BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LANGLADE COUNTY HIGHWAY EMPLOYEES LOCAL 36, AFSCME, AFL-CIO

and

LANGLADE COUNTY

Case 87
No. 57329
MA-10594

Appearances:

Ruder, Ware & Michler, S.C., by **Attorney Jeffrey T. Jones,** 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Langlade County.

Mr. David Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, Wisconsin 54311, appearing on behalf of Langlade County Highway Employees Local 36, AFSCME, AFL-CIO.

ARBITRATION AWARD

Langlade County Highway Employees Local 36, AFSCME, AFL-CIO, hereinafter Union, and Langlade County, hereinafter County, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on March 1, 1999, requested that the Commission appoint either a staff member or a Commissioner to serve as Arbitrator. The Commission appointed Paul A. Hahn as Arbitrator on March 1, 1999. Hearing in this matter was held on April 14, 1999 at the Langlade County Resource Center, Antigo, Wisconsin. The hearing was transcribed. The transcript was received by the Arbitrator on May 20, 1999. The parties filed post hearing briefs which were received by the Arbitrator on August 4, 1999 (Union) and August 5, 1999 (County). The parties were given the opportunity to and did file reply briefs which were received by the Arbitrator on September 15, 1999. The record was closed on September 16, 1999.

ISSUE

Union

Did the County have just cause to discipline the grievant Tim Wensel on December 18, 1998? If so, what is the appropriate remedy?

County

Whether the County had just cause to issue the Grievant a written reprimand for the damage caused to the Grader that he operated on December 18, 1998? If so, what is the appropriate remedy?

Arbitrator

The statement of the issue by both parties reasonably frames the issue for me to decide. I select the County's statement of the issue as being more specific and because the parties have agreed that there was damage to the Grader operated by Grievant on December 18, 1998. I modify it as follows: If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – RECOGNITION

The Employer recognizes the Union as the exclusive collective bargaining representative for all the employees of the Highway Department, except the Highway Commissioner, Patrol Superintendent, confidential, clerical personnel, supervisory employees, managerial employees, and seasonal part-time employees.

. . .

ARTICLE 4 – MANAGEMENT RIGHTS

The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

. . .

D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;

. . .

ARTICLE 7 – GRIEVANCE PROCEDURE

A. Definition: Any difference or misunderstanding which may arise between the Employer and the employee, or the Employer and the Union shall be handled as follows:

. . .

F. Arbitration:

. . .

3. Arbitration Procedures: The arbitrator selected or appointed shall meet with the parties at a mutually agreeable time to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Union, which shall be final and binding on both parties. The arbitrator shall (sic) modify, add to or delete from the expressed terms of the Agreement.

STATEMENT OF THE CASE

This grievance involves Langlade County Highway Employees Local 36, AFSCME, representing the employes set forth in Article 2, Recognition. (Jt. 1) The Union alleges a contractual violation in that the County did not have just cause when it disciplined the Grievant for damage to Grader 350 operated by the Grievant during a snow storm in the Town of Price on December 18, 1998. Langlade County operates a Highway Department. The Department employs approximately 43 employes and operates 100 pieces of equipment. Employes hold certain positions such as Mechanic, Bulldozer Operator, Grader Operator, Heavy Truck Operator. (Jt. 1) Employes operate certain pieces of equipment in accord with the position that they hold.

The Grievant has been employed in various capacities by the County since May of 1991. At the time of this grievance, and currently, the Grievant is classified as a Grader Operator, a position that he has held since April 1997. The Grievant is assigned to Grader No. 350. Grievant has plowed snow with a Grader for five years prior to the grievance in this matter. When plowing snow, the Grievant is responsible for plowing the roads in Price Township in Langlade County. The snow plow route is 24 miles in length, of which 1.9 miles had been seal coated in the summer of 1998.

On December 18, 1998, Langlade County experienced its first snow storm of the season. The storm consisted of between two to four inches of dry snow. (Co. 8) The

Grievant plowed Price Township with Grader No 350. (Co. 9 and 14) Grader 350 has a moldboard which can be tilted back and forward. The cutting edge or blade is bolted to the moldboard; the blade is the actual piece of equipment that meets the road and plows the snow. The Grader has a float position for the moldboard which means there is no down pressure on the moldboard and the moldboard and attached blade essentially "float" on the road. Down pressure would be applied if the grader were trying to plow packed snow or ice off the road. The float position was appropriate for the type of snowstorm Grievant plowed on December 18th.

The Grievant plowed the Township roads for four hours. After plowing for approximately two hours, the Grievant stopped his grader and checked for the wear on the blade. At this point in time, the Grievant did not notice any excessive wear on the cutting blade. After plowing for four hours, Grievant returned to the Highway Shop and left for home sick with the flu. Prior to leaving for home the Grievant wrote a note in which he advised County management that the wing of the Grader had fallen off during his snowplowing, the moldboard had been damaged and the heater was not working properly. (Co. 10) The Grievant also informed shop foreman Resch that "the Grader had been damaged." (Tr. 87, 170)

Resch and Highway Commissioner Every, Assistant Highway Commissioner Rogatzki and Eric Larsen, Chairman of Langlade County Highway Committee who happened to be in the shop, inspected the moldboard on Grader No. 350 immediately after Grievant left for home. These management representatives concluded that the moldboard had been worn from the backside to the front through the bolt holes that allow the plowing blade to be bolted to the moldboard. To cause such wear, they concluded that the moldboard had to have been rotated so that the cutting blade was in the maximum forward position and the moldboard rotated all the way back, which was not a normal position for plowing light snow. (Jt. 3, Co. 12) The County took photographs of the damaged moldboard which necessitated a piece of metal being welded to the moldboard so that a cutting edge could again be bolted to the moldboard. (Co. 11 and 12)

Highway Commissioner Every spoke to Grievant in the presence of the Union President regarding the damage to the No. 350 Grader. The Grievant claimed that the damage was an accident and was unintentional. (Co. 13) Grievant further claimed that he did not understand why he was being reprimanded when other employes had damaged other pieces of equipment and had not been disciplined. (Co. 13)

Prior to this incident, Grievant bid for and was awarded a mechanic position in late November/December of 1998. The trial period for this mechanic position was 45 days. During the course of the trial period the Grievant requested through his supervisor that he be provided additional coveralls. This request was turned down by the Highway Committee on

December 16, 1998. Resch, the Shop Foreman, advised the Grievant that his request to the Highway Committee had been denied. Grievant is alleged to have responded: "Those cheap bastards, they will pay for that." (Tr. 86) The Grievant ultimately decided not to pursue the mechanic position and returned to his Grader job. Resch informed Every, the Highway Commissioner, of Grievant's statement on the same day that it was allegedly made, December 16, 1998. Also on December 16, 1998, Resch issued the Grievant a written warning for failing on numerous occasions to report to him at the start of the normal work day for the purpose of advising him of the work to be done that day. (Co. 18)

Grievant had also been warned regarding self-admitted horseplay which involved damage to County equipment. (Co. 20) The County considered the alleged "cheap bastards" statement by the Grievant on December 16, 1998, the damage to Grader 350 on December 18, 1998 and the prior horseplay and damage to County equipment and decided to issue a warning to Grievant. (Co. 12) The Grievant was issued an "Employee Warning Notice" on December 21, 1998 which found that the Grievant was guilty of abuse, misuse and neglect of equipment. In a memorandum attached to the Employee Warning Notice the County stated that it felt Grievant "purposely abused, misused, and neglected the Grader." (Jt. 3) The Langlade County Highway Employee Handbook specifically prohibits abuse of County equipment. (Co. 7)

The parties processed the grievance through the contractual grievance procedure and were unable to settle the grievance; the grievance was appealed to arbitration. No issue was raised as to the arbitrability of the grievance. Hearing in this matter was held by the Arbitrator on April 14, 1999 in the City of Antigo, Wisconsin at the offices of the Langlade County Resource Center. The hearing concluded at 8:50 p.m.

POSITIONS OF THE PARTIES

Union Position

In its initial post hearing brief and in its reply brief the Union takes the position that the County, because this is a discipline case (written warning), has the burden of proof and, because of the way the written warning was stated, must prove that the damage was knowingly and intentionally caused by the Grievant. The Union takes the position that the County did not present any credible or persuasive evidence that Grievant "inflicted" the damage knowingly. The Union points out that there is no question that Grievant damaged Grader 350 on December 18 because Grievant admitted doing so. What is disputed is whether Grievant intentionally caused the damage.

The Union suggests that the four County management representatives who viewed the damaged Grader on December 18, 1998 all had minimal experience operating a grader and in particular the type of grader operated by Grievant on December 18th. The Union submits

that a non-bargaining unit supervisor who had experience plowing snow with a County grader testified that he had worn into the moldboard and corresponding bolt holes while snowplowing. This witness further testified that he was not reprimanded for that incident and also testified that he did not believe the Grievant intentionally damaged Grader #350.

The Union points out that County "expert" witnesses from Forest County, Oneida County, and the former Highway Commissioner of Langlade County did not see the damaged equipment in an unrepaired state. Further, the Union argues, their input into this matter was not considered at the time the County made the decision to discipline. Therefore, the Union submits that their testimony is irrelevant and should not be given any weight by the Arbitrator.

The Union reminds the Arbitrator that there was admitted animosity between the Grievant and Shop Foreman Resch, and, therefore, the Arbitrator should question the credibility of Resch's statement that the Grievant threatened "the cheap bastards will pay for this" when his request for two additional sets of coveralls was denied. The Union hypothesizes that even if the Grievant did make a remark "along these lines," it is doubtful that he would purposefully damage Grader 350 to which he was assigned as retaliation; a more plausible explanation, the Union offers, would be that he made the County "pay" by returning to the Grader Operator position at the end of his 45-day trial period for the Mechanic position.

The Union next argues that a non-bargaining unit supervisor and bargaining unit employes testified that the moldboard and brackets on Grader 350 had been previously repaired. The Union argues that damage to the moldboard is not common but also not unusual. The Union supports this evidence with testimony of other County Grader operators, with more grader experience than the Grievant, who stated that the damage certainly could have been caused by accident. Those witnesses stated that it was doubtful that the damage was intentional because the damage could not be hidden and peer pressure from other employes on the Grievant would arguably result in a tougher repercussion than what the Grievant would receive from the County.

The Union strongly argues that other employes did not receive formal discipline for damaging equipment, but only received "a good chewing out" from County management. The Union submits that the previous incidents of horseplay are irrelevant because no discipline was given to Grievant, even for the alleged damage to a bulldozer operated by the Grievant.

Lastly the Union argues that the County failed to prove its accusation that the Grievant "purposely abused, misused, and neglected the Grader" on December 18, 1998. The County did not have just cause to issue a written reprimand to the Grievant on that date and therefore the County violated Article 4 – Management Rights, Section D of the parties' collective bargaining agreement by issuing an Employee Warning Notice to the Grievant. The Union requests that the Arbitrator sustain the grievance and order the County to remove the written reprimand, as well as any and all references to same, from Grievant's personnel file.

County Position

The County takes the position that it had just cause to discipline the Grievant by issuing the Grievant a written warning for his abuse and neglect of County equipment on December 18, 1998. The Union's claim that the County violated the just cause provision of Article 4 – Management Rights, subparagraph D is without merit. The County argues that the record establishes that the Grievant abused and neglected an expensive piece of equipment – he wore the cutting blade on Grader No. 350 down to the point that the roadway cut into the moldboard and wore into the bolt holes which hold the cutting blade to the moldboard. The County states that its officials believe that the Grievant's actions were intentional and were taken, in part, in retaliation for the denial of his coveralls request. But, the County argues, that at a minimum, the Grievant's actions constituted "inexcusable negligence" with respect to Grader No. 350 on December 18, 1998.

The County cites and discusses numerous arbitration cases that define just cause and provide that an employer must act in good faith and for a fair reason for the discipline of employes. Further, that discipline must be supported by the evidence and such action by an employer cannot be arbitrary, capricious or discriminatory. The County further argues that under applicable arbitration case law, either intentional damage or neglect resulting in abuse of equipment by an employe can result in just cause.

The County discusses in its post-hearing brief and reply brief the testimony of witnesses at the hearing to support its position of either intentional abuse or at the minimum, neglectful abuse of Grader 350. Through the testimony of Highway Commissioner Every the County argues that the record shows that the Grievant plowed the Town of Price twelve times during the 1998-1999 winter season and that following the incident on December 18, 1998, the Grievant had no further problem in plowing without damaging Grader 350. The County submits that no other employes had problems with their equipment on December 18, 1998. The County further supports this argument by submitting evidence that the actual number of cutting edges used for plowing Price Township was less than in other Townships, even though the Price Township route is one of the longest. (Co. 17) Other foremen, with experience in operating graders and familiar with the conditions in which Grader 350 was operating on December 18, stated that whether the damage was intentional or not, that they could not believe the amount of damage that was done to Grader 350 under the circumstances of snowplowing on December 18, 1998.

The County bolsters its argument with the opinion of County Highway Commissioners from Oneida and Forest County and a previous Langlade County Highway Commissioner. These Commissioners stated that the damage could not have been done to Grader 350 if Grievant had operated it properly. These witnesses further testified that the 1.9 miles of seal coating in Price Township would not have affected the plowing that day. The County argues that the Highway Commissioners testified credibly as to how the Grader should have been operated and further testified that it is the responsibility of the Grader Operator to ensure that

the position of the cutting blade is not resulting in excessive wear.

Shop Foreman Resch testified that he had never seen such excessive damage to a moldboard during his entire career with the County. This testimony, the County submits, was confirmed by Patrol Superintendent and Assistant Highway Commissioner Rogatzki who had extensive grader operator experience. Rogatzki confirmed that it should not have been possible to wear out a set of blades and a moldboard in the manner that was done by the Grievant on December 18, 1998

The County submits that Grievant's own testimony proves intentional or, at the minimum, neglectful, use of Grader 350 because Grievant testified that after two hours he checked the cutting blades and that they were fine. Thus, the County argues that in less than a two-hour period, the Grievant wore most of the cutting blade off and wore into the bolt holes on the moldboard. The County submits that testimony of experienced County management, as well as management from other Counties, proves that it simply would not have been possible for Grievant to accidentally wear off the blade and cause the damage to the moldboard in two hours of snow plowing given the conditions of the snow storm on December 18 of 1998.

The County argues that the Arbitrator should defer to the County's judgment, citing arbitration case law, that the Arbitrator should give due weight to the County's determination of the proper penalty to be imposed for Grievant's misconduct. The County further argues that Grievant had been forewarned about abuse of County property, based on his past record of horseplay. This warning, submits the County, is a relevant factor in determining whether the penalty imposed was proper. The County cites arbitration labor treatise in support of its position that forewarning of unsatisfactory conduct and an employe's past record may be considered by the Arbitrator.

The County then lists the Grievant's history of disrespect and damage to County property citing the bulldozer incident where the County alleges Grievant was responsible for ensuring that the bulldozer he was operating was filled with anti freeze, did not do so, and improperly ran the engine until it seized up resulting in a repair cost of $8,000. The County further cites the incident where Grievant allegedly threw a chainsaw into the back of a pickup truck and the various incidents of horseplay. (Writing "Mike" on a Highway Department truck, painting the gas pedal of a truck yellow, driving over a slow/stop paddle Grievant had thrown to the ground breaking it).

In its reply brief, the County counters the Union argument that the County must prove that the Grievant intentionally damaged Grader No. 350 by stating that even if the facts do not establish intentional damage, the County still had just cause to issue the Grievant a written reprimand for his negligence with respect to the damage caused to Grader No. 350. Citing arbitration case law, the Employer continues its argument by stating that even ordinary negligence can support disciplinary action to an employe and that ordinary negligence would go to the degree of discipline. The County argues that an employer has a right to expect its employes to exercise care in their duties and a co-extensive right to respond to employe negligence with corrective discipline. Thus, the County argues, it could properly issue the

Grievant a written reprimand for the damage to Grader No. 350.

The County submits that the Union recognized that employes have received a good "chewing out" when they have damaged County Highway equipment, a fact supported by both County and Union witnesses. Those "chewing outs," the County submits, constituted verbal reprimands or at a minimum counseling of an employe for inappropriate conduct. Patrol Superintendent Rogatzki testified that he had issued a verbal warning to an employe for misconduct similar to what occurred on December 18, 1998 with the Grievant. The County further submits that other employes did not have a history of prior abuse of equipment when they received their oral reprimand or chewing out and therefore in their cases a written warning, as received by the Grievant, was not justified.

The County submits that it has the right to issue corrective discipline for the damage caused to the equipment by the Grievant's negligence. The County submits that Grievant, if he had exercised reasonable care, should have checked the cutting blade more often.

The County also takes the position that the Grievant did not, as implied by the Union in its brief, deny that he made the statement to Shop Foreman Resch in response to his request for two additional sets of overalls being denied. Citing the transcript, the County states that the Grievant testified "to my recollection I did say no such thing to Mr. Resch." The County argues that the Union itself doubts the Grievant's credibility because in its brief it states that even if the Grievant did make a remark along those lines, suggesting that the Union is not convinced that the Grievant did not make this statement to Resch.

The County points out that although the Union was not aware of the written reprimand to employe Bill Rusch for wearing out an under body of a truck, the Union President, Romy Fleischman, admitted in his testimony that it is up to an employe's discretion to apprise the Union of discipline, and the County is under no obligation to advise the Union when it disciplines an employe. The County also submits that the fact that a piece of equipment has been repaired does not necessarily mean that it is more likely to suffer damage in the future.

The County argues that given all of the above, the issuance of a written reprimand to the Grievant for his conduct on December 18, 1998, was appropriate. The County requests that the Arbitrator dismiss the grievance in its entirety.

DISCUSSION

This is a discipline case involving a warning letter given to the Grievant for damage caused to a Langlade County grader while plowing snow on December 18, 1998. The matter was thoroughly litigated by the parties at the arbitration hearing and through their post hearing briefs. The parties' labor agreement requires that the County must have just cause if it is to discipline a member of the bargaining unit. 1/ The post hearing briefs of the County accurately set forth the arbitral just cause standard, as well as the standard for an arbitrator's

consideration of the appropriate penalty, assuming the just cause standard is met. 2/ The Union does not argue with those standards as cited by the County. 3/

1/ Article 4 – Management Rights

> ***D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;***

2/ County Post Hearing Brief pg. 12 citing LACROSSE LUTHERAN HOSPITAL, 73 LA 722, 725 (MCCRARY, 1979)

> ***. . . any conduct, . . . by an employee which arises out of, or is directly connected with the work, and which is inconsistent with an employee's obligations to his employer . . . might very well be determined to be "just cause. . . ."***

and citing PEPSI – COLA BOTTLERS OF AKRON, INC., 87 LA 83, 88 (MORGAN, 1986).

It simply means that the employer did not act arbitrarily, capriciously, discriminatorily, or without basis in fact.

County Post Hearing Brief pg. 37 citing Borg-Warner Corp., 47 LA 903, 906 (Larkin, 1966)

> ***Unless there is evidence that management has acted in an unreasonable, arbitrary or capricious manner in imposing discipline, the arbitrator should not substitute his judgement for the one who made the initial decision.***

3/ Union Reply Brief pg. 1

> ***From the Union's perspective, there is no dispute as to what constitutes just cause under the Parties' Agreement.***

The Union's main argument, which I must initially consider, is that the County only disciplined Grievant for "intentional" damage to Grader 350 and that is what the County was obligated to and did not prove. The actual Employee Warning Notice to Grievant states the violation as "abuse, misuse and neglect of equipment." (Jt.3) The memorandum attached to the Notice states that Langlade County "feels Mr. Wensel purposely abused, misused, and neglected the Grader." (Jt. 3) The Union argues that the use of the word "purposely" puts the matter as "intentional" and that is what the County must prove.

There is no evidence in the record of what transpired during grievance meetings as to the position of the County on this issue. However, the County made clear in its opening

argument at the arbitration hearing that not only was it arguing intentional cause of damage but also ". . . at a minimum what he did was misuse and neglect of that equipment." (Tr. pg. 7) The County repeated the alternative neglect argument in its post hearing briefs. The Union, therefore, at the start of the hearing knew that the County was not solely relying on proving just cause by intentional or purposeful acts of Grievant. The Union did not ask for a continuance to prepare to address or defend against this alternate just cause position. It is also clear to me that the Union defended this case by trying to prove that not only did Grievant not intentionally damage the Grader but that the damage was not caused by neglect but by accident. This also is not a case where the County introduced new facts at the hearing. It is essentially a legal argument whether the County can take the position that in the alternative the Grievant was disciplined for neglectful damage to the Grader when that was not specifically stated on the Warning Notice.

It is my opinion that the County can try to justify just cause by arguing that, if not intentional the Grievant's actions leading to the Grader damage were neglect, not an accident. I do not believe that the County's contention changes the overall issue of whether there was just cause to discipline the Grievant. And, as recited above, the record establishes adequately that the Union had ample opportunity to and did defend against this contention at the hearing and did argue against its use in its post hearing briefs. 4/

4/ In a promotion case, the Union for the first time at the arbitration hearing claimed racial harassment. The Company strenuously objected that these grounds for the grievance had not been considered at the previous steps of the grievance procedure and that the Company had not had an opportunity to prepare a response. In allowing the evidence, the arbitrator ruled that the Company did not ask for a recess to provide itself with an opportunity to respond. Further, the Union used the harassment claim at the start of a twelve hour arbitration hearing where the Company had adequate time to respond.

ARKANSAS POWER AND LIGHT COMPANY, 89 LA 1028, 1032 (WOLF, 1987).

To similar effect, an arbitrator considered a fact situation where a lawyer with the United Auto Workers Legal Services Plan violated a policy against doing private practice of law. The termination letter only stated as a reason for the termination, the violation of the no-private practice policy. At the arbitration hearing, the Company raised for the first time potential ethical violations from facts surrounding the particular private practice matter. The arbitrator allowed the evidence concluding it was well within the theory of the case and the Company attorney mentioned the alleged ethical violations in his opening statement.

UNITED AUTO WORKERS LEGAL SERVICES PLAN, 102 LA 449, 459-460. (COHEN, 1993). See also: PUREX CORPORATION, LTD., 39 LA 489, 492 (DOYLE, 1962); ST. FRANCIS HOSPITAL, 77 LA 1008, 1010 (GLAZER, 1981).

There is no dispute as to the damage to Grader 350, or more specifically to its moldboard, and I had an opportunity to view that damage. There further is no dispute as to the conditions of the snowstorm on December 18, 1998; it was two - four inches of dry snow. Further, Grievant was not an inexperienced Grader Operator, particularly when plowing snow. The winter of 1998-1999 was at least his fifth year of plowing snow with Graders. (Tr.177) It was also Grievant's second year operating Grader 350, including the plowing of snow in Price Township. (Tr.163 and183) While Grievant may not have had the Grader Operator experience of some of the witnesses who testified, he certainly cannot be described as inexperienced, and he did not previously have any similar damage problem plowing snow.

A careful review of the testimony of witnesses called by both parties, I believe, leads to the conclusion that given the type of Grader, the conditions of the December 18th storm and the Grievant's experience, the damage should not have happened if Grader 350 had been operated properly. Contrary to the Union position, arbitrators can accept and give weight to expert and in this case, at the least, opinion testimony. 5/ Therefore, I have considered the testimony of Forest County Highway Superintendent Cole, Oneida County Highway Commissioner Maass and former Langlade County Highway Commissioner Schuman.

5/ See Elkouri & Elkouri, How Arbitration Works 5th Edition pg. 463 (1997)

These witnesses did not testify as to the issue of just cause for discipline but only to the proper operation of Grader #350 given a known and accepted set of facts about the snowstorm and road conditions on December 18, 1998. That testimony, as well as the testimony of other witnesses, I found helpful to understand the operation of a grader in plowing during a snowstorm.

Cole testified that the damage to #350 could not have been done in four hours and that the 1.9 miles of seal coating could not have caused such damage to the Grader's moldboard. (Tr. 64, 60) Cole, an experienced Grader Operator, testified that with new blades on the Grader, which there were, the blades should not have been worn down and certainly not into the moldboard. (Tr. 87) Cole also testified that an Operator should be checking wear of the blades every two hours. Maass testified similarly that the damage just should not have happened. Maass believed that downward pressure was the only way the damage could have been done which is contrary to Grievant's testimony that the plow was in a float position. (Tr. 67) Maass described through his testimony and visually on a chalkboard the probable cause of the excessive wear in that the Grievant had the moldboard rotated in a backward position which brought the moldboard and its bolts in contact with the road surface. Maass' testimony was uncontradicted that a conscientious operator watches the blade and the moldboard to see that this type of damage does not occur. (Tr.71, 72 and 73)

Completing the County's witnesses, former Highway Commissioner Schuman testified that he had never seen damage to the extent done to #350 while with the County even though there had been damage to graders and moldboards during his tenure with the County. (Tr. 112) Every, the current Highway Commissioner testified that in his review of the incident he spoke with non-bargaining unit foremen, none of whom had seen such damage. (Tr. 55) Both Larsen, the Chairman of the Langlade County Highway Committee and Resch, the shop foreman, testified that they had never seen a moldboard damaged to that extent, particularly given the snowstorm conditions on December 18, 1998. (Tr. 76 and 88) Lastly, Patrol Superintendent Rogatzki testified that the damage was more severe than what he had seen other employes do to moldboards on Graders and trucks. (Tr. 104)

The Union called recently retired Grader Operator Hoerman who had been a Grader Operator with the County for 36 years. Hoerman testified that it would be possible to wear out a set of blades in four hours, particularly with the seal coating on the road and under the conditions of the day. (Tr. 116 and 117) He also testified as to how he would position the blade and the moldboard. His testimony is to a degree at odds with the testimony of the witnesses for the County. But, Hoerman also made clear that during the course of plowing an Operator should be adjusting the blade and the moldboard, should take into account the seal coating if there is any and should get out and check the equipment for wear. (Tr. 118 and 119). The main question that Hoerman raised with his testimony is whether Grievant had enough training stating that it takes five to ten years to be proficient in operating a grader. (Tr. 126)

Mytas, a current employe and Grader Operator, testified that the damage shouldn't happen but it does, and that he did not think the damage was intentional on Grievant's part because there is no way to hide it. (Tr. 141 and 147) Mytas also testified that an Operator should be watching his cutting blades and if necessary stop the equipment, get out and check the blades. (Tr. 143) The Union also relies on the testimony of paver foreman, Reynolds, who testified that he did not think the damage was intentional. (Tr. 128) Reynolds had also worn into the bolt holes on a Grader though not as far up on the moldboard as the Grievant. (Tr. 131) However, Reynolds pointed out that the Grader he did the damage to did not have a float position which is supposed to follow the road contour and that in damaging his Grader he probably applied too much down pressure to cause the damage he described. Reynolds further stated that he was surprised at the amount of damage to Grievant's grader. (Tr. 132 and 133). The Union called Union President Fleischmann who had been a welder with the Highway Department for nine years. Fleischmann testified that in nine years as a welder he had fixed two other cases of damage similar to the damage to Grievant's grader. (Tr. 157) He testified that he was not aware whether the road conditions on the days that damage was caused were similar to the road and snow conditions on the day Grievant's grader was damaged.

The main thrust of Grievant's testimony is that he positioned the blade and mold board on December 18th based on his experience. (Tr. 161) He also testified that he was unaware of the seal coating on the Price Township road prior to his plowing snow on the date in question.

(Tr. 162) Grievant testified that most of the time that he was plowing the moldboard was in

the back position, (Tr. 161), which I note was not the position most of the witnesses stated was the proper position for plowing snow based on that day's conditions. The Grievant admitted that he knew the seal coating was there when the plow hit it but did not think it would do any damage. (Tr. 182) Grievant pointed out his lack of experience as compared with Mytas and Hoerman. It is clear from the testimony that neither Grievant nor any of the other witnesses thought that the type of blade Grievant was using that day or the fact that the wing fell off the Grader had anything to do with the damage. Further, the Grievant did not blame his flu symptoms for the damage. What I do find as critical testimony by the Grievant is that midway through his four hours of plowing snow he got out and checked the cutting edge or blade of Grader 350 and there was no showing of wear that caused him to change his method of operation. (Tr. 164, 178, 179 and 190).

Based on the evidence in the record, I find that Grievant did not exercise the due care that the County reasonably could expect of him while operating the #350 Grader on December 18, 1998. His operation of the equipment was neglectful to a point where it was not accidental even if unintentional and rises to a degree of neglect that some type of corrective action was justified by the County. The fact, by Grievant's own testimony, that after two hours of plowing there was not excessive wear means that we are asked to believe that in only two more hours the damage was caused to the grader; this is just not creditable. The fact that other parts of the Grader may have been worn (circle and brackets) still did not relieve the Grievant from checking whether the blades were wearing properly and that no damage was being caused to the Grader. I find it irrelevant that the Grader may have been similarly damaged in the past. There was no testimony or evidence that the Grader was not fit for snow plowing duties on December 18th. There further is no evidence in the record to explain why Grievant plowed snow with the same Grader the year before without problem and then had problems on the day in question with dry light snow. The fact that Grievant had no problems on that Price Township route the rest of the winter may be due to the fact that Grievant exercised more care when plowing following the issuance of the warning notice.

Having found discipline warranted for neglect, I do not need to determine whether the damage was intentional. I do need to address the Union's argument that Grievant was treated differently because employes of the Highway Department who had damaged equipment in the past only received a "chewing out." Contrary to the County, I do not count these "chewing outs" as oral discipline and there was no testimony to support the formality of an oral discipline. Nor does the written reprimand to another employe for damage to equipment by itself establish any pattern of progressive discipline for abuse or neglectful treatment of County equipment. However, the discipline to Grievant was not considered by the County in a vacuum. As Commissioner Every testified, Grievant's history of abuse of equipment either through horseplay or just plain carelessness was considered by the County in deciding on the warning notice discipline. (Tr.52). The record testimony is replete with evidence that other employes when they damaged equipment only received a "chewing out" because they had no history of abuse or neglect of equipment. Grievant, to his credit, did not deny his efforts at horseplay or his carelessness with equipment. He may have put a different spin on these

incidents but they did happen as described earlier in this opinion. The Grievant also admits that his feeling that he is being singled out for formal discipline may be based on his term as Union President is only a belief without anything to substantiate it. (Tr. 189)

Grievant's case, I believe, is different than other employes, and I find no disparate treatment of him. Grievant evidences that he has a problem with authority. He did not get along with the Highway Commissioner and the Shop Foreman and they confirm this situation. He received a written warning for not checking in with the Shop Foreman in the morning. (Co. 18) He had been talked to by management about his horseplay. (Co. 20) No one refuted Resch, the Shop Foreman's testimony that Grievant has always been hard on equipment. (Tr.82) The Union offered no real evidence that any bargaining unit employe had a similar work background as Grievant and therefore whether or not other employes were disciplined for damage to equipment cannot justify overturning the discipline in this case.

I find in this case that the discipline of Grievant was not unreasonable and was not capricious or arbitrary. I believe what we have here is appropriate corrective discipline to try and help Grievant understand that he has a responsibility to exercise reasonable care in the operation of County equipment. Larsen, the Highway Committee Chairman who was involved in the discipline decision, testified that he did not want to go along with more discipline because he wanted to give Grievant a chance. (Tr. 78) A warning notice gives the Grievant that opportunity without suffering loss of job or pay.

Based on the foregoing and the record as a whole, I enter the following

AWARD

The County did have just cause to issue the Grievant a written reprimand for the damage caused to the Grader that he operated on December 18, 1998. The grievance is denied.

Dated at Madison, Wisconsin this 12th day of October, 1999.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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