BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BRENNTAG GREAT LAKES LLC

and

**TEAMSTERS "GENERAL" LOCAL UNION NO. 200
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA**

Case 1
No. 62443
A-6377

Appearances:

Nathan D. Eisenberg, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Milwuakee, Wisconsin, appearing on behalf of the Union.

Thomas W. Mackenzie, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Suite 100, Milwaukee, Wisconsin, appearing on behalf of the Employer.

ARBITRATION AWARD

Brenntag Great Lakes LLC, hereinafter referred to as the Employer, and Teamsters "General" Local Union No. 200, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the discharge of an employee. Hearing on the matter was held in Milwaukee, Wisconsin on September 15th, 2003. A stenographic transcript of the proceedings was made and received by the Arbitrator on October 2nd, 2003. Post-hearing written arguments were received by the Arbitrator on November 24th 2003. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed to the following issue:

“Was the Grievant terminated for just cause?”

"If not, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

. . .

ARTICLE VIII – DISCHARGE OR SUSPENSION

Section 1. The Company reserves the right to suspend or discharge an employee for conduct, actions or non-actions, which may be detrimental to the Company and which include, but are not limited to: having possession of or under the influence of an alcoholic beverage(s) or controlled substance(s) (refusal to take a test is presumption of under the influence), possession of firearms while on duty or on or in Company property without permission, proven, willful damage or destruction of Company property, dishonesty, carrying of unauthorized persons on the truck, misconduct or carelessness resulting in a serious accident, smoking in unauthorized places (as designated by the Company, the D.O.T., the Company insurance carrier, or the local fire department), failure to report immediately the discharge of ANY material, or failure to perform work according to the uniform standards as set down by the Company as necessary to the proper function of its business. [Emphasis added].

. . .

PERTINENT EMPLOYER POLICIES

PROCEDURE

A. DEFINITION

A preventable accident is any accident involving a motor vehicle, regardless who is injured, what property is damaged, the extent of damage or where it occurred, in which the driver in question failed to ***exercise every reasonable precaution to prevent the accident.***

> Responsibility for accidents is based on whether or not the accident was preventable and not who was at fault. Responsibility to prevent accidents goes beyond careful observance of traffic rules and regulations. Drivers must drive in a defensive manner to prevent accidents regardless of the other person's faulty driving or non-observance of traffic regulations. A poor accident record will result in your discharge.
>
> All accidents must be reported immediately per Section II-E.
>
> . . .

BACKGROUND

The Employer is a chemical distributor that transports all types of chemicals including hazardous materials. Drivers are dispatched from two facilities in the Milwaukee area. In July, 2001 the Employer hired Scott Gurrath, hereinafter referred to as the Grievant, as a Driver. Personnel hired by the Employer to drive its vehicles are required to have a Certified Drivers License. However, the majority of the time the Grievant worked for the Employer he spent working in the Employer's warehouse. Moves between working in the warehouse and driving were at the Grievant's own request.

On January 10th, 2003, while delivering materials to a customer, the Grievant struck the customer's loading dock doorframe. As a result the loading dock's door could not be closed. Damage and repair costs totaled $8,478.00. The Grievant was not formally disciplined, however the Grievant was counseled by Traffic Manager Greg Knoke. Knoke advised the Grievant that as a driver he was responsible for being aware of his surroundings at all times.

During the evening of February 5th, 2003 the Grievant contacted his supervisor, Doug Gottwin, at home using the Employer's two-way radio. During their conversation the Grievant threatened harm to himself and others through the use of a firearm. Gottwin contacted the police and the police investigated the matter. The police issued no citations. However, after the incident the Employer removed the Grievant from driver duties and directed him to be assessed by the Employer's counseling provider. After the assessment and the Grievant's compliance with a recommended counseling program, the Grievant was returned to driving duties.

On April 21st, 2003 the Grievant was involved with a second accident. The Grievant arrived at the customer's location and backed into the customer's loading dock. While pulling out of a customer's loading dock the Grievant's truck snagged and pulled down a low hanging power line. The customer was without power until the power company could restore the power line. The Grievant had previously delivered materials to this customer on a number of occasions without incident. At the time of the hearing no bill had as yet been sent to the Employer

concerning this matter. Knoke again counseled the Grievant about being aware of his surroundings at all times. The Grievant was not issued any formal discipline

On May 2, 2004 the Grievant was involved in a third accident. The Grievant had a personal commitment scheduled with his wife immediately following the conclusion of his workday. During the latter part of the workday he was directed to make a delivery to a new customer. Due to a mistake the materials had been loaded on the wrong type of trailer. The grievant was frustrated with the delay and vented his frustration on Customer Service Manager Margie Ertl in the Employer's office. Ertl testified at the hearing that the Grievant shaking papers in his hand at her direction, approached to within two feet of her, and, swore during the exchange (Tr. 116 – 117). The Grievant than left the office, slamming the door on his way out. Ertl immediately contacted Operation Manager Scott Rhodes and Gottwin and requested that they calm the Grievant down. However, by the time Gottwin got outside the Grievant had already left.

The Grievant drove to the customer's location and made the delivery. During the return trip to the Employer's facility the Grievant made a lane change while he was westbound on Interstate Highway 894. During the lane change from the far left to the center lane he struck a Dodge Neon with two female occupants. He struck the Neon with the right front wheel of his vehicle. The impact caused the Neon to spin in front of the Grievant's vehicle and he drove over the front end of the Neon. The Neon completed a 180 spin and ending up in the medium facing the wrong way. The Neon was totaled, however, neither passenger was injured. The Grievant immediately called the police and then contacted Knoke. Knoke told the Grievant to remain where he was and drove to the scene.

By the time Knoke arrived at the accident scene the police and occupants of the Neon were already gone. Knoke inspected the truck and noted minor damage to it. Knoke than transported the Grievant for mandatory drug and alcohol testing. The Grievant passed both the drug and the alcohol tests. The Grievant was issued a citation for "unsafe lane deviation" and later plead guilty to the citation.

Thereafter the Employer conducted an investigation to determine if the Grievant's vehicle had any blind spots. The Employer concluded the Grievant should have been able to observe the Neon. The Employer than determined to discharge the Grievant. In reaching this decision the Employer looked at the Grievant's entire record, including the prior accidents, his personal problems, and his confrontation with Ertl. Thereafter the matter was grieved and processed to arbitration in accord with the parties' grievance procedure.

Employer's Position

The Employer contends it owes an obligation to the public to ensure its drivers can and will exercise an extraordinary degree of care and caution required to safely operate its vehicles. The Employer argues that to allow a driver to operate a vehicle where evidence suggests that the diver does not exercise the requisite degree of caution and care is an invitation to disaster and a breech of the public trust. Particularly where the materials transported can be highly flammable or explosive. The Employer asserts that it is because of this obligation the parties have vested in the Employer the right to discharge an employee for actions or inactions, which may be detrimental to the Employer including misconduct or carelessness resulting in a serious accident. The Employer points out it has codified this obligation to the public in its polices which state an employee may be discharged for a poor accident record.

The Employer also contends the Grievant's record, that culminated in the May 2nd, 2003 accident reflected the requisite level of carelessness as would warrant discharge under the collective bargaining agreement. The Employer points out in less than three months the grievant was involved in three accidents. The Employer argues the issue is whether the Grievant exercised due care under the circumstances and points out the Grievant was counseled after each of the first two accidents. The Employer stresses that in both counseling sessions the Grievant was told he needed to be aware of his surroundings.

The Employer contends the May 2nd, 2003 accident was caused by the Grievant and his lack of care. The Employer argues there was absolutely no excuse for his failure to observe the Neon in the lane he was attempting to enter. The Employer argues that even if the Arbitrator were to accept the Grievant's claim of a blind spot, the Grievant should have exercised a greater degree of care. The Employer also argues the Grievant's blind spot theory does not hold up under the Employer's investigation. The Employer points out that had the Grievant viewed though the special window or looked over the hood of his vehicle he would of observed the Neon. The Employer also points out the Grievant's own testimony demonstrates he did not check the special window (Tr. 80). The Employer further points out the Grievant acknowledged on cross examination the Neon could have been visible through the special window (Tr. 92-93). The Employer argues that although the Grievant is claiming there is a blind spot, the Grievant is not asserting he used all available tools to confirm the existence of a vehicle in the next lane. The Employer also contends that as the Grievant was cited for and plead guilty to an unsafe lane deviation, the Grievant in the eyes of the State of Wisconsin had not exercised the degree of care mandated by the traffic code.

The Employer contends the Employer's vehicles are capable of lethal damage. Moreover, it is remarkable that the May 2nd, 2003 incident did not injure or due lethal damage. The Employer argues in a four month period the Grievant demonstrated a repeated failure to be aware of his surroundings. The Employer asserts the damage caused in each instance was solely

attributable to the Grievant. The Employer concludes the Grievant's demonstrated pattern of carelessness culminated in a serious accident and avers that the collective bargaining agreement's standard has been met.

The Employer also contends there are no mitigating factors and that the Grievant's personal circumstances appear as a possible contributing factor to his accident history. The Employer points out that the Grievant used Employer equipment to call his supervisor at home to tell him he was contemplating using a lethal weapon. The Employer points out it referred the Grievant to counseling and abided by the assessment that the Grievant was fit for work. However, the Employer also points out, although the grievant testified the counseling was a success, Knoke testified that during the trip to the hospital for the drug and alcohol testing the Grievant told Knoke he was still thinking of shooting someone (Tr. 54-55). The Employer argues there is some question as to whether the Grievant's personal problems impacted on the Grievant's ability to stay focused on his driving.

The Employer also contends it was not precluded from terminating the Grievant's employment because it failed to issue formal discipline in the past. The Employer points out the collective bargaining agreement specifically authorizes discharge or suspension when an employee's carelessness causes a serious accident. The Employer asserts the instant matter is clearly such a case. The Employer argues the Grievant's decision to switch lanes without confirming with certainty the existence of a vehicle in the other lane was at best careless. The Employer points out this occurred after twice being told by his supervisor the Grievant had to be more aware of his surroundings. The Employer concludes that the purpose of progressive discipline was fulfilled in the instant matter because the Grievant was aware that the Employer was dissatisfied with his performance and that if the patterned continued his job was in jeopardy.

The Employer also points out the Union presented no evidence of disparate treatment. The Employer points out Union steward Dennis Luedtke to a general usage of progressive discipline but also acknowledged some employees are advanced to suspension or discharge on a first offense (Tr. 103). The Employer also points out that Luedtke testified that for the behavior the definition describes in the collective bargaining agreement the Employer has terminated on a first offense.

The Employer would have the Arbitrator deny the grievance.

Union's Position

The Union contends the Employer has the burden of proving just cause for the Grievant's discharge. The Union argues that discharge has been widely recognized as the most severe penalty that can be imposed in industrial jurisprudence. The Union points out such capital punishment not only results in a loss of employment but marks the employee as undesirable, thus

affecting future employment. The Union argues the Employer does not meet this burden in the instant matter and asserts the Grievant should be reinstated and made whole.

The Union contends the fact the Grievant had an accident does not meet the just cause standard. In order to meet this standard the Union argues the Employer must demonstrate that the accident must have been the result of misconduct or carelessness. The Union argues there is no misconduct or carelessness in the instant matter.

The Union argues there is no credible evidence the Grievant failed to check his blind spots before merging into the Dodge Neon. The Union points out the Grievant testified he checked his mirrors at least three times prior to merging and even waited for another car to pass before attempting to merge into the right lane (Tr. 81). The Union argues that the Grievant's testimony that the location of the Neon, the speed of the traffic, the proximity of the Neon to his vehicle and the road conditions prevented him from being able to spot the Neon was not due to his lack of effort, simply he was unsuccessful at seeing the other car.

The Union also contends there is no credible evidence that the Grievant's dispute with Ertl for making him wait resulted in reckless driving. The Union points out that the Employer's policy is that all accidents of any type are presumed to be the fault of the employee. Further, that responsibility for accidents is whether or not it is preventable, not who was at fault and that all accidents are preventable (Tr. 69). The Union argues the Employer's presumption of guilt is apparent in the way it evaluated the Grievant's past accidents. The Union points out Knoke testified that running into the power line was the Grievant's fault because the driver has to be aware of low bridges, low power lines, whatever (Tr. 38-39). The Union points out that Knoke had not observed the Grievant but assumed the Grievant was in too much of a hurry. The Union further points out that after the Grievant's accident the power line was permanently relocated to a safer location (Tr. 102).

The Union asserts that in evaluating the Grievant's May 2nd, 2003 accident the Employer again applied a presumption of guilt. The Union argues that the Employer decided that because the Grievant was unhappy with Ertl his accident was causally related and therefore the accident was primarily the Grievant's fault. The Union asserts that the conclusion that simply because the Grievant had an accident that he was driving carelessly is specious. The Union also argues that the Employer's analysis fails to take into consideration the problem of blind spots in large tractor-trailers. The Union avers that rather than acknowledge such a serious problem, the Employer has chosen to deny such problems exist. The Union points out that Knoke testified that the Employer's vehicles did not have blind spots (Tr. 70). The Union argues that vehicles such as the one the Grievant was driving are well known to have blind spots, and further argues one area of blind spots is where the Neon was when the Grievant drove into it. The Union also argues that Knoke's reenactment of the accident was conducted using stationary vehicles, using different actors and was not in a construction zone.

The Union contends the Employer must not only prove that the Grievant had a serious accident but that the accident was the result of misconduct or carelessness. The Union argues the Grievant's claim that he checked his blind spots to the best of his ability, acted cautiously in changing lanes and did everything within his power to safely merge prior to the accident cannot be refuted by the Employer on the basis of the type of accident the Grievant had. The Union concludes that absent tangible evidence concerning the Grievant's driving the Employer has failed to demonstrate that the Grievant's driving was careless and thus the Employer fails to meet the just cause standard.

The Union also contends the discharge may not stand because the Employer improperly relied on non-grievable past incidents. The Union does not dispute the Grievant has been involved in a number of accidents. The Union does point out the Grievant was not disciplined for these accidents. The Union argues the Employers reliance on these past accidents for which he was not disciplined is impermissible and negates just cause for the Grievant's discharge. The Union argues that prior transgressions for which a grievant was not disciplined cannot for the basis for increasing the severity of discipline in the current offense when the grievant has not had the opportunity to challenge the matters through the grievance procedure. The Union also argues the failure of an employer to notify an employee of an alleged infraction at the time of occurrence or to reprimand the employee precludes the employer from using the alleged infraction at a later date. The Union further argues that past incidents were no discipline was taken and no official records maintained and cannot at a later date be properly investigated cannot be accepted to support discharge. The Union contends the Employers actions are an element of surprise that is prejudicial to the Grievant and contrary to the principle of corrective discipline. An employee cannot correct conduct that is considered wrongful if the employee is not made aware at the time that the conduct is considered to be wrong. The Union stresses the Grievant had no opportunity to present his version of events through the grievance process. The Union concludes absent such an opportunity it was inappropriate for review by the Employer and by the Arbitrator in assessing just cause for discharge.

The Union also argues the Employer improperly relied on the Grievant's personal problems where such problems did not affect the Employer's business or the ability of the Grievant to perform work. The Union argues the introduction, over its objections, of the Grievant's personal problems was inappropriate. The Union points out the Grievant attended counseling voluntarily and that the Grievant's counselor concluded he could return to work. The Union points out there is no proof of detriment or harm to the Employer or any evidence the Grievant's personal problems effected his work. The Union argues the fact the Employer looked at the Grievant's personal problems was not a valid consideration. The Union concludes any reliance on verbal past, off-duty statements, later proven to be immaterial, is inappropriate and cannot form a basis for just cause.

The Union would have the Arbitrator sustain the grievance and direct the Employer to reinstate the Grievant and direct the Employer to make the Grievant whole for all lost wages and benefits.

DISCUSSION

Article VIII, Section 1, of the parties' collective bargaining agreement clearly allows the Employer the right to suspend or discharge an employee for misconduct or carelessness resulting in a serious accident. The record demonstrates that on May 2nd, 2003, while returning to the Employer's facility after delivering products to a customer the grievant was involved in a serious accident. The Grievant was issued a citation by the Milwaukee County Sheriff's Department for unsafe lane deviation. The Grievant plead guilty to the citation and paid the appropriate fine. The Union did not dispute that the Grievant's actions caused the accident. There is no evidence that the driver of the Dodge Neon was cited for any wrongdoing. Thus, the Arbitrator concludes that the Employer could reasonably conclude that the Grievant was at fault for the accident.

During the hearing the Grievant testified that on May 2nd, 2003 while he was driving through a work zone, he saw a sign that said "Trucks use right lane," that prior to changing lanes he looked in his mirrors at least three (3) times, placed his blinker on, saw a vehicle behind him back off, and when he proceeded to move over he felt a bump (Tr. 80-81). The Arbitrator notes here that the Grievant, although testifying he looked at his mirrors, never testified that he looked through the special window on the Employer's truck that would allow him to see a vehicle next to his truck's front fender. This is the area the Dodge Neon was in when the Grievant's vehicle struck it. The Grievant also testified on cross-examination that the Neon could have been observed through the special window (Tr. 93). The Arbitrator therefore finds the Union arguments that blind spots were the cause of the accident to be without merit. There is no evidence the Grievant looked at the special window to see if a vehicle was next to him. The Arbitrator therefore concludes it was reasonable for the Employer to conclude the Grievant was careless when attempting to switch lanes.

The Arbitrator would note here that the Union's arguments that blind spots were a factor which caused the accident is without merit based upon the Grievant's testimony that the Neon could have been observed through the special window of the vehicle. Further, the Employer's reenactment of the accident during the Employer's investigation demonstrates that a driver of an Employer's vehicle can observe a vehicle located near the vehicle's front fender if one looks through the special window. Given the Grievant's testimony, he clearly did not do so. Therefore the Arbitrator finds the Employer had just cause to conclude the Grievant was careless when he attempted to change lanes.

The Arbitrator also finds that given the language of Article VIII, Section 1, and given Luedtke's testimony that in the past an employee has been terminated for a first offense (Tr. 108), the Employer had just cause to terminate the grievant's employment.

The Union has also objected to the Employer looking at the Grievant's entire work record when it determined to terminate the Grievant's employment. However, the Grievant had recently been involved with two other accidents. The record also demonstrates that the Grievant had been counseled by his supervisor that the Grievant was responsible for being aware of his surroundings at all time. It is clear to the Arbitrator that the Grievant was aware the Employer was not pleased with his performance and that he could be discharged for having a pattern of behavior that was unsafe (Tr. 90). The Arbitrator therefore concludes that the Employer can take into account the fact the Grievant had been counseled about previous accidents and had been informed he had to be aware of his surroundings at all times. Clearly the Grievant had been made aware that his conduct was considered by the Employer as wrongful.

The Arbitrator also finds the Employer can include the Grievant's conduct towards Ertl in making the decision to terminate the Grievant. The Grievant did not dispute that he was angry, raised his voice and used profanity (Tr. 85, 95). This action by the Grievant, in and of itself, could be grounds for discipline. The fact that it occurred just prior to the Grievant's accident does not mean the Employer must view it as a separate and distinct incident.

During the hearing Knoke testified that after the accident he was with the Grievant for approximately three (3) hours. They discussed the accident and other things. Knoke testified that the grievant, during their conversations, stated he was going to kill or shoot someone (Tr. 55). The record demonstrates the Grievant had previously contacted his supervisor and made such statements and, as a result, the Employer had relieved the Grievant of driving duties. For the Employer to be concerned about the Grievant's statement is not unreasonable. Clearly, the Grievant was angry before the accident. Clearly, the Grievant was also angry after the accident. The Union did not claim the Employer acted inappropriately when it removed the Grievant from driving duties after the February 5th, 2003 call to his supervisor. When the Grievant made a similar statement on May 2nd, 2003 it was therefore reasonable for the Employer to consider the Grievant's statement when making the determination to terminate the Grievant's employment. For the Employer to include such considerations in it's decision making is not only reasonable, but, given the nature of the Employer's business, necessary. Therefore the Union's argument that the Employer should not have included the Employee's personal problems when it determined to discharge the grievant is without merit.

The record thus demonstrates that the Grievant had a serious accident. The Grievant was at fault for this accident and issued a traffic citation. The Grievant had been counseled at least twice that he needed to be aware at all times of his surroundings. The Employer reasonably concluded the Grievant should have been able to observe the vehicle the Grievant struck. The

Employer also reasonably concluded the Grievant was careless when the Grievant attempted to switch lanes.

Therefore, based upon the above and foregoing, and the testimony, evidence and arguments presented, the Arbitrator finds the Employer had just cause to discharge the Grievant. The grievance is therefore denied.

AWARD

The Grievant was terminated for just cause.

Dated at Madison, Wisconsin, this 9th day of February, 2004.

Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator

EJB/gjc
6639