could have been prevented. The worn metal clutch pedal was slippery, the grievant's foot was wet and it slipped, the truck went into gear and leapt forward. What element of this could have been avoided? There is absolutely nothing to show that this accident was the grievant's fault and, in the absence of fault, there is nothing to show just cause for discharge.

The Company seeks to place all of the responsibility for the grievant's accidents on him. This ignores the fact that it knew when it hired him that he had no recent experience in ready-mix trucks. Yet even after he asked for additional training, and again after the October accident, the most he was able to get from the Company was a ten minute explanation of how the truck worked. Other arbitrators faced with claims that an employee is accident prone have rejected the claims, where the employer has failed to provide training adequate to the situation. Arbitrator Kossof, in VULCAN MATERIALS COMPANY, FMCS NO. 96-12234 (1996), found that a Company could not discharge an employee for being unsafe when it knew he was inexperienced when it hired him, and did not provide any additional training. He ordered the employee reinstated and provided with training. Likewise, Arbitrator Roberts in STEEL BRANCH MINING, 96 LA 931 (1991) found that simply telling an employee he was doing something wrong was not adequate, and that before imposing discipline an employer must show the worker how to do the thing correctly. The same principle applies in this case. The grievant was conceded to be a good employee, and terminating without first providing an opportunity for remedial training is manifestly unfair.



**DISCUSSION**

There is no question but that the grievant had three accidents in the space of seven months, nor that, if the December 1996 accident was a legitimate basis for discipline, discharge was the next step of the progression. Article 13 of the contract requires at least two prior warning notices, which the grievant received for his May and October accidents. This is mirrored in the disciplinary action policy in the Company's Safety, Health & Employee Handbook, which calls for a written warning for the first offense, a suspension for the second offense, and discharge for a third offense. Neither of the warning notices, nor the corresponding suspensions, was grieved.

**Was There A Rule?**

The Union asserts that there is no valid work rule violated in this case, and thus no basis for discipline. On the contrary, the employee handbook clearly states, in Rule #4, that "Employees are expected to use equipment and vehicles with care." Rule #5 of the Driver Safety Rules prohibits "Intentional damage, misuse, abuse, or improper handling of any vehicle...", while Rule #6 prohibits "reckless operation of a motor vehicle". None of these rules was cited in the warning notices or the discharge letter. However, the grievant admits that he had a copy of the handbook, had read it and understood it. He was twice counseled about safe operation, and was twice disciplined for unsafe operation. At the time of his two previous suspensions, he did not claim to be confused about the reasons for discipline or the scope of the rules. In light of the inherently dangerous nature of the very large vehicles operated at the Company, anyone of normal intelligence would understand that safe operation would be expected. That expectation cannot have come as a surprise to a professional driver such as the grievant. Given all of this, there can be no plausible argument that he did not know the Company had rules requiring safe operation of the vehicles. On the contrary, the record reflects that the grievant knew he was subject to discipline if he was involved in an avoidable accident.

**Was The Third Accident Avoidable?**

The issue then is whether the accident on December 17th was in some fashion avoidable. There was no external factor involved -- no child darting in front of the vehicle, no second truck bumping the rear. The only actors were the grievant, his truck, and an inanimate wash rack. Neither was there a malfunction as such. The clutch and steering worked properly. It appears from the record that there were three elements to the accident -- the grievant's foot slipping off the clutch, the direction and location of the truck when this happened, and the failure to steer away from the rack when the truck lurched forward. Assuming, as I do, that the grievant did not intend to steer into the rack and had his truck under control before his foot slipped, the fact that his truck was quite close to the rack and aimed at it was only a problem if he somehow lost control of his acceleration or steering. His subsequent failure to steer away from the rack after his foot slipped may or may not have been avoidable, depending upon how far he was from the rack and how quickly the truck moved. If he was very near the rack, steering out of the accident may have been a practical impossibility. According to his testimony, he could not recall how far he was from the rack, and the whole incident was over in seconds. The critical element in bringing the accident about was the grievant's foot slipping off the clutch pedal.

The Union argues that the grievant cannot be blamed for having his foot slip. Obviously he did not intend to let his foot slip off the clutch pedal. However, the arbitrator notes his testimony that he had driven the truck before, he knew the clutch

pedal was metal rather than rubber, and that his foot had slipped off the pedal at least once previously when it was wet. Though he considered it a problem, he did not report the problem to the Company because no damage was done. This testimony complicates matters for the grievant, in that he basically concedes he was aware of the potential for this accident. There is a difference in the degree of care one might expect from someone who is unaware of a hazard as_compared with one who knows it exists. Knowledge of the hazard requires a greater degree of care. This care might be shown by being more careful to insure placement of the foot firmly over the pedal, thus avoiding the problem, or in positioning the truck to avoid hitting anything if the foot slips, thus avoiding damage should the problem occur. It may consist of knocking the mud off your boots before driving. 2/ In large part, it consists of being mindful of the danger and trying to avoid it. This would be even more important if the truck is located and directed in such a way as to be very near an obstacle, as it was here. Yet there is no indication that the grievant paid any mind to the potential for trouble in this case.

The analysis of whether this accident was avoidable is colored by the fact that the Company has used these trucks for quite some time, with the metal clutch pedals. Wet conditions are not an uncommon occurrence around construction sites and yards, and it is standard operating procedure for all trucks to go to the wash rack after taking on a load of concrete. This same combination of conditions and actions is presented on a regular basis at the work place. Despite this, there is no evidence of any history of this type of accident. There was testimony from another driver that he had had his foot slip off the clutch pedal, and that is was simply luck that he wasn't in a position where this caused an accident. I have no reason to question that testimony, but the fact is that there was no accident in that case.

The lack of any past accidents like this suggests that it must be possible to safely operate this vehicle even in wet conditions. The grievant was aware of the danger of his foot slipping, and was aware that he was quite close to the wash rack and was aimed at it while he was shifting. Finally, he had to be aware of the risk posed by losing control, even momentarily, of a vehicle as heavy as a fully loaded ready-mix cement truck. Obviously the grievant did not intend that this accident happen, and it cannot be said that he was reckless. However, he did not take any specific measure to protect against an accident that was known to him to be a possibility. On balance, I find that the Company could reasonably treat this accident as preventable.

**Was The Company Culpable For Not Offering Training?**

The Union asserts that, even if the accident was avoidable, the Company must share the blame for it because it gave the grievant only minimal familiarization with the ready-mix truck, even though it knew his experience with the trucks was not current and despite the fact that he had requested more training on the truck. The Union cites two awards for the proposition that an Employer has an affirmative obligation to properly train and instruct employees in the correct operation of equipment before it may discipline them for incorrect operation. I do not disagree with the essential reasoning of Arbitrators Roberts and Kossoff. However, the elements of the accident in this case -- improperly lining up the truck with the wash rack, letting his foot slip off the clutch and losing control of its direction -- have nothing to do with some functional peculiarity of ready-mix trucks, and do not lend themselves to training and instruction. The grievant is a truck driver of over twenty years

experience. He presumably knows enough to be careful with the clutch, to line the truck up properly and to maintain control over its direction. These are things that must be done with any vehicle. The Union has not identified some aspect of the operation of the ready-mix truck with which the grievant



was unfamiliar and which contributed to this accident. Thus I find that the lack of any training or remediation played no part in the December 17th accident.

The grievant is an employee of only eighteen months tenure with the Company, who has had three preventable accidents in a space of seven months. The Company's rules allow for termination after a third offense within a year. There is no evidence of any disparate treatment or other unfairness in the selection of him for discipline, or in the choice of penalty.

On the basis of the foregoing, and the record as a whole, I have made the following

## AWARD

The grievant was discharged for just cause. The Company is directed to pay him for the time he lost between the date of his discharge and the end of the work day on January 11, 1997.

Dated at Racine, Wisconsin this 25th day of November, 1997.

Daniel J. Nielsen /s/

Daniel J. Nielsen, Arbitrator

## ENDNOTES

1/ The parties were advised that the WERC timeline for issuance of awards were 90 days after the close of the record, caseload permitting. This advice was set forth in a letter from the arbitrator dated March 21, 1997, and verbally at the hearing. The parties waived the 30 day limit on issuance of the Award.

2/ Clearly this amounts to second-guessing the grievant. Any number of steps could have been taken in hindsight, and in the wake of an accident, it is always possible to suggest how it might have been avoided. The question is whether the grievant acted reasonably, not whether he acted perfectly.

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