

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WINNEBAGO COUNTY
HIGHWAY DEPARTMENT EMPLOYEES UNION,
LOCAL 1903, AFSCME, AFL-CIO**

and

WINNEBAGO COUNTY

Case 359
No. 62564
MA-12342

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing for Winnebago County Highway Department Employees Union, Local 1903, AFSCME, AFL-CIO, referred to below as the Union.

Mr. John A. Bodnar, Winnebago County Corporation Counsel, 448 Algoma Boulevard, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808, appearing for Winnebago County, referred to below as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement, which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of John Frings, who is referred to below as the Grievant. A hearing on the grievance was conducted in Oshkosh, Wisconsin on February 19, 2004. The hearing was not transcribed. The parties filed briefs by March 31, 2004, and a waiver of a reply brief by April 10, 2004.

ISSUES

The parties stipulated the following issues for determination:

Was the Grievant disciplined for just cause?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1
MANAGEMENT RIGHTS

The management of the Winnebago County Highway, Solid Waste, Airport, and Parks Departments and the direction of the employees in the bargaining unit, including, but not limited to . . .

4. The right to relieve employees from duty because of lack of work or for other legitimate reasons, shall be vested exclusively in the County.

. . .

ARTICLE 8
DISCIPLINE

SECTION A.

An employee may be suspended . . . or otherwise disciplined for just cause. The sequence of disciplinary action shall be written reprimands, suspension and discharge. . . .

The above sequence of discipline need not be followed in situations calling for immediate suspension or discharge.

No written reprimand shall be valid after twelve (12) months from its issuance after which time all references to the discipline shall be removed from any and all records.

BACKGROUND

The grievance challenges the County's imposition of a three-day suspension on April 4, 2003 (references to dates are to 2003, unless otherwise noted), for the Grievant's conduct at the Landfill Transfer Station on March 31.

The Transfer Station is a large warehouse-type structure, in which garbage trucks unload solid waste, including recyclables. The waste is then transferred, by front-end loaders, from the floor of the Transfer Station onto gondola-type trailer trucks, which transport the waste to the Brown County Landfill. The dumping area of the Transfer Station is accessible through two bays, which open onto a largely undivided area where the waste is dumped pending transfer. On March 31, the Grievant was operating a front-end loader.

The balance of the background is best set forth as an overview of witness testimony.

Jerry Danielson

Danielson has operated a garbage truck for Superior/Onyx Waste Disposal for roughly six years. On March 31, at about 1:45 p.m., he drove his fully loaded truck into the Transfer Station. As a matter of his routine, he pulled the truck into the first bay to check to see if a front-end loader was working. He saw the Grievant, to his left, sitting in the front-end loader, reading a magazine. He then pulled his truck around, so that he could back it into the bay to dump his load onto the floor. His truck has side-view mirrors, a backup camera and backup beepers. He checked his mirrors, and saw nothing in his way, so he started to back into the facility. As he backed from the driveway through the bay door, he saw the Grievant pulling his front-end loader across his path. The Grievant was so close that Danielson had to slam on his brakes. Danielson could see no reason for the Grievant to be there. There was no garbage in his path when he started backing, and after he stopped, the Grievant sat motionless for fifteen to twenty seconds. He did not move his bucket. Danielson decided to pull forward, and back into the adjoining bay.

He checked his mirrors when he started to back into the second bay. There was nothing in his path, so he started to back into the building. The Grievant again drove across his path. When Danielson first saw the front-end loader, he had to again slam on his brakes. The Grievant crossed his path, then proceeded slowly to the other side of the building. Danielson could not recall what the Grievant did with his bucket, but he did not clear a path for Danielson.

Convinced the Grievant had intentionally interfered with him, Danielson went to the Landfill office after he dumped his load. He filed a written complaint with Merle Davey, the Landfill Supervisor.

Danielson did not know the Grievant personally, but was aware of who he was. Four to five months prior to the March 31 incident, Danielson was training a new driver, who dropped his load short of where he was supposed to. The Grievant was enraged, and yelled obscenities at the trainee. Danielson has heard other Superior/Onyx drivers and his supervisor complain about the Grievant, who is regarded by them as a moody person, best left alone. In his tenure at Superior/Onyx, Danielson has had only one minor accident.

Danielson acknowledged that he never attempted to discuss the matter with the Grievant on March 31. He testified that “from past experiences” he had no reason to think talking to the Grievant would do anything other than make the situation worse.

Ron Montgomery

Montgomery has been a County Human Resources Specialist since January of 2000. Lee Tomandl, the Landfill Manager, called Montgomery during the afternoon of March 31. After discussing the complaint with Tomandl and Davey, they decided to discuss the matter with the Grievant and his Union Steward. Montgomery informed the Grievant that a written complaint had been filed against him for reckless behavior. He did not identify the complaining individual or the employer. Without prompting, the Grievant identified the substance of the incident relayed by Danielson, and identified the Superior/Onyx as the employer of the driver involved. The Grievant stated that he had been moving back and forth across the unloading area, and that Danielson should have been able to see him the entire time. He added that he observed Danielson back into each bay, and had no idea why he had done so. The Grievant did not mention any prior incidents involving Danielson.

Before interviewing Danielson on April 4, Montgomery spoke with his supervisor, who stated that Danielson was a reliable and safe worker. Montgomery stated that Danielson’s account did not change from April 4 to the arbitration hearing.

Montgomery felt the three day suspension was warranted, particularly with reference to the Grievant’s disciplinary history. On February 17, the County imposed an unpaid one and one-half day suspension on the Grievant for “improper and unsafe operation of equipment and inappropriate interaction with a contract waste-hauling driver.” The suspension referred to four prior verbal counselings from Davey on the proper operation of a front-end loader. The February 13 suspension refers to a verbal warning on May 8, 2002 for “unsafe speed on equipment” and to a written warning on September 19, 2002 for “insubordination.” The Grievant did not grieve the February 17 discipline.

The Grievant

The Grievant has worked for the County roughly eight years. He started in the Highway Department, and is currently classified as a Landfill Heavy Equipment Operator, Class 3.

On March 31, while he watched Danielson back, the Grievant observed garbage in his path, and drove to remove it. He was behind Danielson when he cleared the garbage. He could tell by the abrupt manner that Danielson pulled forward that Danielson was upset. He did not know why, and because of the prior incidents with contract haulers, he was reluctant to try to speak to Danielson. He returned to his original location, then decided he had enough time before Danielson backed into the second bay to get that bay cleaned up for Danielson's approach. He hoped to push some glass into the pile, so that Danielson could back in without incident. He did not try to talk to Danielson before he moved into his path, stating "I don't know, I just didn't."

The Grievant knew Danielson was probably frustrated at having to back into two bays but he had no idea why Davey called him into the Landfill Office on March 31. Davey's description of the written complaint came as a shock to him. He could not recall the incident with the trainee in any detail, but acknowledged he might have lost his temper with the trainee. He did not view the use of profanity as unusual in the workplace. He thought that Danielson had gotten angry with him once before.

The Transfer Station can be a hectic and stressful place. Prior to January, the station was primarily a recycling plant, and only after January did the County use him as a Heavy Equipment Operator. Learning the new operation was not easy, and was complicated by the pace that waste haulers try to maintain. Contract haulers often back into the bays at high speeds, although he did not think that had been a problem with Danielson. No driver, however, likes to back into more than one bay to unload.

The Grievant wrote a response to the suspension, which states:

...

In my opinion I was unjustly suspended due to the allegation made by the aforementioned driver. There are a number of factors that apparently have not been given the relevance I feel they should.

1. The county as of the 31st of January began operation of a transfer station which inevitably made significant changes in the mode of operation of both receiving solid waste and now is engaged in the transfer by tractor trailer of the solid waste which necessitates the on loading of the waste to gondola type tractor trailers.
2. I can only assume the county made no effort to instruct both the garbage haulers and also the tractor trailer drivers of the need to be patient with county loader operators so as to facilitate the safe operation of the new facility. The county did make such an effort with the two county employees who load the solid waste within the confines of the new transfer facility.
3. It has been my experience that the garbage haulers. . .those who off load solid waste can be quite impatient in their desire to unload their trucks and frequently back into the building with little regard to the loader operators location inside the building often backing directly at the loader who is attempting to push up previous off loaded solid waste.
4. Regarding the (alleged) "incident" I have included a diagram of my position relative to the Superior driver who complained that I had deliberately blocked his entrance to the facility.
5. I have observed this driver since the alleged incident and have noticed his tendency to back into the building and offload in an area that is necessary to keep clear for operations in loading the tractor trailer.
6. It is my contention that the alleged incident was nothing more than a presumption on the part of the aforementioned Superior driver who apparently is unaware of the duties of county loader operators and furthermore that he misread my intentions while operating the loader.
7. In addition I find it unjust that merely the word of a driver is grounds for a three day suspension. There were no other witnesses to this (alleged) incident that I am aware of. So I can only assume the county took the misunderstanding of the driver as gospel and used that as grounds for the disciplinary action.
8. Mention is also made in the (county's) rejection of the grievance, of (harassment) of drivers. There was no (harassment) in any reasonable sense regarding this incident. No words were exchanged between myself and this driver.
9. I am led to believe that due to an earlier incident for which I was (disciplined) the county assumed my guilt concerning this (alleged) incident. This is untrue.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The County's Brief

After a review of the evidence, the County contends that “the grievance . . . is without merit.” The grievance turns on the Grievant’s credibility, and more specifically on whether his testimony should be credited over Danielson’s. A review of undisputed facts establishes that the Grievant’s account is not credible.

Danielson’s account, to the contrary, is fully credible. On March 31, he was on a tight schedule, yet took time after his encounter with the Grievant to file a formal complaint. He had no history of prior complaints and no history of any safety problems in the operation of his truck. That Danielson would enter one bay, then leave it to back into another bay can only be explained by concluding that the Grievant was blocking his path and Danielson sought to avoid him.

Danielson’s credibility is enhanced by his declining to file a complaint against the Grievant when the Grievant harassed a driver Danielson was training. That he took time out of his busy schedule on March 31 reinforces that Danielson received no benefit by filing the complaint other than attempting to stop the Grievant’s unsafe behavior.

The Grievant’s testimony manifests no indicia of credibility. When discussing the incident with management, he could offer no explanation why Danielson had become “so irate as to immediately deviate from his normal schedule to report this incident to management.” Nor did the Grievant offer to management the explanation he offered at the arbitration hearing. Even if this was not the case, the Grievant’s explanation “is just not logical.” Assuming he had glass to clean up behind Danielson, there was no reason for the Grievant to operate his front-end loader in an unsafe manner to clean it up. Nor does it explain why the Grievant blocked Danielson’s path to the second bay.

Since Danielson’s testimony is credible and the Grievant’s is not, and since the Grievant had received a suspension shortly before the March 31 incident, it follows that “the length of the suspension in this matter was appropriate in length and that such suspension should be fully upheld.” The County concludes that the grievance must be denied.

The Union's Brief

After a review of the evidence, the Union concludes that:

There is only one disputed fact of this case, and it may be crucial to the outcome. Danielson indicated that he observed no debris in either entrance-way, and that he believed Grievant was simply attempting to harass him by repeatedly blocking his path. The Grievant contends that he observed small piles of debris which he believed may have included broken glass which could have punctured the truck's air filled tires.

The primary reason for the grievance is that Danielson made no attempt to speak to the Grievant to discover why he had driven into his path. That Danielson chose not to do so "clearly shifts the responsibility for the incident to his shoulders." The evidence shows that Danielson would not speak to the Grievant because of "identified personal prejudice" tracing back to the Grievant's confrontation with a driver being trained by Danielson. The Grievant did not know the driver was a trainee. As a result of the incident, Danielson acted, on March 31, in "a manner which was at least irrational, and perhaps a bit perverse." Had Danielson bothered to speak calmly to the Grievant to learn what had happened, he might have ended up thanking the Grievant. That he overreacted to what he thought had happened "precipitated the incident."

The incident is actually traceable to Danielson's failure to see debris in his path. This is not surprising since he was backing "from the outside sunlight into a darkened warehouse." The Grievant's view was clearer. Since this is the sole disputed fact, and since the County has the burden of proof, the necessary doubt on this fact should be resolved against the County.

The record will not support the County's case. The Grievant has a long-term record of service which "has been good, but not perfect." The prior warnings had to do with unsafe operation of the front-end loader, but have no real bearing on the March 31 incident. The evidence shows little about Danielson, and the evidence is not solid enough to support Danielson over the Grievant. The Union concludes that the suspension "was without just cause" and that the Grievant should be "made whole for his losses."

DISCUSSION

The stipulated issue questions whether the County had just cause to suspend the Grievant for three days for his conduct on March 31. In my view, unless the parties stipulate otherwise, two elements define just cause. The first element is that the employer must establish conduct by the Grievant in which it has a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest.

The grievance poses a considerable issue only with the first element. If the County's view of the conduct is accurate, there is no dispute regarding the second element. Danielson's testimony establishes conduct in which the County has a disciplinary interest. Given the

February 17 suspension, there is no way to question the reasonableness of the three-day suspension.

Thus, the parties' dispute is factual, and turns on whether Danielson's account should be credited. If it is, the County has met each element of the cause analysis.

The record demonstrates that the County's assessment of Danielson's account was reasonable. As the Union argues, the County has the burden of proving this. That there were only two witnesses to the incident does not inevitably mean there is doubt, which must be resolved in the Union's favor.

The credibility determination in this case is not as stark as the Union argues. The Grievant acknowledges that he was not operating his front-end loader as Danielson began to back into the first bay. He further stated that the backing process is complicated by a driver's backing from sunlight into the shade of the building. He further stated that drivers perform this backing as quickly as possible, although Danielson, unlike others, is not prone to do this at unsafe speeds. It is undisputed that the Grievant twice drove across Danielson's path. Standing alone, this is enough to establish conduct in which the County has a disciplinary interest. Each maneuver showed little regard for the safe operation of major equipment. In each case, the Grievant, who had control of the situation, chose to drive into the path of a driver whom he assumed would see him, even though he acknowledges the lighting conditions favor the view of the front-end loader operator over the backing driver.

More significantly, this prefaces the analysis of which account should be fully credited. The Union appropriately argues that Danielson could have approached the Grievant to find out why he had moved behind him. Under this view, Danielson unnecessarily provoked the discipline. This view obscures that the Grievant provoked the situation. Danielson was, apart from how close the vehicles came, right to be upset with the Grievant's maneuver. All the Grievant had to do to remove the glass he allegedly saw in Danielson's path, was to give him some type of stop signal. He could then have moved the debris with no risk to either driver. Danielson is not the initiator of the problem.

Past this, the Grievant's account raises more questions than it resolves. If there was sufficient glass to make Danielson's approach to either bay risky, why was the Grievant sitting in a front-end loader, at a stop, when Danielson first approached the building? Why did the Grievant not mention the glass when Montgomery first interviewed him? How did the Grievant know who reported the incident when Montgomery first interviewed him? Why did his account change at the arbitration hearing? Should Montgomery be discredited with Danielson? Why?

There is no reason to believe anyone at the County exaggerated the incident to “get” the Grievant. In light of the prior suspension, no exaggeration was necessary. Yet the County did nothing more than impose a longer suspension. This is solely reconcilable to the view that the County was trying to get the Grievant’s attention, to modify his behavior. Exaggeration of the incident would be a more serious contention if the County had sought to discharge him. Rather, the evidence points to a reasoned interview and weighing of the accounts by County management prior to the imposition of discipline.

Against this stands Danielson’s account, which was consistent from his first report. As the County points out, there is no evident gain in this for Danielson other than the satisfaction of stopping unsafe behavior. The Union’s attempt to point this to resentment on Danielson’s part for the Grievant’s swearing at a trainee is unpersuasive. Danielson acknowledged the trainee dumped the load in the wrong spot. There is no evidence Danielson reacted to the situation beyond his evident concern with the Grievant’s overreaction. That Danielson and other drivers had observed similar problems with the Grievant does not detract from his credibility. Rather, it points to an observable pattern in the Grievant’s disciplinary record.

The most notable part of the evidence is the Grievant’s unwillingness to take any responsibility for the incident. To credit his account demands discrediting not just Danielson, but Montgomery. His assertion that he was reluctant to talk to other drivers in light of the prior suspension is difficult to understand. How he equates combative conduct to simply informing another driver that he has to clear the area before the driver backs up is not a point worthy of serious consideration. In each case, the emphasis is on the safe operation of large equipment. How one equipment operator reacts to another is a significant part of this. Here, Danielson’s conduct is defensible. The Grievant’s is not.

AWARD

The Grievant was disciplined for just cause.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 29th day of June, 2004.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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