BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

VULCAN CONSTRUCTION MATERIALS COMPANY, LP

Case 4
No. 61760
A-6038

(Kortendick Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill M. Hartley,** 1555 N. RiverCenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Mr. Sam L. Frazier, Senior Labor Counsel, Vulcan Materials Company, 1200 Urban Center Drive, Birmingham, Alabama 35242, appearing on behalf of the Company.

ARBITRATION AWARD

Teamsters Local Union No. 43, hereinafter the Union, with the concurrence of Vulcan Construction Materials Company, LP, hereinafter the Company, requested the Wisconsin Employment Relations Commission, hereinafter the WERC, to submit a randomly-selected panel of five WERC-employed arbitrators from which the parties would mutually select one person to serve as Arbitrator to hear and decide the instant dispute involving Grievant Joe Kortendick, hereinafter the Grievant, and in accordance with the grievance and arbitration procedure contained within the parties' collective bargaining agreement dated June 1, 2002, through May 31, 2005, hereinafter the Agreement. The undersigned, Stephen G. Bohrer, was so selected by the parties. On March 24, 2003, a hearing was held in Racine, Wisconsin. The hearing was transcribed. On April 14, 2003, both of the parties' briefs were received and the record was closed.

ISSUES

The parties stipulated to the following issues:

1. Did the Company have just cause to terminate the Grievant?

2. If not, what is the appropriate remedy?

PERTINENT AGREEMENT PROVISIONS

ARTICLE 13. DISCHARGE OR SUSPENSION

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 notice [sic] of the complaint against such employee to the employee, in writing, and a copy of the same to the Union and job steward affected . . .

. . .

BACKGROUND

The Company is a producer of construction aggregate and operates a rock quarry in Racine, Wisconsin. The Union is the exclusive bargaining representative for the Company's truck drivers and mechanics. The Grievant, Joe Kortendick, is a truck driver for the Company at the quarry and worked in that capacity from October 15, 2001, to the date of his termination on October 21, 2002, except for two months in the winter, during which he was laid off.

Significant events leading up to the Grievant's termination are as follows: On July 11, 2002, the Company issued a written Employee Warning Notice to the Grievant for a safety violation because the Grievant was "standing on platform of truck while box is still partially raised." On September 7, 2002, the Company issued a written Employee Warning Notice to the Grievant for carelessness because the Grievant "backed into water pipe in East quarry . . ." with his truck and damaged the water station. Neither of these two Employee Warning Notices were grieved. On October 16, 2002, the Grievant struck three out of five vertical steel support beams while driving his truck through a tunnel at the Company's quarry. On October 21, 2002, the Company issued a written Employee Warning Notice to the Grievant for a safety violation and for carelessness for the October 16 incident and terminated him later that day. At all relevant times, the Grievant was operating an 85-ton dump truck used to transport rock aggregate.

The Union timely filed a grievance on behalf of the Grievant stating that the Grievant was wrongfully terminated. The grievance was processed through all of the steps of the Agreement's grievance procedure and was then advanced to arbitration.

Additional background information is set forth in the Positions of the Parties and in the Discussion below.

POSITIONS OF THE PARTIES

The Company

The Company had just cause to terminate the Grievant. Therefore, the grievance should be denied.

Article 13 only requires that two warning notices be issued prior to suspension or discharge, not that the warning notices must be for the same or similar offense. If the latter interpretation were adopted, employees could potentially receive numerous warning notices for different offenses and be immune from suspension or termination. Such an interpretation is both contrary to an orderly and efficient workplace and it is illogical as to the parties' intent of the meaning of Article 13.

Alternatively, the two prior incidents on July 11, 2002, and September 7, 2002, are indicative of the Grievant's inattentiveness and disregard for safety. The Grievant stated at the hearing that he "didn't have a clue" that his actions were unsafe with regard to the first incident on July 11, 2002. This summarizes the Grievant's attitude or inattention regarding safety. With regard to the second incident on September 7, 2002, and although the damage was minor, it still reflected the Grievant's inattentiveness and was safety related. Further, another driver claimed by the Grievant to be involved in the second incident was first mentioned by the Grievant at the hearing, but was never identified, even though such information may have obviated the need for a second warning notice at that time.

Even if Article 13 requires that the two prior warning notices be for the same or similar offense before considering discharge, such was the case here. Both the July 11 and the September 7 incidents had safety overtones and were safety related. In addition, and when comparing the second incident with the most recent accident on October 16, 2002, the latter involved considerably more damage. Moreover, and when comparing all three incidents, they all reflect the Grievant's inattentiveness to safety matters which is contrary to the Company's goal of stressing safety at all times.

The Company was fully justified in terminating the Grievant. The October 16 accident was the second incident within a month and was the third safety-related incident within three months. The Company handbook states that carelessness resulting in property damage

warrants discipline. There is no question that these rules were communicated to all employees, including the Grievant. In addition, and after having received two prior warning notices, the Grievant was aware that his conduct was unacceptable. It is noted that the Grievant does not contend that his first two warning notices were improper.

An employer may terminate an employee for careless workmanship if that employee has been previously warned without salutary effect, citing GATX TERMINALS CORP., 94 LA 21 (BARONI, 1990); COPPERWELD BIMETALLICS GROUP, 83 LA 1024 (DENSON, 1984); and THATCHER & SONS, INC., 76 LA 1278 (NUTT, 1981). Further, an employer has a duty to protect the safety of its employees. See, e.g., In re SAN DIEGO TROLLEY, INC., 112 LA 323 (PRAYZICH, 1999) and In re GERTENSLAGER CO., 116 LA 531 (CURRY, 2001).

In this case, the penalty of discharge is warranted. The Grievant was given two prior warnings for carelessness and inattentiveness to safety, both of which occurred within two months, and within three months of the final incident. This pattern of conduct, coupled with the Grievant's relatively short service with the Company, dictated that he be discharged.

Prior to making its decision to terminate, the Company considered mitigating circumstances to determine if a lesser penalty should be imposed. With regard to due process, the decision to terminate was done within five days of the final incident and following a complete and fair investigation, including an opportunity for the Grievant to be heard. With regard to fair treatment, there was no evidence indicating that the Grievant was treated any differently than other employees. With regard to length of service, the Grievant's ten months of employment was considered along with his work record. With regard to considering the Grievant's alleged cause of the final incident, the Company concluded that the cause was due to inattentiveness and not to hitting a pothole. This is supported by the record which shows that the pothole was 164 feet from the first beam which was struck, that the tire track leading up to impact was 44 inches from the wall, and that the tire track was 30 inches from the wall at impact. Company Exhibit 2, picture #7, shows the tire track unswerving and heading directly into the wall. It is noted that an examination of the truck was done after the incident and that it revealed no defects. This evidence supports the theory that the Grievant made no attempt to steer the truck back toward the center until after he had hit the beams.

In addition, the Grievant drove this same route numerous times during his employment with the Company, he had driven over 20 times through the tunnel that same day, he knew the location of the beams and the clearance required to safely pass through, and he knew the condition of the road that morning. However, and because of the repetitive nature of driving back and forth, the Grievant testified that he was "lax" at the time of the incident. This further supports the Company's position that the accident was due to inattentiveness and not due to hitting a pothole.

The Union has failed to offer evidence that discharge of the Grievant under these circumstances was so severe that it would "shock the conscience" of the Arbitrator, citing In re SANDUSKY CABINETS, INC., 112 LA 373 (MORGAN, 1999).

As stated by Company witness Kollver, had the final accident been the only incident, something less than discharge would have likely occurred. However, it is the Company's responsibility to ensure employee safety and, when it is threatened, to take action and remove that threat. Under these circumstances, the Company had no choice but to discharge the Grievant, especially when previous attempts at remedial action did not improve the Grievant's attention to safety.

The Union

The Company violated Article 13 of the Agreement when it discharged the Grievant without just cause. Therefore, the grievance should be sustained and the Grievant should be reinstated and made whole for all lost wages and benefits.

The Company has failed to prove that the Grievant's actions on October 16, 2002, were either unsafe or careless as alleged; rather, the Grievant simply misjudged his placement in the tunnel after veering off of the road due to hitting a pothole. Therefore, his termination was improper.

The condition of the road inside of the tunnel was out of the Grievant's control. Typically, that condition becomes worse after numerous trips through the tunnel by the trucks. Although the Company occasionally sends a grader through during the day to improve the road's condition, the Grievant had not seen one during the morning leading up to the accident. Moreover, there were no lights inside the tunnel, other than the Grievant's truck's headlights, there were no lines on the road within the tunnel to guide the Grievant, and bright sunlight at the end of the tunnel near the steel beams makes things somewhat more difficult to see at that point. The Grievant was forced to deal with this situation, i.e., poor visibility and the road's conditions, as best and as safely as he could. The Grievant did not see and was unable to avoid the pothole which forced him off of the road's crown and into the beams.

The truck in question on that day was fully loaded, had a total weight of approximately 300,000 pounds, and was traveling. After the Grievant hit the pothole, he appropriately and safely eased the truck back toward the center, as opposed to an erratic movement, so as to avoid tipping over the truck. Despite Company witness Michael Kollver testimony refuting the Grievant's claim that there was no danger with the truck tipping over from an erratic correction to the steering wheel, Kollver admitted that Kollver doesn't drive a truck daily and, therefore, Kollver does not have the level of driving experience as the Grievant. The Grievant's failure to properly correct his position was not the result of any carelessness or an unsafe act, but rather was the result of the condition of the tunnel and his desire to drive as safely as possible.

The distance between the pothole which caused the Grievant's truck to veer and the initial point of impact does not prove that the Grievant was careless. Even if that distance was 164 feet, as the Company contends, the Grievant tried to slowly correct his position so as to

avoid turning over the truck and damaging the vehicle or injuring himself. Simply because the Grievant had a significant distance within which to correct his position does not necessarily demonstrate carelessness.

The fact that the Grievant may have misjudged his position in the tunnel does not equate to or imply that an unsafe or a careless act has occurred, citing DIETRICH INDUSTRIES, INC., 83 LA 287 (ABRAMS, 1984). This incident was nothing more than an accident which the Grievant unsuccessfully tried to prevent. Such an act does not rise to the level of a dischargeable offense.

In addition, the termination of the Grievant under these circumstances is unduly severe and the "punishment does not fit the crime", citing MISSISSIPPI VALLEY GAS CO., 41 LA 745, at 750 (HEBERT, 1963); and BARNSTEAD-THERMOLYNE CORP., 107 LA 645, 653 (PELOFSKY, 1996). At most, the Grievant is guilty of being overly cautious when slowly guiding his truck back to the center so as to avoid tipping over.

The Grievant's prior warnings are not serious enough or similar enough to warrant discharge. Article 13 states that the employer "shall give at least two (2) warning notice [sic] of the complaint against such employee to the employee. . ." The phrase "the complaint" suggests that the parties contemplated that the warning notices must be for the same offense or infraction. Although there are similarities among the Grievant's three infractions, they were not the same, thus invalidating discharge under these circumstances. With regard to the July 10, 2002, incident, the Grievant was unaware at the time that his conduct was a safety violation and, therefore, that circumstance should not count toward the requisite two warning notices. At best, the Grievant only had one prior warning for the same complaint: the September 7, 2002 warning.

Moreover, other arbitrators have considered similar language to the language at issue in this case and have found that where the proper warning notice has not been given, that discipline must be reversed, citing NATIONAL CAR RENTAL SYSTEM, INC., 75 LA 518 (ZUMAS, 1980); AIRCO, INC., 62 LA 1130 (TRAYNOR, 1974). See also, NORTHERN CALIFORNIA GROCERS ASSN., 53 LA 88, 89 (EATON, 1969), and PACIFIC OIL CO., 52 LA 173 (MORAN, 1969).

In this case, the Grievant had only one prior warning for the same complaint: the second incident on September 7, 2002. The first incident on July 10, 2002, was neither similar nor serious enough to count toward the required two warning notices necessary before the Company could discharge an employee. As such, the Grievant's discharge lacked just cause and he should be reinstated and made whole.

DISCUSSION

The stipulated issues before me are whether the Company had just cause to terminate the Grievant and, if not, what is the appropriate remedy.

I agree with the Union that discharge from employment is widely recognized as the most severe penalty that can be imposed in industrial relations and that the burden of proving an employee's wrongdoing is generally on the employer. See, Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 905 (1997).

I also readopt my approach to the subject of "just cause" as was stated in my decision of SCHOOL DISTRICT OF GRANTSBURG, WERC, MA-11735 (BOHRER, 10/02):

> As is normally the case, the term "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely understood and applied analytical framework has been developed over the years through the common law of labor arbitration. That analytical framework consists of two basic elements: the first is whether the employer proved the employe's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was justified under all of the relevant facts and circumstances. The relevant facts and circumstances which are usually considered are the notions of progressive discipline, due process protections, and disparate treatment.

ID., citing S & M ROTOGRAVURE SERVICE, INC., WERC, A-5720 (JONES, 6/99).

Thus, the initial point for determination is whether the Company has proven the Grievant's misconduct.

The Grievant's conduct on October 16, 2002.

On October 16, 2002, the Grievant had driven through the tunnel without a problem a number of times that morning and prior to the accident. The Grievant estimates that over the course of a little more than five hours, he had driven that route fully loaded between 20 and 22 times. Applying simple math, the frequency of these trips occurred approximately, and on the average, once every 15 minutes.

The condition of the tunnel's road that morning, and according to the Grievant, "was fairly damp as always." According to the Grievant, "the ruts to [the side of] where the road is crowned for the water to run off – it always tends to be soupy, muddy, soft." This softer rut material on the sides of the road was described by the Grievant to be like "mud" or "slop." Significantly, the Grievant also described the tunnel's route that morning as having "many potholes." Photographs of the road taken that morning inside of the tunnel and near the site of the collision show that these many potholes were scattered throughout and were both on the road's center crown as well as the ruts or sides of the road. Although there was testimony that the road's condition does worsen over time, there was no testimony that the road had suddenly gotten worse during the morning in question. Further, the Grievant testified that he did not

recall whether a grader had gone through the tunnel that morning to smooth out the route as was sometimes done by the Company. I understood this testimony to mean that the Grievant did not remember, not that he remembered it did not occur. It was undisputed that it is not safe to drive a fully loaded truck in these muddy ruts on the sides of the road because of the decreased ability to control and steer a heavy truck in this material and in particular near where the steel beams are located.

I conclude that the Grievant was or should have been on notice of the tunnel's condition that day given the frequency of his trips and given the usual nature of the conditions that morning. Further, and under these conditions, it was incumbent upon the Grievant to take precautions when traveling through the tunnel to stay in the center of the road in the event that he hit a pothole which would alter his position and so as to avoid coming closer than necessary to the muddy ruts up against the walls next to the steel beams. The issue then becomes whether the Grievant took adequate precautions to maintain a position in the center of the tunnel.

The incident report and record state that the Grievant's truck was 17 feet wide and that the maximum clearance width of the tunnel at the point of the beams is 35 feet. From this information, it is established that had the Grievant been in the middle of the tunnel at the point where he passed under the beams, he would have had 9 feet of clearance on each side of his truck.

The Grievant testified that upon hitting the fateful pothole, the impact caused his truck to "ease" toward the right. I find that the Grievant's descriptive, i.e., eased, to be especially helpful in concluding that the Grievant was driving too close to the right side of the tunnel. Had he been driving anywhere near the center of the tunnel, it is unlikely that the truck would have "eased" over as much as nine feet. Further, Company witness Kollver's undisputed testimony was that prior to incident there had been "a lot worse [pot]holes than this and nobody's hit the wall prior." In addition, Kollver testified without dispute that the deepest pothole that day was measured to be no more than 1 ½ inches deep.

I agree with the Union that the condition of the tunnel was out of the Grievant's control. However, the Grievant's placement of his truck while driving through the tunnel was within the Grievant's control. The Grievant knew or should have known given the many potholes and the usual damp and muddy conditions that it was imperative to stay well away from the sides of the tunnel and the ruts. He did not. I disagree with the Union that the Grievant's misjudgment of his position does not equate to an unsafe or careless act. Under these circumstances, it does. Had the Grievant not misjudged his position, it is unlikely that hitting a pothole that morning would have caused his truck to ease into the beams. Therefore, and I find, the Grievant did not take adequate precautions to maintain a safe distance from the side walls of the tunnel and that he was driving in an unsafe manner on October 16, 2002.

Having found that the Company has proven that the Grievant was driving in an unsafe manner on October 16, 2002, I turn toward the Company's other allegations of prior misconduct in July and September of 2002.

The Grievant's prior conduct in July and September, 2002.

A photograph of the actual infraction in July of 2002 was produced at the hearing and it showed the Grievant conversing with another employee while standing directly underneath the front most protruding lip of that box. Company witness Kollver described this infraction as "a big no-no because we don't want – If we blow a hydraulic hose or something were to happen to that truck, the box comes down and hits that guy right about the top of the head and would drive his head right down to his shoulders . . ." This description of the seriousness of this infraction went unchallenged.

I note that the conduct in July was never grieved. Although the Grievant at the hearing claimed that he did not know at the time that standing in such a way was unsafe, his failure to advance such an argument at the time of the prior incident through the grievance procedure severely limits the Union's ability to now persuasively assert a lack of misconduct relative to that incident. In short, the Company has proven the Grievant's misconduct in July of 2002.

I agree with the Union that the Grievant's conduct in July of 2002 is not the same as the Grievant's conduct on October 16, 2002. However, I disagree that the two events are not similar from a safety point of view. Both could have resulted in serious personal injury to the Grievant. I understood Kollver's above description relative to the July incident to mean that had the truck not been properly working, the Grievant could have been seriously hurt and/or killed. With regard to the October 16th incident, it is self evident that had the Grievant hit all five of the tunnel's support beams, instead of only three, that there was a potential for the tunnel to collapse resulting in serious injury to the Grievant. Also, both infractions involved, in a broader sense, the disregard for the safe use of the Company's equipment.

The parties do not dispute that on September 7, 2002, the Grievant backed his truck into a water pipe and damaged the water station. This discipline was also never grieved. At the hearing, and for the first time, the Grievant stated that someone else had been directing him backwards and had failed to tell him to stop in time. The Grievant did not come forward with this information at the time of the September incident because, and according to the Grievant, "I didn't feel it, you know, justified the wrongdoing on my part. I tend to not like to point fingers at other people trying to justify things." In my opinion, the Grievant's failure to bring forth this information immediately following the discipline calls into serious question whether the Grievant can convincingly bring it up now, especially when there is no other evidence or witness to back this claim up. Thus, the Company has proven the Grievant's misconduct in September of 2002.

Comparing the misconduct on September 7, 2002, to the misconduct on October 16, 2002, both involved the Grievant not properly using Company equipment, i.e., the Grievant's truck. Although the Grievant was written up for "carelessness" and not for "safety" in September of 2002, I do not find it unreasonable to construe this infraction as an unsafe act or to conclude that the September incident is related to the October incident from a safety viewpoint.

Contract requirements

Article 13 of the Agreement requires that the Company "shall give at least two (2) warning notice [sic] of the complaint against such employee to the employee . . ." before it can discharge or suspend the employee. The Union asserts that the phrase "the complaint" suggests that the parties contemplated that the warning notices must be for the same offense or infraction. I agree that this is one interpretation. However, an equally plausible interpretation is that the infractions underlying "the complaint" be related or similar. There was no evidence presented at the hearing on what the parties' intended this language to mean other than the express language itself. I am not persuaded that this language is unambiguous or that it requires that infractions underlying Warning Notices be for the same offense or act. Therefore, I give this ambiguous language a construction that is reasonable and equitable and I interpret "the complaint" to mean that the underlying infractions be related or similar. Elkouri, SUPRA, at 513-514.

Applying Article 13 to the case at hand, there is no dispute that the Grievant received two written warning notices and that the requisite copies were given. I have already found that "the complaint" is interpreted to mean that the underlying facts leading to the collective warning notices be related or similar. Further, I have found that the Company has proven the Grievant's three acts of misconduct and that they were all safety related. Therefore, the final issue before me becomes whether the discipline was justified.

Was the discipline of the Grievant justified?

As stated above, the issue of whether discipline was justified in cases like these is dependent upon all relevant facts and circumstances, including notions of progressive discipline, due process protections and disparate treatment.

In this case, the Grievant was advised, in writing, that he was acting in an unsafe or careless manner in July and September of 2002. He accepted that discipline and without a grievance in both instances. As I have already found, the Grievant did not take adequate precautions to ensure that he was driving in the middle of the tunnel the morning of October 16, 2002, and was again found to have acted in an unsafe manner. Thus, and at the time when he hit the pothole that eased his truck into the ruts and beams, he was on notice to correct his misconduct, but he failed to do so.

The evidence was that the Company did an investigation, including inspecting the site, inspecting the truck for any defects and determining that there were none. In addition, the Company gave the Grievant an opportunity to tell his side of the story. Further, and before the Company decided to terminate the Grievant, it considered the past work record of the Grievant, the length of the Grievant's employment, and the underlying facts and seriousness of the third infraction and tunnel incident. The cost of the anticipated repairs to the tunnel, i.e., ten thousand dollars, supports opinion of the Company that this was a relatively serious accident. The Company also considered the relatively short period of time that had elapsed between the three instances (a little over three months) prior to deciding to terminate. Finally, there was no evidence of disparate treatment by the Company toward other employees.

The combination of the above relative facts and circumstances leads me to find that the Company acted in a manner which was consistent with notions of progressive discipline, due process protections, and that there was no showing of any disparate treatment. Therefore, the discipline was justified.

In summary, I find that the Company has proven the alleged misconduct by the Grievant. The Company has also established that the discipline which it imposed was consistent with Article 13 of the Agreement and that the discipline imposed was justified under all of the relevant facts and circumstances. Therefore, there was just cause for termination.

AWARD

Based upon the foregoing and the record as a whole, it is the decision and Award of the undersigned Arbitrator that the Company had just cause to terminate the Grievant. Therefore, the grievance is denied.

Dated at Eau Claire, Wisconsin, this 25th day of April, 2003.

Stephen G. Bohrer /s/
Stephen G. Bohrer, Arbitrator

SGB/anl
6512.doc