BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL 43

and

LLOYD TRANSPORTATION

Case 6
No. 60461
A-5974

Appearances:

Mr. Jeff Lloyd, P.O. Box 129, Pleasant Prairie, WI 54158, appearing on behalf of Lloyd Transportation.

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan**, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Local 43.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Union Local No. 43 (hereinafter referred to as the Union) and Lloyd Transportation, Inc. (hereinafter referred to as the Company) requested a panel of arbitrators from the Wisconsin Employment Relations Commission. The undersigned was selected from that panel to serve as arbitrator of a dispute over an unpaid suspension imposed on Dale Rasmussen. A hearing was held on December 11, 2001, at the Company's offices in Bristol, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The matter was submitted on oral arguments at the end of the hearing, whereupon the record was closed. Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Arbitration Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties stipulated that the issues before the Arbitrator are:

1. Was the Grievant suspended for just cause? If not,

2. What is the appropriate remedy?

CONTRACT LANGUAGE

. . .

ARTICLE 10. DISCHARGE OR SUSPENSION

The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension, shall use the following steps of progression of discipline: (1) written reprimand, (2) written warning, (3) one (1) day suspension, and (4) discharge. To be valid, warning letters must be sent to the employee and the Union within ten (10) days of known violation. Except, that no warning notice need be given to an employee before he is suspended if the cause of such discharge or suspension is dishonestly or drunkenness, which may be verified by a sobriety test (refusal to take a sobriety test shall establish a presumption of drunkenness); or taking, being under the influence of, addiction to, or possession of controlled substances and/or drugs, either while on duty or on Employer property; recklessness resulting in serious accident while on duty, or carrying of unauthorized passengers, or falsification of employment applications or DOT required driver certification documents. The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice. Discharge must be by proper written notice to the employee and the Union. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that injustice has been done an employee, he shall be reinstated.

. . .

BACKGROUND

The Company operates a trucking business in southeastern Wisconsin, hauling liquid freight. Jeff Lloyd and Jack Lloyd manage the Company. The Company is affiliated with Quality Carriers. Many of the tankers it hauls are owned by Quality Carriers and a great deal of its business is through Quality Carriers. The Union is the exclusive bargaining representative for the Company's employees. The Grievant, Dale Rasmussen, is a driver for the Company.

On September 18, 2001, the Grievant was involved in a rollover accident while driving a Company tanker through central Illinois. No one was injured in the accident, but the trailer sustained $61,000 worth of damage. The police investigated and the Grievant was not issued any citations. Two days after the accident, the Grievant was interviewed by Jack Lloyd and Jeff Lloyd, and provided the following account of the accident:

Statement from Dale Rasmussen
September 20, 2001
14:15

I was traveling southbound on 157 at approximately mile maker 96 1/2 in the right hand lane, approaching a construction area.

Time of day: Approximately 16:55
Weather: Heavy rain

I was traveling approximately 45 MPH when I noticed a fifth wheel horse trailer passing on the left hand side while approaching the up coming construction sight. Note: Merging lane was left to right.
Horse trailer started to merge right as I continued to travel south bound. The horse trailer forced my unit to the shoulder of 157, I had to lock up my brakes to avoid hitting this vehicle, because of wet pavement trailer started to slide off black top and got caught in soft shoulder.

Because of the split second I had to make the proper decision. I did the best I could to avoid causing injury to people in the vehicle that forced me over and to the up coming vehicles slowing down for the construction site.

Once my unit got caught in the soft shoulder due to the heavy rain I could not bring it back and the unit rolled over. I honestly feel I did everything I could possibly do to prevent an accident that would have endangered the lives of others.

The Lloyds conducted a second interview with the Grievant and in the course of this interview, he said he had seen the headlights of the vehicle hauling the trailer. After this interview, the Lloyds expressed skepticism about the existence of the second vehicle and suggested that the Grievant may have fallen asleep. In particular, Jeff Lloyd questioned how the Grievant could have known the headlights on the other vehicle were on if, as claimed in the first interview, he did not see the vehicle until it was passing him on the left.

On September 26th, the Grievant was advised that he was being suspended from driving until the investigation was completed and on the 28th, Quality Carriers ordered the Company not to allow the Grievant to operate or haul any Quality Carriers' equipment because it judged his accident preventable.

The instant grievance was filed protesting the suspension imposed by the Company. Union Secretary-Treasurer Gerald Jacobs spoke to Jeff Lloyd about the Grievant's case and Lloyd gave him the impression that the suspension was imposed at Quality Carriers' insistence, and that Lloyd was trying to persuade Quality to back off. The Grievant was reinstated after 21 days. The case was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

At the arbitration hearing, Gerald Jacobs noted that the contract language had been modified in the last round of bargaining to provide for a specific progression of discipline. The progression required a warning and a reprimand before a suspension could be imposed unless there was recklessness involved. Jacobs expressed the opinion that the Grievant's suspension was solely because of pressure by Quality Carriers and that Jeff Lloyd disagreed and tried to persuade them that the Grievant did not deserve discipline. Jacobs said that he believed that Quality wanted a 30-day suspension and that the 21-day suspension was the result of Lloyd's lobbying for the Grievant. Jacobs acknowledged, however, that both Lloyds said after the second interview that they believed there was no other vehicle involved and that the Grievant simply drove off the road because he was tired. Jacobs testified that his review of Union records did not show any suspensions for accidents, with warnings being the highest level of discipline.

Jeff Lloyd testified that the suspension was based on the Company's independent judgment that the Grievant's accident was preventable and was caused by his own recklessness. He noted that the Company owned the rigs and denied that Quality Carriers was dictating the Company's response to accidents. Lloyd acknowledged that there were examples of accidents where employees received only warnings, but observed that those were very minor incidents, while this accident was a serious rollover that caused $61,000 in damage. Lloyd pointed to the discrepancy in the Grievant's statements as to when he first saw the other vehicle and also noted that a professional driver operating a tractor and tanker in heavy rain, in a construction zone, approaching a merge, obviously had a duty to be on even more cautious than usual. Lloyd also noted that there was no witness to corroborate the Grievant's claim to have been forced off the road.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Arguments of the Company

The Company argues that the seriousness of this accident justifies going outside of the normal progression of discipline and imposing a lengthy suspension on the Grievant. Indeed, the Company argues, it was only the Grievant's long and clean record with the Company that kept him from being fired. This was not simply negligence – the reasonable conclusion from the events is that the Grievant acted recklessly and the contract specifically allows more serious discipline in cases of recklessness.

The Company dismisses the Union's citation of other accidents, noting that they were far less serious than this incident and provide no basis for comparison. The Company also disputes the Union's claims that it somehow acted at the behest of Quality Carriers. The Company's judgment was made independently, on the basis of the facts of this case. After reviewing those facts, the Arbitrator should conclude that the Company acted appropriately and in accordance with the contract. For these reasons, the grievance should be denied.

The Arguments of the Union

The Union takes the position that there is no basis whatsoever for the suspension in this case. The Grievant gave a reasonable and credible explanation of the September 18 accident, and there is nothing to contradict his claim that the accident was unavoidable. The Company's supposed concern about when he saw the car come up alongside him is completely irrelevant. What does it matter, the Union asks, when he saw the vehicle? The important fact is that it cut him off and forced him to the shoulder in a heavy rain. He was faced with a choice of hitting another vehicle or hitting the ditch. It is unfortunate that the tanker was damaged, but the Grievant's choice was a reasonable one under the circumstances and there is no proof of recklessness.

The Union acknowledges the problem faced by the Company in trying to abide by its collective bargaining agreement while trying to placate Quality Carriers. That problem is not of the Grievant's making and the Company cannot offer him up as a sacrifice to Quality Carriers' demands. The contract provides him with clear and specific protections and the Arbitrator must uphold those contractual provisions. Accordingly, the grievance should be sustained and the Grievant should be made whole.

DISCUSSION

The collective bargaining agreement contains a clear progression of discipline, beginning with a written reprimand and proceeding to a written warning, a 1-day suspension, and a discharge. The Grievant, in this case, was suspended for 21 days, without any prior discipline in his record. Given the lack of prior discipline and the length of the suspension, the Company's burden, in practical terms, is to prove that it could have discharged the Grievant for his September 18th accident. The contract recognizes that some conduct does not call for correction and will justify summary discipline. A list of such infractions is included in Article 10. The infraction which is relevant to this case is "recklessness resulting in serious accident while on duty." 1/

1/ The Union claims the Company acted at Quality Carriers' behest in suspending the Grievant, while the Company denies that. I find it unnecessary to address this disagreement. Whether Quality had an opinion in this matter or not, the contract is between the Company and the Union, and the Company bears the burden of justifying its actions under the just cause standard and the progressive discipline system contained in the contract.

Certainly, the Grievant's accident on September 18th was on duty and was serious. The question under the contract is whether it was due to recklessness. By specifying recklessness, the parties have agreed that the accident must not only have been the Grievant's fault, but that it must have been caused by more than simple negligence. Recklessness is marked by "indifference to . . . consequences, under circumstances involving danger to life or safety to others, although no harm was intended." [Black's Law Dictionary, 5th Ed., West, 1979.] Arbitral case law frequently distinguishes between negligence and recklessness by holding that the latter requires a degree of wantonness approaching a willful disregard of the consequences of an act. 2/

2/ See, for example, ACME CONCRETE CORP., 33 LA 960 (BONEBRAKE, 1959); INGALLS SHIPBUILDING CORP., 62-1 ARB 8084 (MURPHY, 1961); UNITED STATES POTTERS ASSOCIATION, 64-1 ARB 8125 (BRADLEY, 1963); AMERICAN SYNTHETIC RUBBER CORP., 66-2 ARB 8627 (DOLSON, 1966); KAISER SAND AND GRAVEL, 68-2 ARB 8616 (KOVEN, 1968); CONROCK COMPANY, 73-2 ARB 8363 (PETRIE, 1973); PEPSI-COLA BOTTLING GROUP, 79 LA 597 (HANNAN, 1982); T. W. RECREATIONAL SERVICES, 93 LA 302 (RICHARD, 1989); GATX TERMINALS CORP., 94 LA 21 (BARONI, 1990); See also, William Prosser, Law of Torts, 4th Ed., 1972.

The degree of care which one expects of a person is not, of course, an abstraction, and the question of recklessness may depend upon the circumstances of the specific case. A person causing a fire by smoking a cigarette in a no-smoking area of an office may be said to have been negligent. One who does so in a gasoline storage facility may be said to have been reckless. Likewise, a person handling a knife carelessly may be said to be negligent, while a person handling a gun with the same lack of care may be reckless. The degree of negligence in this latter case would be heightened if it was shown that the person mishandling the gun was employed as a firearms safety expert. Greater care is expected of experts and of persons in situations where it is obvious that there is a greatly heightened risk from a mishap.

The Grievant here is a professional truck driver, controlling a tanker on a public highway. Clearly, there is a substantial risk of harm inherent in any mishap. Just as clearly, the degree of care one would expect from a professional driver would increase if like the Grievant, he was traveling through a construction zone in a heavy rain. Thus, the Company had the right to expect that the Grievant would exercise great care under the circumstances as they existed on September 18th. Having said that, there is no evidence that he failed to exercise such care.

As described by the Grievant, he was cut off by another vehicle. The Company suggested at the hearing that he should have backed off as the vehicle passed, knowing that a merge was approaching. However, the merge was still a mile off and there is no evidence that the other vehicle's abrupt move into the Grievant's lane was caused by the proximity of the merge or that the Grievant was sealing the other vehicle off in the left lane. The accident, as described in the Grievant's statement to the Company, was clearly caused by the other driver's error.

The Company expressed skepticism about the Grievant's account, on the grounds that in a second interview, he said he saw the headlights of the other vehicle as it came up along side him, whereas in the original interview, he said he first noticed the vehicle as it was passing him in the left lane. From this, Jeff Lloyd concluded that there never was a second vehicle and that the Grievant really just fell asleep. Frankly, that conclusion does not follow. The discrepancy noted by Lloyd is relatively minor and is subject to so many explanations that basing a recklessness charge on that alone amounts to an exercise in pure speculation. The Company's theory is not impossible, but it is not the only reasonable conclusion to be drawn from the record evidence, nor even the most reasonable. The Grievant's explanation of the accident is at least equally plausible. It is consistent with the conclusions drawn by the police and with his record of safe driving.

The Grievant was involved in a serious accident and a great deal of damage was done to a Company rig. However, in order to justify the level of discipline imposed here, the Company bears the burden of proving that the accident was caused by the Grievant's recklessness. On the record before me, it cannot be said that he was even negligent, much less reckless. Accordingly, I have made the following

AWARD

The Grievant was not suspended for just cause. The appropriate remedy is to remove all reference to the discipline from the Grievant's personnel file and to make him whole by paying him for all monetary losses incurred by virtue of the suspension.

Dated at Racine, Wisconsin, this 14th day of February, 2002.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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