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June 16, 1987

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For Services Rendered

Grievance No. 35-87-D2 (Helberg)

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June 16, 1987
Date

Rhonda R Rivera
Arbitrator
Rhonda R. Rivera
155-28-4858

RRR/mmwn
cc: OCB
enclosure

IN THE MATTER OF THE

ARBITRATION BETWEEN

87-438

Department of Transportation
and
OCSEA/AFSCME, Local 11

Grievance No. 35-87-D2
Grievant: George Helberg
Hearing Date: May 20, 1987

For Ohio Department of Transportation: Rebecca C. Ferguson

For OCSEA: Daniel Smith

Present at the hearing in addition to the Grievant, George Helberg, his counsel and counsel for ODOT were Michael Shull (union steward/witness), Thersa Watson (ODOT/witness), Maurice Buckley (ODOT/witness), Gwen Howell (ODOT/observer), Molly Forrester (OBM/observer), Kathy Vaughn (OBM/observer), Ellie Flowers (OCB/observer), Barry Braverman (ODOT).

Preliminary Matters:

The parties agreed that the Arbitrator was permitted to record the hearing solely for the purpose of refreshing her memory at the time of opinion writing. Parties acknowledged that they understood that the tapes would be destroyed when the decision was rendered. Both parties agreed that the Arbitrator might publish the opinion.

The parties stipulated that the issue was properly before the Arbitrator. They agreed that at issue was "DID THE DEPARTMENT OF TRANSPORTATION SUSPEND MR. HELBERG FOR TEN (10) DAYS WITH JUST CAUSE. IF NOT, WHAT SHALL THE REMEDY BE?"

Contract Sections

14.04 Unsafe Conditions (Old Contract).

> All employees shall report promptly unsafe conditions to their supervisors. If the supervisor does not abate the problem, the matter should then be reported to the District Safety Supervisor or District Administrative Assistant. In such event, employees shall not be disciplined for reporting these matters to these persons. The District Safety Supervisor or District Administrative Assistant shall attempt to abate the problem or will report to the employee or his representative in five (5) days or less reasons why the problem cannot be abated in an expeditious manner.

14.05 Unsafe Equipment (Old Contract).

> The Employer will not instruct an employee to operate any equipment which anyone in the exercise of ordinary care would reasonably know such operation might cause injury to the employee or anyone else. An employee shall not be subject to disciplinary action by reason of his failure or refusal to operate or handle any such unsafe piece of equipment. In the event that a disagreement arises between the employee and his supervisor concerning the question of whether or not a particular piece of equipment is unsafe, the District Safety Supervisor shall be notified and the equipment shall not be operated until the District Safety Supervisor has inspected said equipment and deemed it safe for operation.
>
> Employees shall not be disciplined for failure or refusal to engage in unsafe practices in violation of applicable Federal, State, local, or departmental safety laws or regulations. In the event that a disagreement arises between the employee and his supervisor concerning the question of whether or not a particular practice is unsafe, the District Safety Supervisor shall

be notified and said practice shall not be resumed unless the District Safety Supervisor has deemed the practice safe.

Nothing in this section shall be construed as preventing an employee from grieving the Safety Supervisor's decision.

11.03 - Unsafe Conditions (Current Contract).

All employees shall report promptly unsafe conditions related to physical plant, tools and equipment to their supervisor. If the supervisor does not abate the problem, the matter should then be reported to the Agency's safety designee. In such event, the employee shall not be disciplined for reporting these matters to these persons. The Agency designee shall attempt to abate the problem or will report to the employee or his/her representative in five (5) days or less reasons why the problem cannot be abated in an expeditious manner.

No employee shall be required to operate equipment that any reasonable operator in the exercise of ordinary care would know might cause injury to the employee or anyone else. An employee shall not be subject to disciplinary action by reason of his/her failure or refusal to operate or handle any such unsafe piece of equipment. In the event that a disagreement arises between the employee and his/her supervisor concerning the question of whether or not a particular piece of equipment is unsafe, the Agency safety designee shall be notified and the employee shall not be required to operate the equipment until the Agency safety designee has inspected said equipment and deemed it safe for operation.

An employee shall not be disciplined for a good faith refusal to engage in an alleged unsafe or dangerous act or practice which is abnormal to the place of employment and/or position description of the employee. Such a refusal shall be immediately reported to an Agency safety designee for evaluation. An employee confronted with an alleged unsafe situation must assure the health and safety of a person entrusted to his/her care or for whom he/she is responsible and the general public by performing his/her duties according to Agency policies and procedures before refusing to perform an alleged unsafe or dangerous act or practice pursuant to this Section.

Nothing in this Section shall be construed as preventing an employee from grieving the safety designee's decision.

§ 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file);
B. Written reprimand;
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§ 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the prediscipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once

the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

§ 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

Stipulated Facts

The parties stipulated to the following facts.

1. The Grievant has worked for the department for fifteen (15) years. He was hired on March 13, 1972. He has held his

current classification of Equipment Operator II for five (5) years at the Wood County Garage.

2. The Grievant was involved in an accident on October 1, 1986 at approximately 11:16 a.m. while driving a State Vac-All.

3. The Grievant was involved in an accident on October 27, 1986 at approximately 2:30 p.m. while driving a state truck.

Facts:

The main facts about the accident of October 1, 1986 are not in issue. The Grievant was driving a Vac-All, a large and cumbersome vehicle, in the left lane of a two-lane highway. On the back of his truck were flashing lights which directed traffic to pass on the left. Behind the Vac-All, another state employee was driving a pick up truck. The pick-up truck also had a board of flashing lights directing traffic to the left. The Grievant turned his vehicle out of the right lane and across the left lane while attempting a left turn across the highway median. His vehicle was struck by an oncoming auto in the left lane. The driver was injured and his car severely damaged. (See ODOT Exhibit #1 and Joint Exhibit #6) The Grievant maintains that he checked his rear view mirrors carefully, put on his left turn signal, and then turned. The state employee in the pick up truck corroborated (in a written report placed into evidence) the Grievant's statement that he turned on his left hand signal. (ODOT Exhibit #1) However, Grievant claimed to have turned the

signal on a significant time before turning while his fellow employee indicated that the signal was on only momentarily before the accident. (ODOT Exhibit #1 and Joint Exhibit #6) The Grievant did not turn off the flashing lights which directed traffic to the left. This fact was confirmed in the written report of the fellow employee, in Grievant's testimony, and in the highway patrol's report. The Grievant was cited for ORC 4511.39 "Change of Course". Both the injured driver and the driver of the car behind the damaged car claimed in their statement to the highway patrol that they saw no left turn signal and that they did see the flashing lights directing them to the left. (Joint Exhibit #6)

An investigation report was made by a Safety Inspector for ODOT, Ms. Watson. (ODOT Exhibit #2A) Ms. Watson testified that the accident was "preventable" and caused by driver error. In her report and in her testimony, she indicated that the Grievant should have 1) turned off the flashing light boards 2) turned on his signal 3) moved to the left lane when traffic was clear and 4) turned.

The Grievant claimed he was not at fault for two reasons.

1. In a Vac-All, turning could only be accomplished from the right lane because of the swing needed, and

2. The vehicle was unsafe because the State did not put in extra mirrors and a two way radio so that the driver could communicate with the vehicle following the Vac-All.

The Grievant testified that he had notified various people

including some supervisory personnel and a mechanic about the need for mirrors and that he was told, from time to time, that "they were working on it." At one time, larger mirrors were installed for a 3 week period. These mirrors were removed by the manufacturer during a repair session. The Grievant on cross examination testified that he knew he had a right to refuse to drive any equipment which was unsafe. The Grievant testified that he attended monthly safety meetings and did not raise the issue of the mirrors nor did he file any grievances about the safety of the Vac-All. The Grievant testified that at the time of the accident he was the Union Steward and that he was aware of the Safety Committee and its designee. The Grievant said he was unaware of Form PS-72 used for reporting safety problems and had never seen one. The Grievant said that he drove the Vac-All for long periods in 1985 and 1986 regardless of the lack of mirrors. He testified that he knew he had to be "very careful" in its operation. Evidence revealed that subsequent to the accident different mirrors and a two way radio were installed on the Vac-All.

With regard to the second accident, the Grievant testified that during work he had backed a truck up near a guard rail. He heard a noise but such noises, he claimed, were common. He did not investigate nor ask anyone else to look. Upon return to base, the Grievant drove up to the gas pumps. While gasing up, the Grievant said that his foreman asked for his "trip sheet" which the Grievant gave him. No accident was recorded on that document. (ODOT Exhibit #4) The Grievant said that subsequent to turning in

the document, he walked around the truck and discovered the bent bumper. He parked the truck and went to his locker. He claims that he was on his way to report the accident when his supervisor stopped him and asked about the accident. Mr. Buckley from the safety office testified that he was at the same location as the Grievant on the day of the incident. Mr. Buckley was there on other business. Mr. Buckley testified that he saw a truck at the gas pumps when he drove in and that he went directly into the office. He testified that Grievant came into the office, handed to the supervisor a paper which he (Mr. Buckley) believed to be the trip sheet and that the Grievant made no mention of the accident. Mr. Buckley said he was talking to Grievant's supervisor at the time. Subsequently, another person came and told them of the damage to the truck. All three persons then sought out the Grievant, and he told them he was on his way to report the damage. Mr. Buckley said that the accident should have been reported to base by radio when it happened and should have been noted on the trip sheet. On cross-examination, Mr. Buckley said that the Grievant gave the paper to the time keeper, not the supervisor. The safety report filed by Mr. Buckley does not indicate when the trip sheet was turned in (ODOT Exhibit 2B) nor does the report of Mr. Claytor (ODOT Exhibit #3) mention the trip sheet. The safety report does cite A-306 #9 as a violation. Mr. Shull testified that bent bumpers were extremely common and that generally driver's were not disciplined for bent bumpers. The investigation report indicated that no damage was done to the

guardrail. (Joint Exhibit #6)

The Grievant was given a 10 day suspension as combined discipline for both incidents. (Joint Exhibit #4)

For October 1, 1986 his cited violations were from Directive A-301

Item 2: failure to follow written policies

Item 7: carelessness with . . . equipment resulting in loss, damage, or an unsafe act

Item 19: damage to State vehicle as a result of a failure to operate a vehicle in a safe manner

Item 33: violation of one or more of the directive of A-306

For October 27, 1986, his cited violation was from Directive A-301

Item 33: violation of one or more of the directives of A-306, in particular,

Item 3: moving violation which involves a minor accident

Item 5: backing accident

Item 9: failure to report to a supervisor

Item 10: failure to report an accident to proper authorities (Joint Exhibit #4)

Discussion

The Arbitrator finds that the employer could reasonably conclude that the accident was preventable and was caused by

driver error. First, the Grievant was officially cited. While not conclusive, this fact is persuasive. Second, the report by the safety investigator also concluded that driver error was the key factor. This report was not conclusive on the issue but again was persuasive. The key factor was the failure of the Grievant to turn off the flashing light board before attempting any maneuver. With those boards flashing, the public was likely to obey them and unlikely to notice other signals even if they had been made well in advance of any maneuver. Turning off the flashing boards would have alerted the truck driver in the following vehicle and, if done with reasonable timing before any maneuver, allowed that driver to turn off the pick-up's signs. This reasonable step depended not at all on the presence of larger mirrors or a two way radio. Given Grievant's testimony that he believed he needed to be extra careful in this vehicle, the failure to turn off the large flashing boards constitutes driver error. The Grievant seeks to excuse his actions by claiming that the vehicle was unsafe to drive without larger mirrors and a two way radio. By his own testimony, the Grievant admitted that he knew he could refuse to drive an unsafe vehicle. He admitted numerous opportunities to bring these problems to the attention of safety personnel which he failed to utilize. The Grievant is an employee of 15 years, was a union official, and a truck driver of 17 years. Given all these factors, the Arbitrator was unconvinced that the Grievant really felt the Vac-All was unsafe to drive. If he really held such a conclusion, he knowingly endangered numerous

persons including himself by failing to utilize the contract as well as ODOT procedures to abate this situation. The Arbitrator finds the accident to have been caused by driver error.

With regard to the second accident, the story told by the Grievant was plausible and credible. The record shows, and the Grievant admits, damaging the bumper. The testimony adduced from Mr. Buckley without more was insufficient to prove that Grievant submitted the trip sheet with knowledge of the accident. Given the situation as described by all parties, the Grievant could not have expected to hide the damaged bumper and failing to report it once discovered would have been incredibly foolish. Mr. Buckley's testimony, while sincere, simply was unclear and inconsistent as to the sequence of events. The Arbitrator finds that the Grievant did have an accident but did not intentionally fail to report it.

We now turn to the question of discipline. The union claims that the discipline was not progressive and that the discipline was excessive. Section 24.02 of the contract requires "progressive discipline" and requires that the "disciplinary action be commensurate with the offense." Section 24.05 requires that the discipline be "reasonable," "commensurate with the offense" and "not be used solely for punishment". ODOT in Directive A-301 purports to apply these same principles. The directive calls for "progressive constructive discipline". The directive states that "disciplinary actions should be imposed at the lowest level possible . . . However, the directive notes that "certain offenses warrant severe disciplinary action on the first

offense." This scheme is reiterated on page 3 of A-301. The directive lays out "types" of disciplinary action consistent with § 24.02. The directive says that "fairness and consistent" of application is of equal importance to correction of behavior.

The union has argued that the discipline in this case was not progressive because a suspension was imposed rather than a verbal warning or written reprimand. This argument is not tenable. While "steps" of discipline can be used in many instances, an employer may reasonably begin with a suspension or even removal when the severity of offense merits such discipline. Thus, the discipline is commensurate with the offense. For a serious offense, a suspension is not only reasonable but well within standard labor-management practice.

The union argues that a 10 day suspension is excessive and can only be justified if discipline is cumulated for all possible offenses arising from one incident rather than imposing discipline solely for the most serious offense arising from an incident and regarding lesser offenses as included within the most serious offense. On this argument, the union is persuasive. The very nature of an accident is liable to give rise to a number of rule violations. To punish for each minor offense within a major offense is unfair. On the other hand, an accident may give rise to violations which essentially speak to very different problems, e.g., one could have a preventable accident and also fail to report it. These two actions reveal behavior of a different character which might fairly give rise to cumulative discipline.

To ascertain whether the discipline in this case was excessive, let us turn to directives A-301 and A-306. The accident of 10-1-86 allegedly violated these rules (with potential discipline listed).

		1	2	3
2C	Failure to follow written policies	Written reprimand/ suspension	Suspension	Removal
7	Careless with equipment resulting in loss, damage, unsafe act	Written reprimand/ suspension	Suspension/ removal	Removal
19	Damage to State vehicle as a result of failure to operate a vehicle in a safe manner	1 day suspension	3 day suspension	5 day suspension
33	Violation of one or more of the statements embodied in § 111 of A-306	Which sections of A-306 were violated were <u>not</u> spelled out. The safety report alleged #4 of A-306 which is "moving violations that involve a more serious accident" which specifies a written reprimand or suspension of 1 to 3 days		

All of these specified violations are essentially derived from one incident and one error. The Grievant had no prior discipline within 2 years. (See § 24.06) No record exists that this accident constituted a second offense of any of the items. The most serious discipline involved for any of the items was a suspension. In three of the items, the duration of the suspension was not specified. A perusal of A-306 indicates that in many

cases where a suspension is mandated, a 1st offense is 1-3 days, 2nd is 3-5 days and a third over 5 days. Given the nature of the accident and ODOT's own policies, the Arbitrator finds that a suspension of 3 days was just.

With regard to the accident of October 27, 1986, the employer charged the following violations (with potential discipline enumerated).

A-306

Item 3 Moving violation with minor accident	Written reprimand	1 day suspension
Item 5 backing accident	Written reprimand	1 day suspension
Item 9 failure to report to a supervisor	Verbal reprimand	Written reprimand
Item 10 failure to report accident to proper authorities	Written reprimand	1 day suspension

Items 3 and 5 encompass one act. Given the accident of October 1, 1986, a second offense level is appropriate. A disciplinary suspension of 1 day is just. Item 9 was not proven; Item 10 had no evidence introduced.

The Arbitrator finds that the Grievant violated various rules and that discipline was reasonable and warranted. However, the Arbitrator finds that the discipline was excessive and not commensurate with the offense.

Decision:

Grievance sustained in part, denied in part.

Suspension reduced to 4 days.

June 16, 1987
Date

Rhonda R. Rivera
Rhonda R. Rivera, Arbitrator