STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

#574

THE STATE OF OHIO, THE OHIO DEPARTMENT
OF TRANSPORTATION, DISTRICT 2

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE: Edith Deluca (15 Day Suspension)

Case No.: 31-02 (9/29/88) 59-01-06

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: November 3, 1990

APPEARANCES

For the Employer

John H. Daniel	Highway Maintenance Supervisor
Edward Herman Jr.	Superintendent II
Shawn Zimmerman	Observer
Meril Price	Second Chair-OCB
Rebecca C. Ferguson	Labor Relations Officer

For the Union

Edith Deluca	Grievant
Dan Lehmann	Observer
Louis Haynes	Advocate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Transportation, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on September 12, 1990 at One Government Center, Toledo, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties mutually agreed to continue the hearing for the purpose of deposing Joe Hendricks. As such, they were given two (2) weeks to depose Hendricks, submit the deposition, and submit written closing statements. All conditions were properly complied with by the Parties.

STIPULATED ISSUE

Did the Department of Transportation suspend Ms. Edith Deluca, for fifteen days, with just cause in accordance with Article 24? If not, what shall the remedy be?

Rebecca C. Ferguson
For the Employer

Louis Haynes
For the Union

(Joint Exhibit 2)

JOINT STIPULATION OF FACTS
Edith Deluca
Grievance #31-02(9/29/88)59-01-06

1) Ms. Edith Deluca worked for the Department as Transportation Seasonal Help the summers of 1983 and 1984. Ms. Deluca was hired by the Department or (sic) Transportation, District 2, on October 15, 1984 as an Auto Service Worker assigned to the Sandusky County Garage. She was promoted on March 25, 1985 to her current classification of Highway Worker 2 (Highway Maintenance Worker 2).

2) Ms. Deluca's supervisors were/are Mr. Ed Herman, Highway Maintenance Superintendent 2, and Mr. Darrell Green, Highway Maintenance Superintendent 1.

3) Mr. John Daniel was a Highway Worker 4 assigned to Sandusky County at the time of the incident. Mr. Daniel started with the Department on October 7, 1974 as a Highway Worker 2. On January 4, 1976 he received a classification title change from a Highway Worker 2 to a Clerical Specialist. On June 24, 1984 he was promoted to a Highway Worker 4. He was promoted on September 25, 1988 to his current classification of Highway Worker Supervisor assigned to the Lucas County garage.

4) Directive A-301 was/is posted in Ms. Deluca's work unit.

5) Ms. Deluca attended Paddle-Flagger Training at the Sandusky County Garage on July 26, 1988. At this training the Utah Department of Transportation, Paddle-Flagger video was shown.

6) On Monday, August 15, 1988 Ms. Deluca was assigned by Mr. Darrell Green, to flag for the crew working on U.S. Route 6 and

U.S. Route 20. Mr. Dan Gonya, Highway Worker 2, was also assigned to flag. The rest of the crew members were as follows; Mr. John Daniel, Highway Worker 4, Mr. Gary Offenburg, Highway Worker 2, Ms. Beverly Younker, Highway Worker 2, Mr. Harold Koepp, Highway Worker 2, Mr. Kevin Balduf, Highway Worker 2, Mr. Jim Reynolds, Highway Worker 2, and Mr. Evert Seevers, Highway Worker 2. Mr. Joe Hendricks, Auto Mechanic 2, was on the job site briefly to burn off the old guardrail.

7) Mr. Darrell Green selected Ms. Deluca and Mr. Gonya to flag at this work location because of their experience.

8) On August 15, 1988 at 10:45 a.m. an approaching storm was noticed by the lead worker, Mr. John Daniel. A severe thunder storm occurred at the work sight (sic) at approximately 11:20 a.m.

9) Ms. Deluca had no discipline in her file at the time of the incident of August 15, 1988 and has received no discipline since.

10) A Pre-disciplinary meeting, in accordance with Directive A-302, was held at the Sandusky County Garage on August 30, 1988.

11) Ms. Deluca attended and was represented at the meeting by Mr. Joe Hendricks, OCSEA/AFSCME Steward. Mr. Herman and Ms. Ferguson, Labor Relations Officer, were present. Subsequently Ms. Deluca and Mr. Gonya were suspended for fifteen (15) days.

12) A Step 3 grievance meeting was initially held on October 11, 1988. The parties agreed to reconvene the hearing on May 30, 1990.

13) This case is properly placed before the Arbitrator for determination.

Rebecca C. Ferguson
For the Employer

Lois Haynes
For the Union

(Joint Exhibit 3)

PERTINENT CONTRACT PROVISIONS

ARTICLE 11 - HEALTH AND SAFETY

...

Section 11.03 - Unsafe Conditions

...

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.

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

Section 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.

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Section 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

Section 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 pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days 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.
(Joint Exhibit 11, Pgs. 34-37)

CASE HISTORY

Edith Deluca, the Grievant, was hired by the Ohio Department of Transportation, the Employer, on October 15, 1984. She originally served as a Auto Service Worker prior to her promotion on March 25, 1985 to her current classification as a Highway Worker 2.

The incident in question took place on August 15, 1988. On this date, the Grievant and eight (8) other individuals were assigned to guardrail repair on U.S. Route 6. Darrel Green, an Employer Representative, assigned the Grievant and Dan Gonya, another Highway Worker 2, to flagging duties. The Grievant was assigned to a position on U.S. Route 20 at a bottom of a small hill and out of visual contact with the remainder of the crew performing the actual repair work. Gonya, moreover, was positioned at the juncture of U.S. Route 20 and U.S. Route 6. Gonya and the Grievant were in contact with each other via walkie-talkies and Gonya was in visual contact with the work crew. Also, a truck equipped with a radio was positioned on the berm across from Gonya's position to facilitate radio contact if such contact became necessary.

As flaggers at this locale, Gonya and the Grievant's activities were critically intertwined. The traffic was funnelled into one traffic lane to protect the work crew and the traveling public. As such, the flaggers expedited the process by synchronizing their efforts. One flagger would stop the approaching traffic while the other directed the approaching traffic through the work area. This process was periodically reversed so that at all times only one lane of traffic was allowed to pass through the lane closure.

John H. Daniel, a Highway Worker 4 at the time of the incident, reviewed the circumstances surrounding the contested incident. Daniel noted that his crew removed the bolts from the guardrail and received additional help from Joe Hendricks who "burned off" damaged portions of the guardrail. At approximately 10:45 a.m. Daniel observed a storm approaching. Even

though the job was not properly completed because a number of sections had not been installed, Daniel decided that the remaining sections had to be installed on a temporary basis. This decision was primarily based upon the location of the guardrail which was located at a bridge, on a curve, with a steep drop-off to a railroad track below. Without a temporary installation, the traveling public could have been placed in a perilous situation.

At approximately 11:20 a.m. some of the posts were pushed back so Daniel had to use come alongs to erect the posts. This procedure completed the temporary installation of the sections. On or about this same time period, it started to rain. Daniel instructed the other employees to pick up the equipment and get into the truck. As these activities were taking place he and another employee crawled underneath one of the trucks to remove the come alongs. During this time frame, conditions worsened and a flash thunderstorm ensued which hampered visibility.

Daniel eventually emerged from underneath the truck and instructed the crew to remove the cones and break down the traffic control area. Visibility had purportedly improved, and as he approached Gonya's flagging post, Daniel observed Gonya and the Grievant exit the truck located at the berm across from Gonya's assigned location. Daniel approached them and asked who gave them permission to leave their posts? The Grievant allegedly responded that "it was raining."

At approximately 11:45 a.m. the work location was shut down and the crew left for the garage. Cones were removed and signs were knocked down and bagged. The crew returned after lunch and completed the assignment.

On August 15, 1988, Edward Herman Jr., a Highway Maintenance Superintendent II, reviewed the incident with Daniel. He, moreover, discussed the departure allegation with the Grievant. The Grievant wrote a statement (Employer Exhibit 3) which reviewed her position. Herman testified that other crew members complained about the Grievant's actions and they, as well, were asked to provide written statements (Employer Exhibit 3) which documented their complaints and observations.

After reviewing the circumstances surrounding the incident, Herman decided that an A-302 Pre-Suspension and/or Removal meeting was appropriate. As such, on August 22, 1988, the Grievant was formally notified that a meeting was scheduled on Tuesday, August 30, 1988. The notice contained the following relevant particulars:

> "...
>
> The evidence on which this charge is based is that on Monday August 15, 1988, you left your duties as flag person, without authorization, during a rain storm at U.S.R.'s 6 and 20.
>
> Therefore your Supervisor Ed Herman, Sandusky County Garage has recommended that you be suspended or removed for this action and therefore will be present throughout the meeting. Your failure to comply with rules listed below places you in violation of Directive A-301 as follows:
>
> Item 1 - Neglect of Duty, a (Major--endangers life, property and public safety)
> Item 2 - Insubordination, a (Refusal to carry out assignment)
> Item 34 - Violation of Section 124.34 of the Ohio Revised Code. (The severity of the discipline imposed should reflect the severity of the violation)**
> Item 35 - Other actions that could harm the employee, a fellow employee(s), or the general public.
>
> ..."
>
> (Joint Exhibit 7)

On September 19, 1988, the Grievant was suspended for a period of fifteen (15) days. The Employer found her in violation of two (2) Directive A-301 particulars: Item #1a - Neglect of Duty (Major) and Item #2c - Insubordination (Joint Exhibit 4).[1]

On September 22, 1988, the Grievant contested the Employer's action by filing a grievance. It contained the following relevant particulars:

> "...
>
> STATEMENT OF FACTS (for example who? what? when? where? etc.) On Monday, Aug. 15, 1988 we were left to flagging in a severe lighting (sic) and thunderstorm. Storm hit around 11:25 a.m. with the high winds and heavy rain there was little to no visibility. Unable to control the operation should have been discontinued. Equipment removed from the road until after the severe condition pasted (sic) and then continued the operation. I do not feel when I report to work that my life be placed in jeopardy by poor judgement of management (note - see attached copy). Rest of Highway Is sitting in trucks except one due to conditions.
>
> I feel given 15 day suspension for seeking safety for my own self perservation (sic) significance should be placed on the fact that a crash barrier (sic) assigned to facility was not in use to protect the employees working on off road repair.
>
> ..."[2]
>
> (Joint Exhibit 4)

On May 30, 1990, a Level III grievance meeting was held to discuss the above specified grievance. The Hearing Officer concluded that the Employer did not violate Article 11.03, and as such, denied the grievance in its entirety.

The Parties were unable to resolve the grievance. Since neither Party raised objections dealing with substantive nor

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[1] It should be noted that Gonya received an identical suspension but his grievance was not tendered for adjudication purposes.

[2] Some portion of the Statement was illegible. The above quotation, however, represents a complete accounting of all relevant phrases originally presented by the Grievant.

procedural arbitrability, the grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to suspend the Grievant for fifteen (15) days. The suspension was based upon two (2) related Directive No. A-301 violations: Item #1 - Neglect of Duty (Major) - endangers life, property, or public safety and Item #2 - Insubordination - Failure to follow written policies of the Director, Districts, or offices (Joint Exhibit 5, Pg. 4). The Employer, moreover, opined that its disciplinary action in no way violated the spirit and intent of Article 11 - Health and Safety, Section 11.03 - Unsafe Conditions.

It was alleged that the Grievant had proper notice of the potential consequences associated with insubordination and neglect of duty. Notice of the relevant provisos contained in Directive A-301 (Joint Exhibit 5) were posted in the work area and made available to the Grievant and other bargaining unit members.

Knowledge and notice concerning proper flagging procedures were especially underscored by the Employer. Daniel and Herman testified that a flagging post does not necessarily refer to a specific location. As long as a flagger continues to control traffic by keeping the traffic behind him/her, movement by a flagger from an originally assigned post will not be viewed as abandonment. They, moreover, emphasized that the Grievant's

training reinforced the notion that she was never to leave her post unprotected. Also, the Grievant was cautioned that she had a responsibility to protect the lives of her co-workers and the public; as well as control traffic through the work area.

Proof of proper notice was established via a number of sources. First, the Grievant served as a flagger on numerous other occasions, and had flagged at this particular locale. Thus, her general work experience and knowledge of the potential dangers associated with this particular work site, provided full and complete notice of her work responsibilities. Second, the Grievant admitted that she received flagger training. At one training session the Grievant and others viewed the Utah Paddle Flagger training video (Employer Exhibit 2). During a general orientation, she received, and had available, the Flagger's Handbook (Employer Exhibit 3).

The Employer maintained that the Grievant was insubordinate when she abandoned her post and failed to take corrective action. The Grievant admitted that she dropped her paddle and ran to the truck when "things got out of control." She, however, abandoned her post without soliciting additional instructions from Daniel, and after Gonya purportedly told her to hold her ground until he made radio contact.

Her testimony and the record clearly indicated that she failed to consider any less severe alternatives prior to her flight. She never contacted Daniel advising him that she needed additional equipment, flares, and personnel. All of these alternatives should have been considered, especially soliciting instructions from Daniel, her immediate superior, and acknowledged by the Grievant as her primary contact person. The

Grievant's inaction, moreover, violated the reporting requirement contained in Section 11.03.

The Union's safety theory was viewed as lacking credible support. If the Grievant feared for her life, she should have informed Daniel when he confronted her about her location. Daniel testified that the Grievant never informed him about being endangered or threatened by the weather conditions. Also, any perceived fear was mitigated by the forewarning testified to by the Grievant. She claimed that she observed the oncoming inclement weather approximately forty-five (45) minutes prior to the storm's eventual arrival. Without taking any preventive action, the Grievant could hardly suggest that she was fearful and threatened.

By abandoning her post, turning he back to traffic, and releasing control, the Grievant engaged in conduct resulting in Neglect of Duty. Her departure, more specifically, endangered the lives of her co-workers and the motoring public. Both Daniel and Herman noted that the Grievant's actions, in such a dangerous locale, could have resulted in serious injury. In fact, the storm and related visibility problems underscored the need for protective action; actions which would have protected the lives of two (2) employees working under a truck from oncoming merging traffic.

The Employer asserted that it did not discipline the Grievant in an arbitrary manner because another similarly situated employee was dealt within a like fashion. Gonya, more specifically, was given an identical fifteen (15) day suspension for engaging in similar misconduct.

The Union's argument dealing with Daniel's negligent handling of the guardrail assignment was viewed as defective and misplaced. Daniel only replaced the sections designated as defective by his direct superior, Superintendent Herman. Herman, moreover, made the assignment based upon the Ohio State Patrol report for the AU-62 (Joint Exhibit 15). As such, Daniel did not have the authority to deviate from specific orders generated by his immediate supervisor. He merely attempted to comply with the directive in an expeditious manner; and only decided that temporary replacement of certain sections was necessary because of hazardous conditions.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to suspend the Grievant for fifteen (15) days. The Union viewed the Employer's action as punitive because it failed to consider the circumstances surrounding the incident. Arguments dealing with Article 11 violations were also posited in support of the unreasonable nature of the Employer's response.

The Union contended that the Grievant's training was deficient which minimized the Employer's notice arguments. Even though the Grievant was an experienced flagger and had received training, she was never advised of her potential options when confronted with severe weather conditions.

Weather conditions on the day in question were not viewed as mere showers but severe enough to reach tornado proportions. Several sources were referred to in support of this notion. The Grievant testified to the abhorrent working conditions based upon the amount of rain, thunder, lightning and visibility. Her

perceptions were supported by testimony provided by Joe Hendricks. Also, the Union introduced weather advisories (Joint Exhibit 10), issued on or about the time of the incident which indicated a forthcoming thunderstorm warning.

The Grievant maintained that these conditions hampered her ability to control traffic and placed her in an unsafe situation. The Grievant, moreover, was purportedly harassed by the traveling public which made her job even more difficult. A notarized statement (Union Exhibit 1), authored by a motorist traveling on the U.S. Route 20 bypass and solicited by the Grievant, not only underscored the severity of the storm but some of the difficulties experienced by the Grievant in her attempt to control the traffic.

Other circumstances were proposed in support of the Grievant's departure decision. First, the Grievant had no way of directly communicating with Daniel. As such, the Grievant was unable to solicit any additional advice or assistance. Second, Daniel should have offered assistance even if direct communications were unavailable based upon the inclement conditions. Such assistance was readily available because a number of crew members were sitting in their trucks at the time of the thunderstorm. Third, work performed at the site was excessive and unnecessary which placed the Grievant and others in a perilous situation. It was asserted that undamaged portions of the guardrail were replaced which impeded a timely shutdown of the project. If Daniel had not decided to engage in this unnecessary work, the Grievant would not have been forced to engage in her unilateral departure decision. Fourth, the motoring public was never placed in jeopardy. Sufficient guardrail was in place prior to the

railroad overpass which provided enough leeway for safety purposes. This condition was supported by an aerial photograph (Joint Exhibit 18) submitted by the Union. Also, the traffic control signs and cones in the work area would have provided motorists with sufficient and timely notice prior to the drop-off location.

The weather conditions and the related contingencies previously described clearly engendered a significant amount of legitimate fear and apprehension. As such, the Grievant reasonably discerned that the working conditions posed an imminent risk for her safety and that no other reasonable alternative was available. By failing to consider these circumstances, the Employer violated Section 11.03 because it disciplined the Grievant for a good faith refusal to engage in an unsafe or dangerous act.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, it is this Arbitrator's opinion that the Employer had just cause to suspend the Grievant for fifteen (15) days. Her actions on Monday, August 15, 1988 did result in Neglect of Duty and Insubordination violations; items specifically noted in the disciplinary guidelines (Joint Exhibit 5). She did, indeed, abandon her post without proper notice or instruction. By failing to comply with this expressed policy, the Grievant endangered the lives of co-workers and the motoring public. The reasoning for this conclusion follows.

The Union argued that the Grievant's training was deficient because it never dealt with proper flagging procedures under

circumstances similar to those on the day of the incident. Neither the Grievant's own testimony nor other documents introduced by the Parties support this conclusion. The Grievant admitted that she attended Paddle-Flagger Training sessions (Joint Exhibit 11); received and read the Flagger's Handbook (Employer Exhibit 1); and viewed the Utah Paddle Flagger training tape (Employer Exhibit 2). This Arbitrator reviewed and closely scrutinized these documents. They underscored the importance of a Flagger's work responsibilities, with special emphasis placed upon never leaving one's post or work station and never turning one's back to traffic. The Utah video (Employer Exhibit 2), however, added two (2) exceptions dealing with leaving one's post. An alternative of this sort could only be engaged when one was formally relieved and/or when "movement" by a flagger was deemed necessary. The "movement" exception is particularly important to the present matter. It was emphasized that necessary "movements" should be reestablished at intervals. Also, the example provided the viewer indicated that these "movements" should not be engaged in with one's back turned away from the traffic.

Daniel and Herman confirmed that the previously mentioned procedures were well-established and fully understood by all flaggers. They testified that traffic control could be sustained, even if the Grievant had moved from the initially assigned location, as long as she kept the traffic behind her. Such movement would not have been viewed as an illegal departure.

Another training deficiency raised by the Union was contradicted by the Grievant. Under direct examination the Grievant asserted that she did not know about the procedure used

to contact the lead worker during an emergency. This assertion, however, was contradicted under cross-examination. The Grievant stated that she had sought instruction from work leaders in the past. Also, the Grievant testified that she contacted Gonya and asked him to contact Daniel for instructions when the weather worsened. The latter admission clearly indicates that the Grievant was fully aware of the proper procedure.

In my judgement, the Employer's disciplinary action in no way violated the provisos contained in Section 11.03. The Grievant was "not . . . 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." In other words, the Grievant's departure did not constitute a good faith refusal. This conclusion is based upon the general duties and responsibilities engaged in by flaggers; the weather conditions in existence at the time of the incident; and the availability of reasonable alternatives.

It is understood that flaggers engage in dangerous activities on an ongoing basis as a function of their daily work requirements. Oftentimes, assignments are fulfilled under extremely trying circumstances. As such, working in inclement weather is a critical facet of a flagger's position description; which makes it normal to the place of employment.

An opposite finding required the Union to establish that the weather conditions were totally foreign to the circumstances typically confronted by flaggers. This critical aspect of the case was not sufficiently established. As such, the Grievant should not have held expectations that her departure was neces-

sary to protect her safety. A number of reasons support this conclusion.

First, in my opinion, the testimony and evidence surrounding the weather conditions present a contrary point of view. Although a storm took place, statements (Employer Exhibit 3) submitted by co-workers suggest that it was not overwhelming; that thunder could be seen at a distance; and that visibility was adequate. The weather reports (Joint Exhibit 10) introduced at the hearing did not sufficiently support the Grievant's interpretation of the existing conditions. The thunderstorm watch was issued approximately twenty-five (25) minutes after the circumstances which gave rise to the Grievant's departure. The Union's reliance on a motorist's statement (Union Exhibit 1) solicited by the Grievant also failed to support the assertion. At the time the motorist spoke to the Grievant, it had not started to rain even though the sky was darkening. The storm actually took place after he had passed the traffic zone and reached his ultimate destination. As such, the timing of his encounter, and the eventual onset of the storm, is a bit confused and unclear. The motorist, in other words, never had a full opportunity to accurately describe the conditions faced by the Grievant prior to her departure.

Second, the Grievant's expectations are also viewed as unreasonable as a function of her own actions. The Grievant testified that she had observed these alleged onerous conditions forty-five (45) minutes prior to the actual onset of the storm. And yet, she never contacted anyone for advice or assistance. The Grievant, moreover, noted that she left her post because she sought safety and wanted to "get things under control." This

rationale is quite difficult to understand because her actions do not suggest any effort on her part to gain control of the situation.

When confronted by Daniel she stated she left because it was raining. She never expressed the fear and apprehension she displayed at the hearing on or about the time of the incident. If, in fact, the Grievant was so distraught and threatened by the conditions, one would think that she would have offered these justifications as reasons for her departure. One has to wonder, as well, why she went to gonya's truck rather than directly to Daniel's location if she desperately wanted to get things back under control.

A responsible employee, faced with similar circumstances, would have attempted a number of available reasonable alternatives rather than placing the lives of co-workers and the motoring public in jeopardy. The Grievant should have engaged in more frequent communication attempts to contact Gonya, and have Gonya contact Daniel via the radio. The record suggests that these attempts were not engaged with sufficient frequency. If the Grievant was legitimately concerned, she could have reestablished her post by moving under an overpass. Such an action would have given her some protection and allowed her to control the flow of traffic. Additional assistance could have been solicited by legitimate movement toward Daniel's work location. By engaging in an alternative of this sort, the Grievant could have used the truck radio and had Gonya control the traffic.

One has to focus on these reasonable alternatives because of the unique responsibilities held by flaggers to their co-workers and the motoring public. These individuals are the gate keepers

at any construction location. As such, they oftentimes possess a direct responsibility for the safety of co-workers who often work in perilous circumstances and must be protected. In a like fashion, their actions are directly responsible for the safety of the motoring public. These responsibilities played a critical role in this Arbitrator's determination that the Grievant was negligent. When she illegally departed from her post two (2) individuals were attempting to disengage come alongs underneath the truck. This facet of the project was important because some sections had to be temporarily affixed. If Daniel had disregarded this task, the motoring public could have easily slid off and landed onto the railroad tracks.

The Union's attempt to question the legitimacy of Daniel's assignment by labeling it as excessive and unnecessary appears totally misplaced. The assignment was not formulated by Daniel but fashioned by his superiors. Herman's review of the decision-making process indicated that a reasonable analysis took place. Prior investigation reports were reviewed and Herman evaluated the site before any project programming took place. Within this context, the Union's attempt to substitute its judgement for that of the Employer does not appear to be justified.

AWARD

The grievance is denied and dismissed.

Dr. David M. Pincus
Arbitrator

November 3, 1990