

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LYCON, INC.**

and

**TEAMSTERS LOCAL UNION NO. 579**

Case 1

No. 62617

A-6084

(Kevin Jones Grievance)

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**Appearances:**

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Nathan D. Eisenberg**, 1555 North River Center Drive, Suite 202, P. O. Box 12993, Milwaukee, WI 53212, on behalf of Local 579.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker**, Ten East Doty, Suite 900, P.O. Box 1664, Madison, WI 53701-1664, on behalf of the Company.

**ARBITRATION AWARD**

The parties having waived Article 28, Section 1C of the 1999-04 labor agreement requiring the parties to submit the case to the Federal Mediation and Conciliation Service for a panel of arbitrators, the parties jointly requested that Sharon A. Gallagher be appointed as impartial arbitrator to hear and resolve a dispute between them regarding the discharge of Kevin Jones. The parties mutually agreed that the hearing in the matter would be held on October 9, 2003, at Janesville, Wisconsin. A taped transcript of the proceedings was made and received by the Arbitrator on October 29, 2003. The parties agreed that they would postmark two copies of their briefs to the Arbitrator on December 5, 2003, which the Arbitrator would thereafter exchange. The parties waived the right to file reply briefs. The Arbitrator received all documents in the case by December 8, 2003, whereupon the record was closed.

## ISSUES

The parties were unable to stipulate to the issues to be determined in this case. However, the parties agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument in the case as well as the parties' suggested issues. The Company suggested the following issues herein:

Was the Grievant reckless in his conduct on March 18, 2003? If not, was there cause for discharge? If not, what is the appropriate remedy?

The Union suggested the following issues for determination in this case:

Was the Grievant terminated for just cause? If not, what is the appropriate remedy?

The Arbitrator, having considered the parties' suggested issues as well as the relevant evidence and argument in this case, has determined that the Union's issues should be decided in this case.

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 12. DISCHARGE OR SUSPENSION

The Employer may not discharge any employee except for just cause. An employee charged with an offense justifying immediate discharge will be informed of such offense in writing at the time of his discharge, and a copy thereof shall be sent to the Union and Steward. Except for those cases of serious misconduct the Employer will give at least one warning notice in writing of a complaint against such employee to the employee, the Steward and the Union. Only warning notices which have been given within the six (6) month period immediately preceding the date of discharge can be considered in determining whether there is a warning notice in existence at the time of the discharge. All warning letters and disciplinary action will remain as part of the employee's record but after the six (6) month period cannot be the basis for future disciplinary actions.

Discharge without a warning notice is authorized in (but not limited to) cases of:

- (1) Dishonesty
- (2) Working under the influence of liquor or illegal drugs or possession of liquor or illegal drugs while on duty

- (3) Refusal to take any legal drug or alcoholic test. The Company has in place a dual sample random drug testing program. The employees covered by this agreement are to be included in the program as of the effective date of the Agreement, subject to the right of the Union to review the plan at any time to insure it is legally proper and fairly administered, and to make suggestions for any prospective changes, which the Company agrees to discuss.
- (4) Carrying unauthorized passengers in Company vehicles
- (5) Loss of Commercial Drivers License (CDL) regardless of current assignment
- (6) Recklessness while on duty
- (7) Any wrongful intentional act resulting in interference with Employer's business.

Written protest of any discharge must be made to the Employer within five (5) working days after said discharge. The matter shall be discussed by the Employer or his representative and the Union in an attempt to reach a mutually satisfactory agreement based upon the facts of the case. The employee may be reinstated under other conditions agreed upon by the Employer and the Union. Failure to agree shall be cause for the matter to be submitted to arbitration as provided in Article 28 on Grievance Procedure.

In the event an Employer intends to discharge an employee, he shall notify the Union office, the steward and the employee affected. Discharge shall not take effect for a 24-hour period following notice to the Union office, during which time the employee shall be suspended.

. . .

#### ARTICLE 35. MANAGEMENT RIGHTS

It is agreed that the management of the Employer and its business and the direction of its working forces is vested exclusively in the Employer, and that this includes but is not limited to the following: to direct and supervise the work of its employees; to hire, promote, transfer or lay off employees or demote, suspend, discipline or discharge employees; to plan, direct and control operations; to determine the amount and quality of the work needed; to schedule the hours of work and assignment of duties; to make and enforce rules. The Employer's exercise of the foregoing functions shall be limited only by the express provisions of this contract and the Employer has all the rights which it had at common law except those expressly bargained away in this Agreement and except as limited by Statute.

The exercise by the Employer of any of the foregoing functions shall not be reviewable by arbitration except in case such function is so exercised as to violate an express provision of this contract.

### **BACKGROUND**

Lycon, Inc., (Company) is affiliated with Janesville Sand and Gravel Company. Lycon provides concrete for contractors and private customers. One of the Company's regular customers is Custom Building Enterprises. The Company maintains a fleet of trucks to mix and deliver concrete to its customers. The Grievant, Kevin Jones (Jones), was regularly assigned to drive Truck 15, a tri-axel Ready-Mix truck having a 17 foot wheel base and a 34 foot total length. Truck 15 weighs approximately 32,000 pounds empty; loaded with a maximum of 7.5 yards of concrete at 4,000 pounds per yard it weighs 62,000 pounds not including water (150 gallons weighing 1,260 pounds) and gas (70 pounds). The engine in Truck 15 is located in the rear of the truck as are the transmission and transfer case. The transfer case gives power to the rear axel and to the two front axels (known as the steer axel and pusher axel).

The Company conducts a three-day training/orientation for new drivers. The Grievant completed this training in mid-September, 1999, after his hire. These training sessions are conducted by one or more of three Company trainers who are not bargaining unit members. On the first day of training, the responsible trainer has new drivers watch a series of video tapes including tapes on the basics of lifting, the properties of the concrete they will be hauling, the operation of Ready-Mix trucks, safety issues surrounding Ready-Mix trucks and a video showing a driver who has an accident and breaks down and one showing off-road delivery sites and the procedures therefor. Also on the first day of training, a Company trainer goes over a written training guide with each new driver. The guide was reviewed with the Grievant by Trainer Hinkley on September 13, 1999, and it reads in relevant part as follows:

...

#### AREAS OF IMPORTANCE WHEN TRAINING NEW DRIVERS

##### **PAPERWORK - DRIVERS REPORTS**

- DRIVER CARDS  
(REPAIRS, LUNCH, DELIVERY SCHEDULE - SIGN WHEN COMPLETED)
- PUNCH CARDS  
(HOW HOURS ARE TABULATED - NO FORGING OF TIME - SIGN)
- ACCIDENT REPORT/INJURY REPORT  
(COMPLETE SAME DAY - IMPORTANT INFORMATION)
- FUEL SHEETS  
(NEATNESS IN RECORDING - EXPLAIN WHEN TO FUEL)
- PREVENTIVE MAINTENANCE SCHEDULE  
(SERVICE DUE REPORT)
- INJURY REPORT  
(WHEN RELEASE IS NEEDED)

**PAPERWORK - DELIVERY TICKETS**

- BLUE, YELLOW & GREEN COPIES
- IMPORTANCE OF ACCURATE TIMES
- IMPORTANCE OF WATER ADDED
- SIGNING TICKETS
- DOCUMENTATION ON BACK OF BLUE TICKETS (I.E. QUALITY PROBLEMS, JOBSITE PROBLEMS, ADDITIVES BY CONTRACTOR)

**RADIO COMMUNICATIONS**

- RADIO CHANNELS
- KEYING MIC - 1 SECOND BEFORE SPEAKING
- PROPER MIC POSITION - 1 INCH FROM MOUTH
- NO SWEARING
- NO IDLE CONVERSATIONS (CLEAR & PRECISE)
- KEEP OPINIONS TO YOURSELF
- STATUS HEAD

**JOBSITE COMMUNICATIONS**

- 10=98
- CONDITION OF JOBSITE
- SPEED OF POUR
- JOB DELAYS
- WHEN AWAY FROM TRUCK (RADIO VOLUME)
- AVOID CALLING IN ORDERS
- CONTRACTOR COMPLAINTS
- DO NOT GIVE CONTRACT MICROPHONE FOR ANY REASON

**ADJUSTABLE AXLES**

- PUSHER AXLE
- TAG AXLE

**GREASING (LOCATION - HOW OFTEN)**

- |                                       |  |
|---------------------------------------|--|
| <input type="checkbox"/> STEER AXLE   | <input type="checkbox"/> DRUM ROLLERS    |
| <input type="checkbox"/> SHACKLE PINS | <input type="checkbox"/> DRUM RINGS      |
| <input type="checkbox"/> SWING CHUTES | <input type="checkbox"/> SLACK ADJUSTERS |
| <input type="checkbox"/> U-JOINTS     | <input type="checkbox"/> BUSHINGS S-CAMS |
| <input type="checkbox"/> HAND OUT     |  |

**MISCELLANEOUS COMMUNICATIONS**

- WHEN FUEL IS NEEDED
- DURING BREAKDOWNS

**PARKING TRUCK**

- FUEL TRUCK
- WIPE DOWN DRUM
- CLEAN EXTERIOR/INTERIOR OF TRUCK
- DRAIN AIR TANK
- REPORT MAINTENANCE PROBLEMS TO DISPATCH CENTER

**PRE-TRIP INSPECTION**

- ENGINE OIL
- COOLANT LEVEL
- HYDRAULIC LEVEL
- TRANSMISSION LEVEL
- FUEL (DON'T BELIEVE GAUGE)
- LEAKS (OIL & AIR)
- ALTERNATOR BELTS
- WATER PUMP BELTS
- FAN BELTS
- OIL LEVEL IN PUSHER AXLE HUBS, TAG AXLE HUBS & STEERING AXLE HUBS
- OIL ROOM                       OIL CHART                       PROPER OIL
  
- BATTERY SWITCH
- VOLT METER
- HORN
- FRONT CLEARANCE
- FOUR-WAY FLASHERS
- AIR GAUGES  
AND HOW THEY WORK
- HEADLIGHTS
- REAR CLEARANCE
- REAR TAIL LIGHTS

**EXTERIOR MECHANICAL**

- TIRES
- RIMS (LOOSE LUGS)
- SPRINGS
- SLACK ADJUSTER
- STEERING LINKAGE
- BRAKE HOSES
- HUB OIL PLUG
- SHOCK ABSORBER
- SPRINT MOUNTS
- BRAKE CHAMBERS
- BRAKE DRUMS

**BRAKES**

- PARKING BRAKES
- EIGHT WHEEL BRAKE

**LOCKING IN AXLES**

- POWER DIVIDER
- FRONT AXLE (COTTA, TRANSFER CASE)  
(EXPLAIN WHEN NEEDED & HOW TO USE)

**SAFETY**

- LOCK-OUT, TAGOUT
- HAZARDOUS COMMUNICATION - RIGHT TO KNOW
- CONFINED SPACE
- EMERGENCY AND FIRE PREVENTION PLANS
- SHOES
- PROPER ATTIRE
- HARD HATS
- EAR PLUGS
- GLASSES
- DUST MASKS
- 3 - POINTS OF CONTACT

**JOB SAFETY**

- WALK TERRAIN BEFORE ENTERING JOBSITE
- LOW OVERHEAD WIRES, GAS/WATER MAINS, SEPTIC SYSTEMS, WELLS
- WASHING UP ON JOBSITE – CHECK WITH CONTRACTOR
- CHECK WITH CONTRACTOR BEFORE DRIVING OVER CURBS, SIDEWALKS, OR PRIVATE PROPERTY
- NEVER PUSH TRUCK WITH ANOTHER VEHICLE
- EXCATATION OR TRENCHES – ONE FOOT AWAY FROM EDGE FOR EACH FOOT OF DEPTH
- PAY ATTENTION – CONTRACTOR , OTHER TRUCKS, CHANGE OF JOBSITE

**MISCELLANEOUS**

- ROAD BANS – BRIDGE WEIGHT LIMITS
- PLANT WASH-UP PITS
- ALLOWABLE WASH-UP TIME
- KEEPING TRUCKS CLEAN

...

**WHEN LOADING**

- DOORS – RED LIGHT
- TRUCK PLACEMENT
- READING TICKETS – KNOWING DIRECTIONS
- STAYING BY TRUCK BEFORE LOADING
- RINSING DOWN FINS (SAFE BARREL SPEED)
- VISUALLY CHECK LOAD FOR AGGREGATE SIZE, LOAD SIZE, CEMENT CONTENT, SLUMP, SANDY OR STONY
- 50 REVS, RINSE DOWN, +20 REVS

**QUALITY CONCRETE**

- SLUMPS – MUST VISUALLY CHECK ALL LOADS (DO SLUMP TEST)
- ADMIXTURES (A.E., H.E., FIBERMESH, PLASTICIZERS, ISOLATION JOINT-THEIR PURPOSE)
- MIX DESIGNS (5B 6 – 2, 6B 6, ETC.) (DIFFERENT AGGREGATED SIZES)
- LEFT-OVER CONCRETE (BLOCKS, RIBBONING)

**WATER VALVES**

- WATER VALVES (LOCATION & PURPOSE OF EACH)

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On the second day of training, Company trainers review Ready-Mix truck operations hands-on with new drivers. The trainer has the driver pull under the plant and load the truck with cement and then operate the truck as it mixes the concrete and drive the truck to a jobsite. The trainer then unloads the concrete at the jobsite for the driver while the driver observes and is able to ask questions.

On the third day of training, the trainer has the new driver load the truck, drive it to the jobsite and unload the concrete while the trainer observes and comments. If the driver has a question or a problem, the trainer assists him/her. Company trainer Dean Baumgarten field trained Jones at the time of his hire. As of the hearing date, Baumgarten was no longer employed by the Company.

Company Trainer Hinkley stated that drivers should walk the terrain their truck will travel over before entering a jobsite; that drivers are told by the Company to notify dispatch as soon as they realize their truck is stuck and that they should stay put and wait for further instructions thereafter. Hinkley also stated that it is policy for drivers to put their trucks in the lowest gear if they are driving off-road so that all three axles are locked together and the driver has greater control, gets greater traction and can move through mud with less likelihood of damaging the truck.

It is undisputed that drivers get stuck in Ready-Mix trucks from time to time, either at jobsites or off-road. It is also undisputed that somewhat infrequently, drivers call in indicating their trucks are stuck, but later radio the Company to state that they have extricated their trucks on their own and that no wrecker is necessary. The Company does not call a wrecker 100% of the time, but tries to use its own trucks to pull stuck Ready-Mix trucks out without paying a wrecker to assist. There is a limit, i.e., to the center of the axles, as to how much mud a Ready-Mix truck can travel through before the truck sinks in, comes to a stop and is stuck.

Company trainers also periodically evaluate drivers and they report their findings to Company H.R. Director Jeff Lemirande. These reports are verbal only and the trainers do not complete any written reports or make or use any written evaluations. Trainers also investigate accidents, injuries, contractor complaints and driver complaints. Trainer Hinkley stated herein that he had evaluated Jones two to three months after his hire in September, 1999, and again sometime during the 2000 concrete season, after having observed Jones' driving; and that he found Jones to be a below average driver. However, Hinkley stated that there was no documentation at the Company of his evaluation of Jones or any written record to support Hinkley's opinion of Jones. Hinkley stated that Lemirande can impose discipline on drivers but that trainers do not have this authority and that Lemirande has not always followed through on Hinkley's driver evaluations. There is no systematic evaluation scheme at the Company; drivers are not regularly evaluated and trainer conversations with Lemirande are "off the cuff."

The Company submitted Jones' accident report records through testimony of H.R. Director Lemirande (Company Exhibits 10-13). However, the Company stipulated herein that these four accident reports were not considered warning letters or disciplinary actions against Jones and they were not considered in the decision to terminate Jones for his actions on March 18, 2003. Also, the Company submitted a December 11, 2001 write-up regarding Jones' alleged failure to timely report to work at 6:10 a.m. on that date. In this write-up, the Company representative stated that the Company had left a message on Jones' answering



machine regarding his start time prior to the day in question, which Jones claimed he had not received. This write-up was also not considered by the Company when it terminated Jones for his actions on March 18, 2003.

### FACTS

It is undisputed that on March 18, 2003, Jones was delivering concrete to Custom Building Enterprises at a jobsite on Wright Road. As the Wright Road job was almost complete and there was some concrete left in Jones' truck, Custom Building Enterprises Concrete Foreman Meinhardt told Jones ". . . we were going to County A and that I would go down (Hwy) 14, be sitting at Burdick — end of Burdick Road and 14 and he could follow me from there because I didn't remember the exact house number where we were going" (Tr. 54). The second job was at Pinnow's Barn, located west on County A, past Burdick Road. Meinhardt admitted herein that he did not tell Jones how to get to the job. (Tr. 55) Meinhardt told Jones he would wait for Jones on Burdick for Jones to follow Meinhardt. (Tr. 56) When Jones arrived at the intersection of Burdick and County A, he was driving west on County A and he turned onto Burdick Road going north. Meinhardt told him he would have to turn around to follow Meinhardt to the Pinnow jobsite which was west on County A. Rather than drive miles around a large rural area in order to come around in the opposite direction, Jones decided to turn into a nearby driveway with some asphalt on it and about a 20 degree grade leading into a farmer's field.

Jones' truck was hanging out of the driveway over the blacktop roadway when Meinhardt saw in his rearview mirror that Jones was stuck. Meinhardt then drove over to Jones' truck and told Jones that he would go and get Pinnow to help get Jones out with Pinnow's truck. The back end of Jones' truck was then seven feet out onto the road but the front of the truck was in the driveway/opening to the field. (Tr. 60, 69)

Meinhardt drove to Pinnow's property, explained the situation and he and Pinnow drove back to where Jones was stuck in Pinnow's one-ton truck. When Pinnow and Meinhardt arrived at the farmer's field, Jones' truck was out in the farmer's field, shaking, bouncing, wheels spinning and sliding in the mud as Jones drove it in the field trying to get the truck out of the field. Pinnow stated herein that Jones' truck was 500 feet out in the field going 3-4 mph when he and Meinhardt arrived. Meinhardt stated that he did not recall where Jones' truck was when he left to get Pinnow (Tr. 60) and that he did not know when Jones radioed Lycon for help. (Tr. 16) Meinhardt stated that there were gravel driveways connected to homes in the area as well as one across the road from the driveway Jones chose to turn around in.

On March 18, 2003, Mike Koning, Company Fleet Maintenance Manager received a telephone call from Company Dispatcher Chadwick indicating that the Grievant had radioed in that "his truck was stuck along the road and he couldn't get out on his own." (Tr. 16) Koning told the dispatcher to tell Jones "we are on our way and to sit there until we got there."

(Tr. 16) Koning heard Chadwick relay this message to Jones and then Koning called Davis, the Company's wrecking company, and asked if a tow truck was available. Davis advised that a wrecker could assist the Company.

Koning then radioed Chadwick to dispatch Company Truck 91 to the site. Koning intended to use the cables from both Truck 15 and Truck 91 to pull Truck 15 (Jones' truck) out. However, when Koning arrived at the site, he saw that Jones' truck was 270 feet out into a muddy farmer's field and Koning realized that the cables from Trucks 91 and 15 were not long enough to get Truck 15 out. 1/ Koning then called Davis to send a wrecker out to pull Truck 15 out of the mud. Koning stated herein that when he arrived, he saw that Jones' had dug ruts in the field and he concluded that Jones had driven in the field, locking his steer axle and spinning in front wheel drive on high gear, instead of locking his axles and driving in low gear. Koning asked Jones how he got that far out in the field and Jones replied that he had slid down into the field.

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*1/ Wrecker trucks have 250 foot cables for pulling trucks out. Company trucks have much shorter cables.*

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Koning stated that drivers are supposed to call in when they get stuck. (Tr. 18) Koning also stated what the Company expects drivers to do when they get stuck:

. . . depending on the situation as to what the driver might want to do. Number one, if they're instructed to wait, that's what they should wait and do is just wait until we can analyze the situation. A driver should always walk his terrain once he's stuck to see where there's alternatives. Other than that there's not much they can do until I get there. (Tr. 19)

The Company decided to investigate the circumstances surrounding Jones' actions on March 18, 2003. The Company, however, did not suspend Jones at this time and he continued to drive Truck 15 and he continued to work full-time for the Company. On March 21, 2003, Koning interviewed Jones and made notes of his interview. 2/ The notes from Koning's interview of Jones read in relevant part as follows:

- ONE YARD LEFT FROM 1<sup>ST</sup> JOB
- 2<sup>ND</sup> JOB JUST PAST BURDICK ON COUNTY A.
- HE THOUGHT IT WAS ON BURDICK RD

PULLED UP TO RIGHT ON BURDICK RD ABOUT ¼ MILE DOWN THE ROAD. HE SAT AND WAITED FOR THE CUSTOMER TO SHOW HIM THE EXACT SPOT TO DELIVER. WHEN THEY FINALLY SHOWED UP

THEY TOLD KEVIN THE JOB WAS ON COUNTY A AND HE NEEDED TO TURN AROUND AND GO BACK TO CTY A. KEVIN DID NOT WANT TO BACK ¼ MI DOWN BURDICK AND THEN ACROSS COUNTY A. NOR DID HE WANT TO DRIVE UP TO HWY 14 AND ALL THE WAY AROUND THE BLOCK. SO HE DECIDED TO PULL INTO ENTRANCE TO FARMER'S FIELD. HE PULLED HIS FRONT TIRES OFF THE ROAD AND TRIED TO BACK UP AND COULD NOT SO HE PULLED IN FURTHER AND TRIED TO BACK UP AGAIN AND FRONT TIRES WERE GETTING CAUGHT ON EDGE OF ROAD. HE PULLED IN FURTHER AND THE TRUCK WAS CATAPULTED INTO THE FIELD. (HE DID NOT HAVE HIS BRAKES APPLIED.) HE LET THE TRUCK GO THINKING HE COULD GET IT BACK OUT. WE HAD SEVERAL DAYS OF RAIN SO THE ENTRANCE AND FIELD WAS WET. (SOFT) HE PULLED THE TRUCK UP TO THE RIGHT (NORTH). THIS AREA WAS HIGHER SO IT WAS NOT AS SOFT AS THE OTHER AREAS IN THE FIELD. HE WAS ABLE TO TURN THE TRUCK AROUND AND DRIVE I [sic] BACK TO THE ENTRANCE AND CALLED DISPATCH FOR ANOTHER TRUCK TO PULL HIM OUT. HE FELT HE WAS TOO FAR FOR A TOW CABLE TO REACH HIM SO HE TRIED TO PULL FORWARD AND THE TRUCK SLID TO THE RIGHT. KEVIN WAS WORRIED THE TURCK MIGHT ROLL OVER ONCE IT HIT THE GRASS AREA. SO HE BACKED DOWN THE GRASS AREA TO GET A GOOD RUN AT IT. WHILE GETTING HIS TRUCK IN POSITION HE GOT STUCK AGAIN ACROSS GRASS AREA INTO ANOTHER FIELD. HE GOT IT OUT BUT KEPT BACK DOWN GRASS AREA AND IN MUD FIELD FURTHER BACK AND IN BETWEEN TWO OTHER AREAS HE TURNED AROUND AND FIELD ACROSS GRASSY AREA. WHEN SHOP MGR AND WRECKER SERVICE ARRIVED HE WAS 275 FT INTO FIELD. WRECKER HAS 250 FT TOW CABLE AND HE NEEDED ANOTHER 25 FT CHAIN. THE TURCK WAS SAFELY PULLED BACK TO THE ROAD.

KEVIN CLAIMS THEIR [sic] WAS NOT ANY DAMAGE TO TRUCK (AT THIS TIME).

...

Koning stated that he never asked Jones how much his tires had spun in the field and what gears he had used on March 18<sup>th</sup>; that the Company did not measure the amount of soft ground in the field to determine the level of mud therein on or after March 18<sup>th</sup>; that Ready-Mix trucks can damage asphalt and blacktop roads as well as gravel driveways; and that when damage is done, the Company has to pay to repair these, if a complaint is made. If a gravel

driveway is well-established, a Ready-Mix truck will not damage it but if the driveway is new, the driveway may be damaged by a Ready-Mix truck driving on it. Koning stated that no one at the Company checked to see how long the gravel driveways in the area of the March 18<sup>th</sup> incident had been established. Koning stated that the Company did not inspect Jones' truck (Truck 15) until one week before the instant hearing when the Company found two of four bolts in the transfer case were broken. However, Truck 15 has been available for use at all times and it has been used intermittently by the Company since March 18, 2003, although it was not regularly assigned to a driver following Jones' discharge on April 1, 2003. The Company has not repaired Truck 15 in any way following the March 18 incident.

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*2/ It should be noted that Jones did not testify herein and the Union did not offer any witnesses herein.*

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H.R. Director Lemirande also admitted that the Company did not interview customers Pinnow and Meinhardt before the Company decided to terminate Jones. Lemirande stated that he did not know until the day of hearing that Meinhardt had told Jones to turn around on March 18<sup>th</sup>. Lemirande stated that he conferred with Director of Operations Lyons and Koning before discharging Jones and that all three managers agreed that termination was appropriate. Lemirande stated that no complaints or requests for damages have been received by the farmer whose field Jones had rutted up on March 18, 2003. Lemirande stated that he went to the site of the March 18<sup>th</sup> incident on March 19<sup>th</sup> and took pictures of the field (Company Exhibits 2-7, submitted herein).

As stated above, Jones worked steadily for the Company using Truck 15 until his suspension on March 28, 2003. The Company conducted a meeting prior to April 1, 2003, with Union representatives present at which Jones became very upset when he was notified of his termination, pointing out that other drivers had done extensive damage to their trucks and had not been fired. The Company nonetheless terminated Jones by its April 1<sup>st</sup> letter as follows 3/:

...

This letter is written in accordance with Article 12 of the agreement with LYCON Inc. and Teamsters Local Union No. 579.

On March 18, 2003 you were involved in an incident while driving truck 15. This incident is considered reckless while on duty.

You were suspended on March 28, 2003 and will be discharged following notification to Union office and steward. Discharge will be effective 24-hours after this letter.

...

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*3/ Although the termination letter is dated April 1, 2003, the Company made its decision to terminate Jones prior thereto and therefore the grievance was submitted on March 31, 2003, in response to the Company's notification to the Union that Jones would be formally terminated the following day.*

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Lemirande stated that Jones was terminated by the Company for recklessness while on duty; that in Lemirande's view it was an error in judgment for Jones to decide to turn around in a farmer's field driveway and that Jones became "reckless" when he went into the field and rutted it up. Lemirande stated that the main problem was that Jones had done damage to the field by rutting it up. (Tr. 140-141) However, Lemirande admitted that neither Custom Building Enterprises nor the farmer made any complaints to the Company and the farmer never sought any compensation for damage to his field due to Jones' actions on March 18<sup>th</sup>.

On March 31, 2003, Jones filed the following grievance which detailed his complaint as follows:

. . .

I am writing this grievance to protest my unjustified termination from Lycon, Inc., in regards to the incident that happened on 18 March 03. On the 28<sup>th</sup> of March 03, I was informed by Jeff Lemirande (The Company Representative) that I violated Article 12 #6, and was to be terminated from employment at Lycon. The reason being, that after I had gotten the truck stuck in the field at Cty A and Burdick, that my attempts to get the truck out of the field it was in, was considered reckless. I consider this termination unfair for the following reasons: There is no clear definition in the Contract of what constitutes recklessness. There are no clear-cut standards as to what is to be considered to be recklessness. The truck was not damaged, that I was driving. It was able to be driven back to the plant. There was no down-time for the truck; it did not need repairs and was able to be used in making deliveries the next time that I worked. The reason I consider this termination unjustified is that several drivers, in the past, have done far worse and more serious damage to their trucks and property than I am being terminated for. Their actions could be considered, by far, more reckless than being just stuck-in-mud. The actions that other drives have done have caused from minor to massive damage, up to including totaling a truck. All of these driver are still employed at Lycon.

. . .

After the grievance was filed, it was processed through to arbitration.

There is no dispute that Jones' assertions in his grievance regarding Company treatment of other drivers are correct. For example, Driver Craig Hamilton had a load of concrete in his truck when he backed into a pole inside a building in Delevan, damaging the truck and disabling the mixer so that the cement hardened in the truck. It took two or three days to get the hardened concrete out of the truck and more time to repair it. Hamilton was not suspended or terminated for this incident. Driver Dave Bauer had an accident in which he was going too fast for conditions and he rolled his truck to avoid a car, totaling his Ready-Mix truck. Bauer's truck was used later by the Company to supply parts for other trucks. Bauer was ticketed for the accident and suspended by the Company for five days but not terminated. Bauer was also given a warning letter. Hamilton also had another accident that required major repairs to his truck and he was not terminated. Driver Jose Tejada rear-ended another Lycon truck which he was following too closely, doing damage to both trucks. Tejada was suspended for three days, but he was not terminated.

### **POSITIONS OF THE PARTIES**

#### **The Company**

The Company argued that the Grievant was reckless when he knowingly violated at least four Company rules: failing to walk the terrain at a jobsite; failing to call dispatch immediately when he became stuck; failing to stay put and rocking the truck and not placing it in low gear. The Company noted that various definitions of reckless would cover the situation in this case and demonstrate that Jones' conduct was reckless. Thus, the Company observed that various dictionary definitions show that reckless means to be careless, heedless, inattentive, to be indifference to consequences involving danger to life or safety of others, but it may also constitute knowing conduct which could result in property damage or personal injury.

Because Jones did not testify in this case, the Company argued that any doubts regarding what actually happened on March 18, 2003, should be resolved against him. In addition, the Company noted that the evidence in this case undisputedly showed that Jones lied during the investigation of this matter and this should constitute an independent reason why Jones should be discharged. In this regard, the Company noted that on March 18<sup>th</sup>, Jones told the dispatcher he was stuck near the road when this did not turn out to be true per Koning's testimony; and that in his accident report, Jones tried to make it appear that Meinhardt was at fault for giving insufficient information regarding the second customer's jobsite address or because the customer was late arriving at the intersection of Highway 14 and Burdick.

There is no basis to overturn Lemirande's decision that the Grievant had been reckless on March 18<sup>th</sup>. No Union witnesses appeared on behalf of Jones, to support the Grievant's story or to deny Lemirande's testimony that it is Company policy to call the dispatcher immediately when a truck becomes stuck and to stay put. Here, the Company contended that

Jones had been utterly unconcerned about the consequences of his action in turning into the field and then attempting to extricate himself; that he had done this in a careless fashion, without caution and without regard for Company rules. The Company also urged that danger to life or safety to others need not be included in the concept of recklessness, as Black's Law Dictionary (7<sup>th</sup> Edition) now excludes these concepts of danger to life or safety to others under the definition of "reckless."

The Grievant's failure to testify in this case leaves the Union's assertions herein unproved and it should raise a strong inference that if called to testify, he would have made statements damaging to his case. In this regard, the Company noted that the Union's assertions that Jones was sucked into the field, that he made good faith attempts to get out, that there was no damage to the field, that there was no damage to the truck and that Ready-Mix trucks routinely get stuck and drivers extricate themselves where simply unproved assertions made by the Union.

In all the circumstances of this case, the Company had just cause to discharge Jones for recklessness while on duty and the Arbitrator should deny and dismiss the grievance in its entirety.

### **The Union**

The Union argued that the Company has the burden of proving it had just cause for Jones' discharge by a substantial preponderance of the evidence, a fair standard in a serious case involving discharge. Here, the Company failed to prove that Jones' actions constituted recklessness while on duty and therefore the Company violated the agreement by discharging him. In this regard, the Union noted that the testimony regarding how Jones was driving on March 18<sup>th</sup> and whether or not he should have attempted to get himself out of the field was largely conjecture and of limited relevance. Rather, the analysis should be whether Jones consciously chose a dangerous course of action which would create a probability that an accident or damage would occur. The Union contended that the evidence failed to show that Jones consciously made such a choice. Indeed, the evidence showed no damage to the truck or the field and no bodily injury to anyone. Thus, danger was not present here and it would be unfair to analyze Jones' errors by hindsight, as the Company has done. Thus, Jones' actions merely constituted bad judgment in choosing a place to turn his truck around and this is not the same as recklessness on duty.

Furthermore, the evidence showed that Jones' decisions might not have been as bad as the Company has argued. In this regard, the Union noted that greater damage could have been done to roadways or driveways than Jones did to the field, and that to leave the truck blocking the highway would have been dangerous to the truck, and to passersby. There was no evidence to show that Jones had any intent to seek out dangerous conditions or circumstances on March 18<sup>th</sup>. Furthermore, the Union noted that Company witnesses testified that drivers often get themselves unstuck and that Jones was simply following these procedures in a reasonable fashion.

The Union cited several cases which showed that getting a truck stuck is not reckless but may constitute only bad judgment. Here, Jones tried to get out but also radioed the Company for help. The Company, in this case, must show not only just cause for discharge but that Jones acted recklessly on March 18<sup>th</sup>. As there was no evidence that Jones was indifferent to circumstances around him or that he had been negligent, the Company has failed to prove that Jones was reckless on March 18<sup>th</sup>.

The Company did not have just cause to discharge Jones without first applying the progressive disciplinary scheme referred to in Article 12 of the labor agreement. Thus, by immediately discharging Jones, the Company violated Article 12 of the contract. As Article 12 states that only "serious misconduct" will be the exception to a driver receiving at least one written warning notice before discharge, the Company failed to follow the contract in this case.

In this regard, the Union observed that Jones had no opportunity to correct his behavior because there were no relevant prior disciplinary actions in his file; and the Company stipulated that it had not considered Jones' prior accident record in reaching the decision to terminate him and that it had not disciplined Jones for any of those prior accidents. As the contract requires that each disciplinary warning must be removed from consideration by the Company after six months, there was no showing that Jones had received any progressive discipline relevant to this case in the past.

The Union argued that the Company treated Jones disparately from other drivers as the record evidence showed that other drivers were given written warnings or suspensions if they were involved in accidents. In this regard, the Union noted that Company drivers have done major damage to Company trucks and other property, yet they have not been discharged. These accidents resulted from inattention and other driver error. As a general rule, just cause requires the Arbitrator to find that the grievant was treated the same as other employees who had been similarly situated in the past. The Union observed that David Bauer was given a five-day suspension when he totaled his truck; that Joes Tejeda was given a three-day suspension when he damaged his truck and that Craig Hamilton was not suspended at all when he damaged the drum on his truck, which resulted in the concrete drying in the truck and the truck having to be cleaned out, thus putting the truck out of commission for several days.

In sum, as the Company has not been consistent with its discipline of employees, Jones' discharge was disparate as well as without just cause. The Union urged the Arbitrator to reinstate Jones with full back pay, sustaining the grievance in its entirety.

### **DISCUSSION**

Article 12 of the effective labor agreement requires the Company to have "just cause" to discharge "any employee." On April 1, 2003, the Company discharged Kevin Jones immediately without having issued him "at least one warning notice." The reason given by the



Company for the discharge, pursuant to Article 12, item 6, was because Jones had been “reckless while driving” Truck 15 on March 18, 2003. It is significant that the Company has never before discharged an employee without having issued a prior warning for this reason. Thus, there are no internal examples to which to compare Jones’ actions of March 18<sup>th</sup> to determine whether Jones’ actions constituted recklessness in the context in the Company’s business/operations.

In addition, the labor agreement does not define “reckless” or “recklessness.” Furthermore, the Company has established no work rules or policies which address this subject. The only Company document which addresses “job safety” is the training guide (quoted above) which Trainer Hinkley discussed in his testimony. However, there is no reference in this document to when a driver should put his truck in low-low gear or what a driver should do if his truck gets stuck off road and specifically no references therein to staying put once a truck is stuck. This document does refer to the requirement of walking the terrain but it limits this activity to “before entering jobsite.” This document states a driver should “check with contractor before driving over curbs, sidewalks or private property” and advises drivers to “pay attention” to contractors.

In addition, no evidence was offered by the Company to show what hands-on field training Jones received from former Company Trainer Baumgartner (who was not called to testify herein) when Jones was hired. In addition, although Trainer Hinkley stated that he evaluated Jones in 1999 and 2000 as a “below average driver,” because the Company has no systematic evaluation system, no documentary evidence existed or was submitted to support Hinkley’s testimony. In any event, no evidence was offered to show that the Company considered Jones’ evaluations in reaching the decision to terminate him. Finally, the Company stipulated herein that Jones’ prior accident record and the write-up he received in 2000 were not considered in its decision to terminate Jones for the March 18<sup>th</sup> incident.

Given the lack of guidance in the labor agreement and the record evidence herein, the Arbitrator has looked to various sources to help define the term “reckless.” Black’s Law Dictionary, 6<sup>th</sup> Edition (1991) 4/ defines “reckless” as follows:

. . . careless, heedless, inattentive; indifferent to consequences. According to circumstances it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive or negligent. For conduct to be “reckless” it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended . . . .

The Random House Dictionary of the English Language, College Edition (1968) defines “reckless” as follows:

utterly unconcerned about the consequences of some actions; without caution; careless . . . to be reckless of danger . . . characterized by proceeding from such carelessness.

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*4/ I have not considered the endangerment portion of this definition herein as the 7<sup>th</sup> Edition of this dictionary no longer recognizes this concept.*

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It is important to note that because neither Jones nor any other Union witnesses testified herein, the evidence proffered by the Company is all that is available to determine what occurred on March 18<sup>th</sup>. Indeed, the only full account of what occurred on March 18<sup>th</sup> is Jones' accident report which in large part stands uncontradicted by the record evidence. It is also significant that Company witnesses Pinnow and Meinhardt did not actually see Jones get stuck on March 18<sup>th</sup> and that they were not interviewed by the Company before the Company decided to terminate Jones.

In his accident report, Jones admitted that he pulled into the entrance to the farmer's field and tried to back out but could not do so; Jones stated that he then pulled ahead further into the entrance and that his front tires then got caught on the edge of the road; again, Jones pulled into the field further and the truck "catapulted into the field." At this point, Jones stated in his accident report, he decided to "let the truck go" hoping he could drive the truck out himself. Jones stated that after driving in the field, he called dispatch because he was then too far out in the field for a tow cable to reach him; he continued to try to pull the truck forward and it slid to the right; he admitted he continued to try to get the truck out of the field and that he was worried at one point that he might roll the truck over. When Shop Foreman Koning and the wrecker came, Jones admitted he was 275 feet out in the field.

It is striking that Contractor Meinhardt originally stated that he asked Jones to meet him at the intersection of Highway 14 and Burdick Road, but that he did not tell Jones how to get there or how to find Pinnow's barn on March 18<sup>th</sup>, because he (Meinhardt) could not remember the address. However, Jones came from a different direction to the intersection than Meinhardt had expected and Jones stopped on Burdick Road facing north. This was an understandable mistake because Meinhardt had only told Jones that they "were going to County A." Meinhardt then told/ordered Jones to turn around and follow him west on County A. Jones "paid attention" to Meinhardt as required by this Company's training guide, and did as he was told in coming to the intersection and attempting to follow Meinhardt by turning his truck around.

In deciding to terminate Jones, Lemirande stated that it was not Jones' decision to turn into the entrance to the farmer's field which Lemirande called reckless and which caused Jones' discharge. Rather, it was the fact that Jones went into and rutted up the field which Lemirande found was reckless conduct and cause for immediate termination. The question raised at this point is what did Jones know and what did he intend by turning into the entrance to the farmer's field.

Clearly, Jones was trying to follow Meinhardt's instructions in accord with the above-quoted training guidelines. In addition, it is clear that Jones believed that he could turn into the entrance to the farmer's field and successfully turn his truck around rather than having to drive miles around a very large country block to position his truck going west on County A, as Meinhardt had requested. There is no question that Jones made mistakes on March 18<sup>th</sup>. Certainly, Jones should have called dispatch immediately when he knew that he was stuck, according to the Company's verbal policy. The problem is, Jones did not believe he was stuck when he first entered the field. Rather, Jones thought he could get Truck 15 out on his own. Clearly, the record herein shows that other drivers have called in but later they have advised the Company that they have extricated their trucks on their own. The Company offered no evidence to show that it has disciplined these drivers who have failed to "stay put" when stuck.

In addition, Koning's testimony was hardly absolute on the point. Koning indicated herein that "depending on the situation as to what the driver might want to do" and "if" the driver is instructed to wait, he should wait, and that the driver should walk the terrain "to see where there's alternatives." This testimony shows that drivers are expected to exercise their own judgment, to decide what they might want to do and to look for alternatives on their own. It is also clear on this record that the Company does not call a wrecker every time a truck becomes stuck. In these circumstances, it is far from clear that Jones acted recklessly, as it is not clear that Jones was "utterly unconcerned about consequences" or that he acted with "disregard of or indifference to consequences," although his actions were extremely stupid when analyzed in retrospect. 5/ Rather, the facts showed that Jones was trying to follow Meinhardt's instructions, albeit in an extremely ill-advised manner.

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*5/ To say that one has acted without regard to or with indifference to consequences requires that one know the likely outcome of one's choices. Here, no evidence was proffered to show that Jones had ever driven a Ready-Mix truck into a field before March 18<sup>th</sup>.*

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In the Arbitrator's view, the record facts in this case are simply insufficient to support a conclusion that there was just cause to discharge Jones. Rather, various weighty facts such as the lack of Company rules, policies and periodic training sessions to assure that employees understand what the Company expects of them and what conduct is reckless, the lack of any systematic evaluation program, the fact that the Company conducted almost no investigation of the March 18<sup>th</sup> incident and never checked what, if any, damage had been done to Truck 15 before it fired Jones, the fact that no complaints or requests for damages arose due to the March 18<sup>th</sup> incident and that Jones continued to drive Truck 15 for two weeks after March 18<sup>th</sup> without incident, all show that the Company's decision to immediately terminate Jones without a prior warning was done without just cause.

This conclusion is further bolstered by the fact that Company drivers Hamilton, Bauer and Tejada received three or five day suspensions or no discipline at all after doing greater damage to their trucks while driving too fast for conditions or following another vehicle too closely or backing into a poll. This record, in general, and these three prior cases specifically show that Jones would not necessarily have been put on notice that his actions on March 18<sup>th</sup> would lead to his immediate discharge. These three prior cases also show that Jones was disparately treated by the Company for his actions on March 18<sup>th</sup>. I, therefore, issue the following

**AWARD**

The Grievant was not terminated for just cause. Grievant Kevin Jones shall be reinstated after serving a three-day suspension for his actions on March 18, 2003, 6/ and after serving that suspension, he shall receive full back pay and benefits. In addition, Jones' record shall be expunged of any references to his termination.

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*6/ As the Company failed to prove that Jones had damaged Truck 15, a three-day suspension for his conduct on March 18<sup>th</sup> is fair based on past incidents of record. Jones is being given another chance by this Award, which it is hoped he will use well.*

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Dated in Oshkosh, Wisconsin, this 2<sup>nd</sup> day of February, 2004.

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Arbitrator