IN THE MATTER OF THE ARBITRATION BETWEEN:	*	
State of Ohio, Ohio Department of Transportation	*	**Case No. 31-12 (03-19-92)03-01-06**
-and-	*	**Grievant: Clarence Castellano**
Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO	*	

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the Employer:

William Tallberg, Advocate
Edith Bargar, Labor Relations Specialist
Jim Ford, Superintendent, Highway Maintenance
Joseph Regina, Supervisor

For the Union:

Steve Leiber, Staff Representative
Ron Weich, Highway Worker II
Robin West, Highway Worker II
Jim Milnar, Highway Worker IV
Jeff Palmer, Highway Worker IV
Stacey Bailey, Highway Worker II
Kirk Adams, Highway Worker II

The Hearing was held in a conference room at the Ohio Department of Transportation Building, Cleveland, Ohio, at 9:00 a.m. on March 24, 1993. Both paraties were represented, and had a full and fair opportunity to present all evidence and testimony in support of their case and to cross-examine that presented by the other party.

ISSUE

Was the discipline issued to the Grievant for just cause? If not, what shall the remedy be? (JX-7)

BACKGROUND

The facts of this case are largely undisputed. Mr. Clarence Castellano (hereinafter, "the Grievant") has been employed by the Ohio Department of Transportation (hereinafter, "the Employer" or

"ODOT") for over ten years, was classified as a Highway Worker II in District 12 and was the only Shop Steward for the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO (hereinafter, "the Union") in Geauga County. He normally worked the day shift, but on January 14, 1992, the Grievant also worked overtime due to adverse snow and ice conditions.

At or about 8:00 p.m., the Grievant left his assigned plowing area on Route 306 and drove one mile or less to his Sister's house, off Bainbridge Road, where he took "lunch" for one half hour. The parties disagree as to whether or not he called the Burton Yard to notify anyone that he was leaving his route. When the Grievant attempted to back truck T-12-691 out of the driveway after "lunch," the right rear wheel slid off the apron, sank into the ground, and the vehicle became stuck.

Ms. Robin West, was working the radio at the Burton Yard at 8:32 p.m. when the Grievant called in to inform management that his truck was stuck. She contacted Superintendent Jim Ford, who then reached Supervisor Joseph Regina, by radio, and told him to proceed to the Grievant's location to assess the situation. Ms. West also was instructed by Superintendent Ford to reach a Mechanic named Neil Craxton and to direct him to go to Bainbridge Road to assist in assessment of the situation and in extrication of truck T-12-691.[1] Supervisor Regina testified that, even though he went up and

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[1] Mr. Craxton was not presented as a witness by either party nor did they offer any reason for his nonappearance. The record contains no rebuttal to the Grievant's testimony that Mr. Craxton was a "very good Mechanic" and that he had worked for ODOT for at least twenty years at the time of the incident in question.

down Bainbridge Road, he could not find the Grievant's vehicle. He further stated that he "spotted" Ron Weich in truck T-12-529, asked him if he knew where the Grievant's Sister lived, was answered affirmatively, and he followed Mr. Weich to the Grievant's Sister's home off Bainbridge Road.

There is no dispute that, at the scene, Mr. Craxton 'called the shots' about what needed to be done to extricate truck T-12-691. According to the testimony of both the Grievant and Supervisor Regina, approximately two tons of salt was off loaded, on advice from Mr. Craxton, to prevent twisting of the frame when truck T-12-691 was pulled out by truck T-12-529. Messrs. Regina and Weich, and the Grievant agreed in their testimony that Mr. Craxton stated that it was an "easy pull" or "one of the easiest pulls" he had ever supervised.[2] The Grievant gave unrebutted testimony that Mr. Craxton then checked truck T-12-691 and said, "The truck looks okay, Babe [the Grievant], go ahead and finish your route." The parties agree that the Grievant's truck was out of service for two hours as a result of this incident, that after his truck was extricated, he plowed for one hour before arriving at the Burton Yard, and that no defect in truck T-12-691 was discovered until after the Grievant had properly turned it over for the next shift.

The record is uncontroverted that, when the Highway Worker and the Mechanic (both were unnamed) who began work at midnight looked

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[2] The Grievant's testimony is unrebutted that Mr. Craxton usually was involved in pulling out trucks that were stuck.

at truck T-12-691, it was discovered that two "studs" (aka, lug nuts) were broken and had to be replaced before the truck went back in service. The repair took one and one half hours. (EX-5). and a

On January 21, 1992, Mr. Vincent Armenti, Geauga County Superintendent, wrote to Mr. William Tallberg, Labor Relations Officer, to provide an account of what had transpired on January 14. Mr. Armenti asserted that the Grievant was in violation of Directive "A-301" (sic) (revised December 10, 1990 to be Directive A-601 and supersedes Directive A-301), Sections 2c, 8, and 35 (JX-5), and requested "that appropriate disciplinary action be taken. (JX-3) On January 30, 1992, Mr. Charles Vaughn, Hearing Officer, wrote to the Grievant to state and to describe the charges against him and to inform the Grievant that the Employer was considering suspension or termination as discipline for the incident on January 14, that a pre-disciplinary meeting would be held on February 3, 1992, and that he had a right to Union representation.(JX-3) On March 10, 1992, Mr. Jerry Wray, Director, Ohio Department of Transportation, wrote to the Grievant to advise that he was being suspended for ten days effective March 16 through March 27, 1992.(JX-3)

The Grievant, with the Union's assistance, filed a grievance on March 16, 1992 (JX-2), claiming that the discipline was in violation of the just cause provision of the collective bargaining agreeement.(JX-1) The parties agree that the matter was properly processed through the steps of the grievance procedure and that they were unable to reach a mutually satisfactory resolution. The

case is now before this Arbitrator for decision.

EMPLOYER POSITION

The Employer contends that the Grievant's ten day suspension for violation of sections 2c, 8, and 35 of Directive A-601 was progressive in nature, commensurate with the offense charged and taken for just cause. As proof, the Employer first offered Documentation of a Written Reprimand, dated March 12, 1991, and a letter, dated June 24, 1991, to show that he had previously received a written reprimand and a two day suspension, respectively, for offenses similar to the one at bar in the instant case.(JX-4)

Next, the Employer cited Superintendent Ford's testimony to prove that, in October of 1991, the annual "Snow and Ice Seminar" was held to review with employees the policies and procedures to be followed in inclement weather. The Employer buttressed this testimony with evidence of this training, a list of subjects to be covered and an attendance list showing that the Grievant was present at the Seminar.(EX-8) It contends that, despite these instructions, on January 14, 1992 during a snow storm (EX-7) and while on overtime duty (EX-10), the Grievant left his assigned route without notifying management (EX-6), parked his truck (EX-2) on private property (EX-1) and, when he attempted to leave, the truck got stuck in the mud.

According to the Employer, the Grievant compounded these problems because he did not given directions to his Sister's house which could be easily followed by Supervisor Regina once he reached

Bainbridge Road. The Employer also points out that two tons of salt had to be off loaded from truck T-12-691 and that Supervisor Regina had to divert two other employees, Neil Caxton and Ron Weich, from their assigned duties for two hours to assist in extricating the truck from the mud. From both a service and a public relations standpoint, the Employer maintains that such events can be very detrimental to ODOT's reputationa with taxpayers. The Employer also asserts that these disadvantages were compounded by the fact that, at the beginning of the midnight shift on January 15, it was discovered that repairs had to be made to the right rear wheel of truck T-12-691 which kept it out of service for another one and one half hours.(EX-4-5)

The Employer argues that these events prove that the Grievant is guilty as charged of violating Directive A-601, sections 2c, 8, and 35 and, thus, that there was just cause to discipline him. It also contends that the ten day suspension is appropriate discipline since it is in line with the guidelines for such offenses listed in Directive A-601.(JX-5) Finally, the Employer rejects the Union's assertion that the Grievant was subjected to disparate treatment when he received a ten day suspension for the incident which occurred on January 14, 1992. The 1990 award of Arbitrator Rhonda R. Rivera was offered by the Employer in support of its rejection of the disparate treatment claim. The Employer asks, therefore, that this grievance be denied.

UNION POSITION

The Union does not dispute the essential facts of the case or

that the Grievant had previously received a written reprimand and a three day suspension as discipline. It does, however, challenge the Employer's assertion that the Grievant failed to call off before he went for a meal on January 14. In support of its position, the Union offers the testimony of Ms. West to show that she was working the radio on the evening in question and that she received a call off from the Grievant, but forgot to log this information because of the press of other business. Through the testimony of Messrs. Weich and Milnar, the Union further contends that Superintendents Ford and Armenti had told them it was acceptable practice to go out-of-service by calling on the radio or by using a telephone.(See also, UX-2&5) Thus, Union asks the Arbitrator to find that failure to call off cannot stand as a basis for the discipline meted out to the Grievant.

The Union also stands behind the Grievant's account that he had gone to his Sister's many times for meals, that management was well aware of this activity and never told him not to go there, and that others, including Superintendent Armenti, had been there on breaks. In support of the Grievant, the Union offers the testimony of Messrs. Adams, Milnar, Weich and Palmer that it was accepted practice to go home for a meal, even during ice and snow conditions, as long as the location was near their assigned route.(See also, UX-4-5) It also emphasizes Mr. Palmer's testimony that he knew Superintendent Ford went as far as 10 to 12 miles off route during ice and snow conditions, during the winter of 1992, to go home for a meal. Thus, the Union contends that the Employer

lacked just cause to discipline the Grievant for going less than one mile off his assigned route to take "lunch" at his Sister's home during ice and snow conditions.

The Union argues that the prohibition against parking an ODOT vehicle on private property has not been enforced and that it is being used in the instant case to justify the harsh discipline imposed on the Grievant. As evidence, the Union points to the testimony provided by Mr. Weich that he got his truck stuck on private property, while delivering dirt from a ditching operation, and received a written reprimand from Superintendent Ford. The Union also offers its exhibit 3 and Mr. Milnar's testimony that he had gotten his truck stuck in his own backyard while delivering a load of wood and that Mr. Armenti told him nothing would happen as long as the Union did not object. It refers the Arbitrator to the testimony of Mr. Bailey who stated that he had used an ODOT truck to dump chips and dirt at Superintendent Ford's home and no discipline was imposed. Finally, the Union cites the testimony of Mr. Adams that he had parked an ODOT truck at his home, in a shopping center, at Superintendent Ford's home where he also participated in cutting down a tree, and no disciplinary action resulted. To the extent that the Grievant's discipline at all and the harshness of the penalty, in particular, is dependent upon the fact that truck T-12-691 was at his Sister's home when it got stuck, the Union contends that he has been subjected to disparate treatment which should be overturned by this proceeding.

Another position taken by the Union is that the Employer has

overdramatized the extent of the damage to truck T-12-691 in order to justify the harshness of the discipline imposed. The Union stresses that there is agreement among the Grievant's and Mr. Weich's testimony, and its exhibit 1 written by Mr. Caxton, that extrication of the truck was an easy pull. As additional support for this position, the Union points to the facts that the Grievant plowed for one hour after his truck had been pulled out of the mud and that Superintendent Ford's notation on the Incident Report (JX-6) states that there was "No Damage" to the truck.

Based upon the foregoing information, the Union contends that the Employer has: (1) failed to provide any of the charges against the Grievant in relation to compliance with Directive A-601; (2) engaged in disparate treatment by disciplining the Grievant at all and/or by imposing an overly harsh penalty; and (3) failed to give proper weight to the mitigating circumstance that the Grievant was working overtime and had been on the road for twelve hours when the incident occurred. To these allegations, the Union adds its belief that the real motivation for the Employer's action in this case was anti-union animus directed at the fact that the Grievant was the only Shop Steward in Geauga County. This belief is substantiated, the Union claims, by the evidence and testimony of record showing that the Employer presumed the Grievant to be guilty of the offenses charged without ever conducting a full and fair investigation into the circumstances. For these reasons, the Union therefore believes that the Employer lacked just cause to discipline the Grievant and asks that he be reinstated with

full backpay and be made whole in every other respect.

DECISION

The evidence and testimony of record was carefully considered in determining what the award should be in this case. Part of this determination hinges upon an assessment of whether the Grievant knowingly and willfully violated established rules by failing to notify management when he went to "lunch," leaving his assigned area to take a break during ice and snow conditions while working overtime, and parking his ODOT truck on private property. In reaching a ruling, the list of 'rules' attached to the October 28, 1991, memo that "Snow & Ice Training" had been conducted was considered.(EX-8) Although there is no dispute that the Grievant attended this training, note was made of Superintendent Ford's testimony that the list of rules was not given to employees at the training, but rather the information was verbally communicated to employees by supervisors. No proof was offered by the Employer that such communication ever occurred with the Grievant. It is also a fact, however, that the Grievant has been employed by ODOT for at least ten years and has acknowledged that he has attended numerous snow and ice training sessions. It is therefore difficult for this Arbitrator to believe, nor does the Union ask her to, that the Grievant was unaware of the 'rules' pertaining to work during adverse winter weather conditions.

In the instant case, however, such awareness is not sufficient to make the Employer's case. This depends, in part, upon a showing that the Grievant did not call off on January 14, and if he had,

permission to go to his Sister's for "lunch" would have been reasonably denied. The Arbitrator noted that the evidence (UX-2&5) and the employee witnesses who testified gave varying statements about whether or not, and the extent to which, they called off when taking breaks, and about the means used for this purpose. Two things were evident from this record. First, regardless of the information contained in the 'rules,' the practice with respect to call off and the means used varied across the spectrum. Second, regardless of what practice a given employee adhered to on that spectrum, no evidence or testimony was presented that any employee, save the Grievant, was ever disciplined for utilizing his/her practice of choice.

This ruling makes the question of whether the Grievant called off on January 14, 1992 moot. It also calls into question whether the Employer conducted a thorough investigation in the instant case. If such an investigation was conducted, it is difficult for the Arbitrator to understand why the Employer was not aware of the variety of call off and of off route break practices adhered to by Highway Workers whose testimony was unrebutted at the Hearing. The same reasoning applies to the uncontroverted testimony of Ms. West that the Grievant called off, but she was too busy to log in the call.

The question of whether and under what conditions Highway Workers are permitted to leave their route during snow and ice conditions to take meals at home must be resolved next. Superintendent Ford testified that employees have been given

permission, when in the vicinity of their homes, to take an ODOT truck to pick up medicine or to check on a child that is ill. The operative word here is 'permission,' since Superintendent Ford maintained that he would have denied a request from the Grievant to go to his Sister's home for "lunch" on January 14, 1992, because this location was, "Too far off route with the weather conditions applicable at the time."

The Arbitrator was not persuaded by this testimony, first, because no showing was made that even when employees called off, that this activity was used for anything more than a status report. None of the employees who called off regularly or on occasion, who also went home at any time for breaks, reported that as part of the call off procedure they received permission to take their break in an off route location/at home. Second, none of these employees reported that they had been disciplined for such behavior. Third, Superintendent Ford's reason why he would have denied the Grievant permission to go to his Sister's home for "lunch" is clearly invalid vis-a-vis the practice adhered to by other employees, the Grievant's own past practice, and the testimony of the Employer's own witness, Supervisor Regina, that the location the Grievant was at on January 14, was less than a mile off his assigned route.

The validity of the Arbitrator's conclusions on these matters is evidenced by Joint Exhibit 6. It was noted that Superintendent Ford filled out the incident report on January 14, 1992, prior to going off duty. This report is most informative in terms of what it does not contain. It does not indicate any damage to truck T-

12-691, however, the Superintendent acknowledged that he wrote the report before the truck was examined. This report also does not charge the Grievant with any rule violation(s) nor does it reflect a need for further review or action even though the record shows that the Superintendent was apprised of the circumstances surrounding the January 14 incident, save the damage to the truck, when he wrote this report. If the call off procedure used by the Grievant, his going a short distance off route and/or parking truck T-12-691 on private property were truly egregious violations, then the Arbitrator is at a loss to understand why Superintendent Ford did not either order further investigation and/or outline charges against the Grievant on Joint Exhibit 6.

It also follows that the Arbitrator found that the Employer lacked just cause to discipline the Grievant because he parked an ODOT truck on private property. In reaching this conclusion, the Arbitrator noted the Grievant's unrebutted testimony that management was aware that he had parked his truck at his Sister's home during breaks on numerous occasions in the past and no disciplinary action was taken. Additionally, Messrs. Weich, Milnar, Bailey and Adams all testified that they had parked ODOT vehicles on private property on one or more occasions, with or without management's knowledge, and had not been disciplined. Indeed, Messrs. Bailey and Adams gave unrebutted testimony that some of the occasions when they parked an ODOT truck on private property were at Superintendent Ford's home. The Arbitrator concluded, therefore, that not only has the prohibition against

parking an ODOT truck on private property not been enforced, but also that use of this prohibition to justify discipline of the Grievant, including the extent of the penalty imposed, is not supported by the facts of the instant case.

According to the Employer, the Grievant's discipline and the severity thereof is justified partly because truck T-12-691 got stuck and it took two hours to extricate the truck during adverse snow and ice conditions. With respect to the fact that the Grievant's truck got stuck, the Arbitrator considered the unrebutted testimony of Messrs. Weich and Milnar that they had gotten stuck on private property and the former received a written reprimand, whereas the latter received no discipline at all. However, she also considered that their circumstances could be distinguished from the instant case in that there iss no evidence that Messrs. Weich and Milnar's distress occurred during adverse snow and ice conditions. It was further noted that the Employer's assertion was unrebutted that an ODOT truck parked on private property, never mind stuck during snow and ice conditions, has an adverse impact upon public relations and upon taxpayer perceptions of ODOT's service. The record contains no evidence or testimony to inform the Arbitrator whether, and to what extent, the amount of time (and, therefore service) and of taxpayer dollars expended to extricate stuck ODOT trucks in non-snow and ice conditions differs, if at all, from the Grievant's circumstances, or of how such alleged differences affect public response to ODOT's alleged business necessity. The Arbitrator therefore holds that the

Employer has argued a distinction without demonstrating a difference in the instant case.

The next task of this Arbitrator is to resolve the extent to which truck T-12-691's being stuck was related to the fact that an unnamed Highway Worker and an unnamed Mechanic, who assumed responsibility for the truck after the Grievant turned it over, found that two studs (aka, lug nuts) needed to be replaced before this vehicle could go back in service; a repair which took one and one half hours.(EX-5) The undisputed facts she has to consider are that Mr. Caxton was not presented as a witness by either party, he is a Mechanic experienced in extricating stuck trucks, he told the Grievant after the pull, that truck T-12-691 was okay to go back on the road, and the Grievant plowed for an hour thereafter until he returned to Burton Yard. Based upon the record, the Arbitrator must find that the Employer's best evidence is circumstantial and does not support the charge that the Grievant violated section 35 of Directive A-601. (JX-3)

Based upon the foregoing analysis, the Arbitrator has also determined that the Employer has failed to prove that the Grievant violated sections 2c and 8 of Directive A-601, and thus, that it had just cause for the discipline imposed.

AWARD

The grievance is sustained. The Grievant's ten day suspension shall be rescinded and all record of this discipline shall be removed from his file within ten working days of the date of this award. Furthermore, the Grievant shall receive full backpay (less any interim earnings) and otherwise be made whole for the period of his ten day suspension.

Date: April 13, 1993

Mollie H. Bowers
ARBITRATOR