BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 528
No. 55492
MA-10027

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Guadalupe G. Villarreal, Deputy City Attorney, City of Racine, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1995-1997 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the grievance of Markus Dyess regarding a five-day suspension. The undersigned was appointed and held a hearing in Racine, Wisconsin on April 1, 1998, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by August 17, 1998.

ISSUE

The parties ask:

Did the Employer violate the collective bargaining agreement when it imposed a five-day suspension on the Grievant on May 12, 1997? If so, what is the appropriate remedy?

BACKGROUND

The Grievant is Markus Dyess, an employee of the City in the solid waste division of the Department of Public Works. He started working for the City as a seasonal employee in 1994 and became a full-time employee in 1996. This grievance is over a five-day suspension for an accident that he had in a truck on May 5, 1997.

On May 5, 1997, Dyess was assigned to pick up newspapers and cardboard. It was the first time he had this particular duty. He is usually assigned to pick up garbage, which is dumped in the landfill. He used the same kind of truck to pick up papers as he used to pick up garbage, and he was familiar with its operation.

The City has a contract with USA Waste, which maintains a facility for dumping recyclable papers and cardboard. There are two areas for dumping – one for papers and another for other recyclable materials. There are separate doors to these areas. When entering the door for the paper dumping area, there is nothing to indicate the height of the door or any caution to drivers to lower the tailgate, while there is such a warning on the inside of the door for the other recyclable materials.

When Dyess finished his route and went to the building to dump the paper, he was alone. No one met him to go through the routine of dumping paper in the building. His supervisor, Joe Johnson, did not tell him to hook up with anyone to learn the routine or give him any instruction on dumping at the recycling center. Dyess had never been in either side of the building before May 5th.

Dyess drove the truck out of the building without putting the tailgate down. The tailgate was too high to clear the doorway, and it hit on the doorway around the light bar of the tailgate.

The City does not have any specific training program for an employee to go out to the landfill. There is a training program when employees start working for the City. Golden feels that they should be competent enough as drivers to enter a building and look for obstructions or know the work rules. Drivers are supposed to get out of the truck prior to backing up, and look around the area.

John Tate, an employee who also works in the solid waste division of the DPW, had driven a solid waste truck for about two years before first going to the recycling center in the summer of 1997. When he was assigned to go to the recycling center for his first time, Tate was told by a supervisor to get together with someone who has been doing that duty for awhile, and that Tate was not to go out there by himself until someone else showed up to show him the ropes on what to do when he got out there. The other employee who helped Tate learn the routine told him to watch out backing into the building because it is rather narrow with only a foot on each side. The area to dump paper is about 100 feet back from the doorway. Tate was also told to lower the tailgate before leaving the building or it would hit the top.

Supervisors Irv Keller and Joe Johnson also instructed Tate to then help newer employees when they started taking materials to the recycling building. Tate was specific about telling new employees to lower the tailgate before entering or exiting the building. Tate testified that it would appear that one could come out of the building with the tailgate raised, that some people would likely think that it would fit. He noted that Dyess missed the building by only about two feet.

Jeffrey Fidler, the General Maintenance Supervisor in the DPW, was called about the accident. He went to the scene and observed that the top of the door frame was damaged, as well as the sides of the door, and that the truck was not in the same position where the accident had occurred. The truck had been pulled out into the yard of the facility. Dyess told Fidler that he had backed up into the building to dump a load of paper and cardboard, and after pulling forward once to let the load out, he got out of the truck, finished ejecting the load, hopped back into the cab and proceeded to pull out of the building. He heard a scraping noise, got out and saw the tailgate in a raised position in contact with the top of the doorway to the building.

Fidler stated that when a truck is backed into the building or area for dumping, the driver has to get out to see that there is clearance to raise the tailgate. The driver then unbuckles the turnbuckles -- a bolt and nut that holds the tailgate down, located near the rear of the truck -- and goes back to the controls that mechanically lift the tailgate. Those controls are located near the cab or front of the truck. One has to be out of the truck to operate the turnbuckles and lift controls. When the tailgate is full upright, the driver uses the ejector blade to push the load forward and out of the truck.

A supervisor with the Department, Ward Hinze, took some pictures of the accident scene and the truck.

One of the work rules states that employees should not move the vehicle when involved in an accident. Golden stated that if Dyess left the truck at the spot where it hit the door without pulling it out into the yard, it would have been better in terms of gathering information. It is not known whether more damage was done to the door when the truck was pulled out of the door opening. Dyess immediately reported the accident.

Fidler stated that he thought it would be obvious to anyone that he or she could not pull a truck out with the tailgate up without hitting the door frame. He estimated the tailgate to be 10 feet above the top of the truck when fully raised. Golden estimated the tailgate to be 20 feet above the box of the truck. Dyess estimated that the tailgate would be closer to 10 feet above the truck. Tate estimated that the tailgate would add another six to eight feet. There is nothing in the truck that tells the driver the height of the truck with the tailgate raised.

The parties agree that there is a difference in operating a truck in wide open spaces versus an enclosed building, and there is a particular difference in raising and lowering the tailgate in those different environments.

The Superintendent of Public Works, Joseph Golden, went to the site of the accident on May 6, 1997, after hearing that there was quite a bit of damage. He asked the Assistant Commissioner of Public Works, who is an engineer, to go along to get a ballpark figure on the damages. Jim's Garage Door Service estimated that it would cost $4,653 to fix the door, and Metzger Metal Fabricators estimated that the repair of the framing and sheeting would cost $8,690. Since this accident, the height of the door was raised so that a truck could go through the doorway with the tailgate raised and not hit the door frame.

Dyess' prior work record includes an accident when he was plowing snow and hit a car. It was the first time he had plowed snow. Dyess was originally given a one-day suspension for that accident, but the parties reached an agreement to reduce it to an oral reprimand by January 17, 1997. When Dyess was still a long-term seasonal employee back in 1994, he received a written reprimand for pulling a jeep with a trailer over a mower. He has had an accident for which he received no discipline – he recently hit a fire hydrant and reported it.

Golden considered the amount of damage to the building along with Dyess' work record to be a factor in the decision to suspend him for five days. City Personnel Director, James Kozina also visited the site of the accident, and he agreed with Golden that the significant damage to the building was a factor in the degree of discipline leveled against Dyess. Other facts included the length of service of the employee involved and his prior vehicular or equipment damage and prior disciplinary record. Kozina considered Dyess to be a relatively short-term employee with numerous infractions of work rules, and he was concerned about the employee's disregard of the employer's interest due to two prior vehicular accidents or damage and prior discipline regarding tardiness and absenteeism.

Kozina stated that the City tried to use progressive discipline to elicit correction action on the part of an employee. In this case, there were other vehicular accidents or equipment damage on the record. The major factors in determining that Dyess was to be suspended for five days were the prior disciplinary actions and the seriousness of this incident.

The parties have never agreed on what constitutes "minor" discipline that goes out of an employee's record after a period of time, or what kind of progressive discipline has to be used in various kinds of infractions or incidents.

THE PARTIES' POSITIONS

The City

The City argues that the Grievant's actions on May 5, 1997, were a clear violation of the work rules, specifically Sec. D(6), Sec. F(1) and Sec. L(1)(a). He failed to exercise extreme care when he failed to lower the garbage box after he completed the dumping procedure in the building. The dumping site was at least 100 feet from the entrance, so the Grievant's truck cab could not have been outside the building when the dumping procedure was completed. Also, it is improbable that he could not have perceived that the uplifted garbage box was higher or taller than

the open

door. He failed to make sure all obstructions were safely clear of the truck's equipment. Finally, he failed to adhere to the cardinal rule of not moving a piece of equipment after an accident. While he knew the rule, he thought it only applied to public property, not private property. That explanation is ludicrous given the Grievant's truck driving experience and past vehicular accidents.

The Grievant has been a truck driver during the entire time with the City. The Union attempted to imply that he was somehow involved in an operation totally alien to him and that he was not trained in this new operation. Common sense and facts and exhibits show otherwise. The truck the Grievant operated on May 5th is the same type of garbage truck that he has always operated. His actions on the mechanics of the garbage truck are the same whether the contents are dumped inside or outside of a building. The only difference is the USA Waste site is inside a building and other dumping sites are usually outside.

The work rules require that the Grievant check to make sure all obstructions are safely clear before moving the vehicle. It is obvious that a garbage truck with its box in the up position is likely to hit objects if operated or moved within a building. The truck with the box up is 20 feet high. The Grievant clearly failed to lower the box or check for obstructions like the doorframe and the door he managed to tear out.

Then the Grievant compounded his error by continuing to move his vehicle after he hit the door and frame. He vehicle was found some 100 feet away from the door and frame. The work rules require that a vehicle must not be moved after it is involved in a property damage accident. Common sense would also dictate that the truck's forward motion should stop and not cause further damage. The Grievant's removal of the truck from the contact or collision position changes or destroys the evidence that the work rule is intended to preserve.

The five-day suspension is reasonable given the seriousness of the offense and is consistent with the City's progressive discipline policy, given the Grievant's disciplinary history.

The Union

The Union feels that the action taken against Dyess fails any reasonable analysis. Fidler told how the City trains workers to operate equipment and the specific use of that equipment, depending on the function being performed. Fidler even testified that the City is obligated to train workers and that failure to train would lead to equal culpability by the City. Although Dyess had been trained in the operation of the type of vehicle he was driving on the day in question, that training occurred outdoors where there are no overhead doorways to avoid. The operation of picking up garbage is different than unloading a recycling truck.

The Union points out that Tate testified that he has been assigned the same recycling duty that Dyess was assigned to on May 5th, and Tate was instructed by his supervisor to team up with another worker who had been assigned to recycling before in order to learn the ropes. No such instructions were given to Dyess, and no such training was given to him.

Also, a sign by the second doorway cautions drivers to lower their tailgate before exiting the building. Dyess never used the doorway that was posted with the cautionary sign. There was no such caution appearing at the doorway used by Dyess. It also did not have any height warnings, while the second doorway did.

While the City claims that Dyess further violated its work rules by moving the truck before a supervisor showed up, the City disregards one of its own rules by not having a second worker available to assist the driver in backing up. The Union asserts that the severity of the discipline invoked is harsh. The Union notes that the doorway was later modified so that a truck can now safely exit the area without needing to lower the tailgate.

The Union argues that if there is some reasonable degree of discipline for the May 5th incident, a five-day suspension was way out of bounds. The City follows a policy of progressive discipline for similar types of offenses. One need only study the settlement of June 19, 1996, to see that similar types of occurrences cause the stakes to remain high and that lack of further similar situations causes the impact to lessen. The City admitted that it considers other vehicular accidents when disciplining workers for vehicular accidents. The settlement of June 19, 1996, reduced the level of discipline to an oral reprimand. To jump from an oral reprimand to a five-day suspension is unreasonable and without foundation. The spirit of the prior settlement would have allowed for no more than a written reprimand.

The Union argues that Dyess did not have a suspension on his record when he hit the top of the opening on May 5th. If the 1996 settlement does not lead to that conclusion, the Union states that it may need to rethink its long-standing tradition of compromise. The Union asks that Dyess be made whole for all money lost.

DISCUSSION

The main dispute in this case centers on whether the disciplinary measure of a five-day suspension is excessive or not. No one disputes the fact that Dyess made an error in judgment, that his error damaged a door frame and the light bar on the truck, and that he alone was responsible for this accident.

The Arbitrator hesitates to second-guess the degree of discipline imposed once it is determined that there is just cause for discipline. An arbitrator should not substitute his or her judgment for that of management unless the penalty is excessive, unreasonable, arbitrary, capricious, or management has abused its discretion. A five-day suspension is a severe disciplinary measure. The loss of a week of pay is a substantial economic penalty.

Both parties make very legitimate points in this case. It is true that common sense should have dictated that Dyess at least check to make sure that the truck with the box raised up could clear the doorway. However, common sense doesn't seem to be so common as it should be. It is

also

true that Dyess was not trained on the operation inside the building, and that other employees were trained on this specific operation when they went to this building for the first time. These are both major considerations in this case.

The fact that Dyess was not a long-term employee cuts both ways in this case. The City has a strong and legitimate interest in seeing that employees who start out working for the City and quickly accumulate accidents are either corrected quickly or weeded out from the work force. A long-term employee with a clean record would generally be viewed more positively in a disciplinary setting than a short-term employee with other matters on his record. However, the short-term employee has no time to gain a lot of experience or skill on a job. Those considerations tend to nullify each other, making the length of service relatively unimportant in this case.

The City did not give any deference to the fact that Dyess had no training, that his was his first time in newspaper recycling area, and that others had some training when going to this recycling area for the first time. The testimony shows that other employees were trained and told to hook up with more experienced employees when going there for the first time. This is an important consideration in this case. Even experienced employees and managers had no idea how high the truck was when the box was up – guesses ranged that the box was another six to 20 feet above the truck.

Also, the record fails to show that less severe discipline would not achieve corrective action by this employee, or that such a severe penalty was needed under the circumstances. The disciplinary record is mixed with different matters, such as accidents, tardiness, etc. However, the negligence that concerns the City may well be corrected by a much lesser penalty, given the fact that this employee does not have much experience in the various operations of the Employer, or did not at the time of the accident at the landfill operation.

Moreover, the degree of negligence is not related to the amount of damage or the expense of repair in this case (would the City penalize an employee more for hitting a Cadillac than a Chevette?). The City seems concerned about the cost of the accident, but it fails to take into account the fact that the accident was a minor error in judgment on Dyess' part. As Tate noted, Dyess did not miss the door frame by much.

For all of the reasons stated above, the penalty of five days of suspension is clearly excessive. However, a one-day suspension would be appropriate because of the fact that the Grievant should have known to put the box down, and once he heard it hit the door, he should not have moved the truck further in accordance with the work rules.

AWARD

The grievance is sustained in part and denied in part. The City had just cause to discipline the Grievant in accordance with the guideline listed above. The City is ordered to reduce the Grievant's discipline for this incident to a one-day suspension and pay back to him money lost for four days of suspension.

Dated at Elkhorn, Wisconsin this 9th day of October, 1998.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator

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