

October 18, 1990

#502

In the Matter of Arbitration)
between)
The Ohio Department of Transportation) 31-12-90-
and) 0426-30-01-
Ohio Civil Service Employees Association,) 06
Local 11, AFSCME, AFL-CIO)

APPEARANCES

For the State:

John Torns	Advocate
Roger Coe	Second Chair
Bill Tauberg	Labor Relations
Keith Miller	Highway Maintenance Superintendent
James D. Hokin	Highway Maintenance Worker
Frank Dormendo	Highway Maintenance Worker
William Wilson	Highway Maintenance Worker

For the Union:

Joe Ealey	Staff Representative
Dominic Fiozza	Grievant

Arbitrator:

Patricia Thomas Bittel

BACKGROUND

This matter was heard on September 20, 1990 at the offices of the State of Ohio Office of Collective Bargaining before the mutually selected permanent umpire Patricia Thomas Bittel. The parties stipulated to the following facts:

"The date of hire of the grievant was September 17, 1973. The grievant was classified as a Highway Worker I. The grievant was assigned to the Warrensville Yard in District 12 of the Ohio Department of Transportation. The incidents for which the grievant was terminated occurred on December 1, 1989."

The parties stipulated to the following issue: "Was the grievant terminated for just cause? If not, what shall the remedy be?" Stipulated documents included the parties' collective bargaining Agreement, the grievance trail, the Grievant's disciplinary history, an ODOT directive regarding discipline and the daily work report for December 1, 1989.

Grievant's disciplinary history included a series of suspensions. On June 3, 1986, he received a two day suspension for insubordination, refusal to carry out a work assignment and using obscene, abusing or insulting language toward another employee.

On September 2, 1987 he received a written reprimand for horseplay. On October 19, 1988 he was given a five-day suspension for insubordination and willful disobedience of a direct order by a supervisor, using abusive and insulting

language toward a supervisor and immoral or indecent conduct.

On June 22, 1989 Grievant received a ten-day suspension for neglect of duty and insubordination by willful disobedience of a direct order by a supervisor and failure to follow written policies of the director, districts or offices.

On November 21, 1989 he was given a thirty-day suspension for willful disobedience of a direct order by a supervisor, failure to follow policies of the director, district or offices and carelessness with tools, keys and equipment. Under Section 24.06 of the Agreement, prior disciplinary actions will become void after a twenty-four month period free of disciplinary action. Grievant's disciplinary record has accumulated since 1986 due to his failure to avoid discipline for a continuous 24 month period.

Grievant's letter of termination is dated April 9, 1990 and lists the following violations: failure to follow written policies of the director, districts or offices, neglect of duty and insubordination by willful disobedience of a supervisor's direct order. Following his termination, a grievance was filed claiming "The driver of the truck left the yard without me because the driver was not told to take me to the job." The remedy sought was "to be made whole and returned to my job with back pay."

CONTENTIONS OF THE EMPLOYER

Evidence

Highway Maintenance Superintendent Keith Miller testified he had worked with Grievant and had held Grievant's job. He stated on the day in question, December 1, 1989, Grievant filled out a time sheet requesting a vacation day and gave it to the timekeeper. He did not discuss it with him first as was customary, said Miller. The timekeeper gave the sheet to Miller who declined the request because he did not have enough people to cover the shift without Grievant. Miller described Grievant's reaction as angry.

Because the crew split up on arrival at the site to work, no one realized Grievant was missing until break time, he explained. Miller said when he arrived at the job site around 10 to 10:30 in the morning, he noticed Grievant was not there and asked where he was. Foreman Frank Dormendo then made a special trip back to the yard to look for Grievant and returned with him, explained Miller. Miller said he asked Grievant why he was late, and Grievant merely shrugged and walked away.

Miller also asked William Wilson, the driver to whom Grievant was assigned, about the situation and Wilson told him Grievant was not around when they left. According to Miller, Wilson said he knew he was supposed to have brought

Grievant along. Miller admitted there was no further investigation or discussion of the matter. It took three weeks, however, to evaluate the case and review it with the superintendent and labor relations, he said.

Miller said when Grievant received his notice of pre-disciplinary hearing on March 5, 1990, he threatened if anyone showed up at the hearing, there would be "fucking bloodshed" and said people should "come ready to fight". Miller asserted Grievant has a violent temperament and has been seen getting into fights.

Miller estimated someone had been left behind by the truck perhaps five times in the ten years he has been superintendent. He said it happened once this summer when a younger student missed the truck. According to Miller, anyone who is left behind by the truck should come to his office or to the timekeeper who mans a radio base station. He claimed he had brought Grievant into his office for counseling on several occasions.

Dave Hokin, foreman and member of the bargaining unit, testified he receives daily assignments from Miller and relays them to the employees. He stated on the morning in question, Grievant was not near enough to the bullpen (a lunch room area where assignments are given out) to hear them, nor was he within eyesight of the bullpen. He stated Grievant had been told to stay in the bullpen for assignments.

He said he told Wilson to take truck 697 and two employees, specifically naming Grievant. He stated he was sure Wilson knew Grievant was supposed to ride with him. After giving out the instructions as a group, he went directly to Grievant who was standing by a truck and told him his duties -- to load fence onto the truck, go to the job site and put up the snow fence.

He said he did not see Grievant loading any of the fence, but did see him behind another truck. Hokin claimed Dormendo called him over and said to watch how Grievant was hiding behind a truck so he would not have to load fence.

He described Grievant hiding behind a truck, and said he decided to take it up with Miller at the end of the day rather than delay operations at the time. He said he watched Grievant for one to one and a half minutes standing idle in a place where he could not be noticed.

He stated his truck left before Wilson's and upon arrival at the job site, he took one driver and a laborer and told Dormendo he could have the rest of the crew. He stated drivers sometimes have to wait for someone to use the rest room but he does not know of a time when a driver had to wait twenty-five minutes. Hokin said when Grievant's absence was first noticed, the area around the job site was searched because Grievant has a tendency to wander off.

He also said when Grievant received his hearing papers, he threatened that anyone testifying against him would have nothing but "fucking bloodshed". Hokin said he was afraid

and called the police. Frank Dormendo, a foreman for four to five years, testified he saw Grievant in the bullpen after assignments had been given out and others were outside loading fence. He said when he asked Grievant if he had received his assignment, Grievant said he had forgotten the truck number. Dormendo said he asked if it could be number 697; "I guess," replied Grievant. Dormendo told him to go help load the trucks. He then asked Hokin to stand with him and watch to see if Grievant would work. According to Dormendo, Grievant was hiding behind a truck to avoid work.

He said Wilson's truck looked ready to go and Wilson was signing it out when he, Dormendo, left. He said he told Grievant again at the trucks "You know you're riding with Willie," and pointed to the truck. He stated this was the third time Grievant had been told to ride on truck 697 and he should have figured it out by then.

Dormendo said when he returned to the yard to look for Grievant, he found him in the locker room with the door closed. He was reading a newspaper and had one foot on a bench. When asked what he was doing, Grievant stated they had left him. Dormendo said he has had to look for Grievant before and once found him in a boiler room with a newspaper but no lights on.

Dormendo claimed when Grievant threatened him about the bloodbath, he asked "Are you threatening me?" to which Grievant replied "Yes." He stated he heard Grievant threaten a bloodbath to those showing up for his hearing on

two separate occasions. He said the first time he told Miller about it; the second time he and Miller overheard the comment together.

He admitted it is the foreman's responsibility to make sure trucks are ready for departure and asserted telling Grievant three times to get on the truck sufficed. He said in the thirteen years of his employment no one had been left behind by the truck more than one or two times.

Argument

Management argues Miller's denial of Grievant's request for a half-day vacation angered Grievant and precipitated the neglect of duty and insubordination. It emphasizes Grievant has a long and progressive history of such offenses, having been given two, five, ten and thirty day suspensions for insubordination and neglect of duty. Given the contractual intent for discipline to correct behavior, Management has repeatedly attempted to correct Grievant's insubordination and neglectful behavior -- but without result, it contends.

It states the discipline imposed was both progressive and commensurate with the offense. It points out that on the day in question, Grievant did not assist loading snow fence and did not ride in his assigned vehicle even though all three trucks were loaded in the same vicinity and left at about the same time. His conduct was aggravated, insists Management because he never attempted to contact the crew,

going instead to an area where he would not be seen.

After 17 years in the same job, Grievant certainly knew what he was supposed to do and where he was supposed to go, argues Management. In fact, the foreman specifically talked to him about his assignment because of his tendency to try and get out of work, it explains.

Management has gone above and beyond any reasonable standard in attempting to correct Grievant's behavior, it contends, claiming to have displayed extraordinary patience and undergone much frustration in enduring Grievant's repeated infractions. Arguing a finding of just cause is warranted, Management urges the Arbitrator to deny the grievance in full.

CONTENTIONS OF THE UNION

Evidence

Truck driver Wilson was unexpectedly unable to attend the hearing due to a prior injury or illness. The Union protested going forward with its case without what it deemed to be a key witness. The State argued the Union was responsible for its own witnesses and no compromise should be crafted to accommodate its negligence. Given the options of going forward without the witness or delaying the hearing, at the suggestion of the Arbitrator the parties agreed to a compromise whereby Wilson would testify by

telephone using a speaker system so that all parties could hear the testimony. The witness was not sworn.

Wilson stated both foremen told him to take truck 697 with employee Gideon as a passenger. Neither said anything about taking Grievant, he said. He said he gave a written statement one afternoon some time after the event, possibly as long as seven months later.

He did not remember whether Grievant helped load snow fence before leaving. "If I knew that [Grievant] was supposed to ride with me, he'd have been in the truck -- I guarantee you that," stated Grievant. He admitted his might have been the last truck to leave the yard and said he knew from the beginning Grievant was not there.

Grievant testified that 95% of the time he receives his assignments from Dormendo. He said on the day in question, he did not see the others loading trucks because they cannot be seen from the bullpen. His story is that no one ever gave him a work assignment; everyone else got their orders and left. He looked for the two foremen and Miller but could not find them, he claimed. All the employees were gone, stated the Grievant.

In his view the driver "screwed up" by leaving him behind. He admitted hearing the trucks leave and said he went to the locker room to straighten it out. At another point in his testimony he stated he stood in front of the garage door so he could be seen, then went to clean up the locker room.

He claimed Dormendo came in, told him to go to the job and took him there. He said they did not talk in the car and no one even mentioned his having missed the truck. He said he did not know the timekeeper could call people back and claimed he did not feel he could tell her what to do. He did not remember asking for a half a day vacation, but admitted the request for leave form was in his own handwriting.

Grievant claimed no one even mentioned the incident until after a letter placing him on notice was issued, he said. Grievant contended he had missed the truck about three times and each time Dormendo had come to pick him up and no discipline was given.

Argument

The Union argues Grievant's 17 years of faithful service should count strongly in his favor as a mitigating circumstance. It further argues he did not willfully disobey any direct order because there was none. Unless he is specifically told, he does not know what to do, it asserted.

The Union denies Grievant had any obligation to go to the timekeeper or otherwise seek out his own assignment. It claims his discharge lacked just cause.

DISCUSSION

A. Did Grievant Neglect his Duties in Defiance of Supervision's Instructions?

The thrust of the Union's case is the simple allegation that Grievant received no assignment on the day in question. Management witnesses uniformly dispute this fact, claiming he received his assignment and was reminded of it twice. This conflict in testimony is the threshold question to be resolved in this case.

Miller was not present when either Hokin or Dormendo spoke to Grievant, so he had no direct knowledge of whether an assignment was given. Frank Dormendo was an extremely credible witness, a man who plainly 'tells it like it is' with outspoken frankness. His forthright honesty and visible sincerity render his testimony both reliable and convincing. The facts as he described them were supported in part by Hokin.

Hokin testified he gave Grievant his assignment. Dormendo said he reminded him twice to go with Wilson. Even if Hokin failed to convey to Grievant what his assignment was, Grievant fully knew he had one. After 17 years on the job, he surely knew he would have to ride in a truck to the job site. Wilson's knowledge and/or responsibilities are therefore irrelevant.

If Grievant had attempted to ride in the wrong truck, he would have either been directed to the right one or been

taken to the job site anyway; either result would have allowed him to fulfill his responsibilities as a Highway Maintenance Worker.

By contrast, Grievant's testimony, though consistent, was unconvincing. His claim boils down to the incongruous assertion that he sat and watched everyone leave, then suddenly found himself abandoned against his will.

His admission that he actually heard the trucks leaving is telling. He gave no indication that he reacted in any way to their departure. The bullpen would have been deserted, with Grievant having watched as one by one his co-workers grabbed their gear and headed for the trucks. Every indication is that he fully intended to be left behind and consciously watched it happen. Even had he not received a specific assignment, his conduct in stoically listening to the departure of the trucks amounts to a refusal to work.

The evidence also clearly showed Grievant did not help load the trucks despite having been told by Dormendo to do so. Even Wilson did not recall seeing Grievant load the truck. Two separate eyewitnesses testified that they observed Grievant placing himself behind a truck so that it would serve as a block between himself and those loading the truck. Both witnesses described his behavior as 'hiding'. There was testimony that this behavior was consistent with a pattern of wandering off or hiding. In hiding behind a truck while others loaded fence, Grievant neglected his job duties by intentionally shirking them.

It is fundamental to the employment relationship that failure to carry out assigned duties is failure in the job. Indeed, there is nothing so basic to the employment relationship as the legitimate expectation of the employer that the employee will complete his assigned job duties. Dormendo's testimony that Grievant was told to ride in Wilson's truck is clear and convincing. Because Grievant was at the very least reminded to go to Wilson's truck, I find he did receive an assignment and refused to follow it.

B. Was Grievant On Notice That His Conduct Could Result in Discipline?

Directive Number A-301, an internal document generated by management regarding disciplinary actions, describes various violations and the guidelines for appropriate penalties. Miller testified without rebuttal that the directive was posted on the bulletin board in the bullpen.

The guidelines provide neglect of duty (not endangering life, property or public safety) warrants suspension or removal after the third instance. Insubordination is divided into three categories: refusal to carry out an assignment, resulting in suspension after the second occurrence and removal after the third; willful disobedience of a direct order by a supervisor, resulting in suspension on the first occurrence, suspension or removal upon the second and removal upon the third; and failure to follow

written policies of the director, districts or offices, resulting in written reprimand or suspension on the first occurrence, suspension upon the second and removal upon the third.

Grievant's conduct in deliberately avoiding his obligation to help load the truck, coupled with his failure to join his co-workers and go to the job site constitute neglect of duty and refusal to carry out an assignment within the meaning of the posted directive.

Grievant testified he had missed the truck on several other occasions and Miller said Grievant was once found hiding near a shed. The testimony did not indicate any discipline resulted.

In many situations such inconsistency could bar the imposition of discipline by creating an impression that the employer can tolerate the offense. However, any expectation that Grievant could continue in a pattern of shirking his work is unreasonable on its face and cannot be credited.

Sitting idle when there is work to be done is the very antithesis of employment. Clearly, such conduct fails to meet even the most basic expectations of an employer. For this reason, the Employer's expectation of compliance outweighs any considerations of leniency which may have occurred in the past.

C. Was the Investigation Conducted By Management Adequate and Fair?

Grievant claimed he was surprised to learn he was in trouble over the incident. He said on the day in question he was simply asked where he had been; he was never drawn into anyone's office. No further investigation took place. Grievant was unrebutted in claiming he received his first notice of discipline well after the incident.

For an investigation to be fair, the Grievant must be apprised of his situation and its gravity. He must be given adequate opportunity to prepare his defense without loss of evidence due to erosion of time or denial of access to pertinent information. Where prejudice to a grievant's case can be shown due to a failure to notify the employee of his or her status, the arbitrator may find a failure of due process.

In this case, Grievant was afforded a full-blown pre-disciplinary hearing prior to the final decision of removal. He was given a full opportunity to tell his side of the story at the pre-disciplinary hearing and was fully aware of the seriousness of his situation prior to that hearing. No prejudice to his case has been shown. It follows that any inadequacy in the initial investigation was subsequently wiped clean by a full and fair opportunity to present all existing evidence on his behalf.

D. Did Management Give Adequate Consideration to Mitigating Circumstances?

The Union has argued Grievant's 17 years of employment should be a mitigating factor in the case. The Employer has countered with Grievant's history of repeated suspensions for related types of misbehavior. In this regard the Employer has shown the discipline given to Grievant was progressive in nature and designed to be constructive, giving him numerous opportunities to succeed. His suspensions went from two to five, then ten and thirty days. This extended progression was indeed an ample opportunity for him to mend his behavior.

Grievant failed to become a successful employee despite repeated warnings. While the 17 years of service weighs in his favor, his disciplinary record weighs against mitigation quite heavily.

Mitigation is further disfavored by Grievant's repeated violent threats against witnesses. While such conduct was not part of the removal decision, it does go to the issue of mitigation. Grievant admits he was "just a little heated" and "might have said a few words on the spur of the moment but I didn't mean anything by it". He claims, "That was no big deal." Whether he actually meant to follow through on his threats of bloodshed or perceived his threatening behavior as a "big deal" are of no consequence. The un rebutted language attributed to him is clearly and reasonably understood as a serious threat. This conduct

further militates against any mitigation of his discipline.
Given the facts in this case, it cannot be said the
discharge was unduly severe.

AWARD

The grievance is denied. The discharge of Grievant in
this case was for just cause.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Patricia Thomas Bittel".

Patricia Thomas Bittel

October 18, 1990