

ARBITRATION DECISION NO.:

16

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation

DATE OF ARBITRATION:

March 13, 1987

DATE OF DECISION:

April 10, 1987

GRIEVANT:

Richard Fulk

OCB GRIEVANCE NO.:

6-86-D3-U6

ARBITRATOR:

Linda DiLeone Klein

FOR THE UNION:

Daniel S. Smith

FOR THE EMPLOYER:

Tim Wagner

KEY WORDS:

Just Cause

Negligence

Burden Of Proof

ARTICLES:

Article 24 - Discipline

§24.01-Standard

§24.02-Progressive

Discipline

FACTS:

Grievant was an Equipment Operator 2 for the Ohio Department of Transportation who was suspended for 30 days for Neglect of Duty. Grievant was plowing snow on a two-lane highway and the hydraulic lift malfunctioned at a railroad crossing resulting in minor damage to fittings in the truck. Although Grievant had prior disciplinary actions, the issue of progressive discipline was

rendered moot by the resolution of the just cause issue.

MANAGEMENT'S POSITION:

Grievant testified that he pulled the lever and the plow did not lift properly. He then applied the brakes and the plow unit became disengaged from the truck. Management contends that grievant failed to stop and clear plow accordingly to established procedures, and, had he done so, he would have avoided the accident. Management also claimed that Grievant was guilty of excessive speed.

UNION'S POSITION:

The Union relied on testimony of the Grievant concerning an attempt to raise the plow and the failure of the mechanism to respond to show that the cause of the accident was not driver neglect. Other witnesses testified that the plow unit cannot come off when the truck is moving forward and the plow is down. The Union maintained that damage was only minor and not extensive.

ARBITRATOR'S OPINION:

The State failed to establish within reasonable limits that the accident was caused by Grievant's negligence. The plow unit separated from the truck and from the testimony of others this could not have happened unless the plow had been raised. Mechanics testified that the bottom of the plow blade was not damaged, lending credibility to Grievant's testimony that the plow did raise in some measure. The Arbitrator refused to consider the speed due to the probability of faulty hydraulics and the fact that Grievant did not exceed the speed limit. Grievant's prior disciplinary record is of no consequence unless there is just cause. There is no just cause in this instance. Suspension rescinded and grievance granted.

AWARD:

Suspension rescinded and grievance granted.

TEXT OF THE OPINION:

**ARBITRATION PROCEEDINGS
BEFORE
LINDA DILEONE KLEIN**

In the Matter Between:

**THE OHIO DEPARTMENT
OF TRANSPORTATION**

-and-

**THE OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION,
LOCAL NUMBER 11,
AFSCME, AFL-CIO**

Opinion and Award

Grievance No.:

16-86-D3-U6

Heard:

March 13, 1987

APPEARANCES

For the State

Tim Wagner, Labor Relations
Specialist, District 3
Eugene Brundige, Deputy
Director for Labor Relations

For the Union

Daniel S. Smith,
General Counsel
Richard Fulk, Grievant

ISSUE

Was the grievant disciplined for just cause? If not, what shall the remedy be?

FACTS AND CONTENTIONS

On or about June 19, 1986, the following Order of Suspension was issued to the grievant:

"This will notify you that you are suspended for thirty (30) days; June 23, 1986 through August 1, 1986 from the position of Equipment Operator 2 effective June 23, 1986.

The reason for this action is that you have been guilty of violation of Ohio Revised Code, Section 124.34 (Neglect of Duty) in the following particulars, to wit: On December 29, 1985 you were plowing snow with ODOT vehicle T-3-646. As you approached a railroad crossing, you failed to lift the snow plow which then struck the tracks. As a result of striking the railroad track, your vehicle was extensively damaged. In 1982 you received three written reprimands for preventable vehicle accidents, in 1983 you received 2 verbal reprimands and a three (3) day suspension, in 1984 you received a one (1) day suspension and a written reprimand. In February 1985, you received a written reprimand for a similar incident when you again failed to lift your snow plow over a railroad track. In July of 1985, you received a five (5) day suspension for neglect of duty."

The grievant, an Equipment Operator II in the Surface Treatment Department, has been employed by the State of Ohio since August, 1978. On Sunday, December 29, 1985, at approximately 8:30 a.m., he was involved in an accident while in the process of performing the duty of operating a snow plow. On the day in question, the grievant was plowing in an area which was not a part of his regular route. The grievant was the only person present at the time of the incident.

According to the grievant, he was traveling at a speed of 30 to 35 m.p.h. and he was plowing on Route 302 near the edge of the berm. The grievant testified that as he approached the railroad tracks, he slowed down and he pulled the lever to raise the plow, but the plow did not come up as it

normally did. The grievant testified further that as he applied the brakes to reduce his speed, the plow and plow frame slid forward and came off the truck; the grievant stated that as the plow struck the tracks, he lost control of the vehicle and was drawn off the right side of the road. According to the grievant, his vehicle stopped approximately fifty feet from the tracks. The grievant notified his Supervisor of the accident and he also discussed the matter with a Highway Patrolman.

The witness statement taken by the Trooper reflects that the grievant said that he pulled the lever to raise the plow, but it did not come up properly and the plow hit the tracks. The Trooper's written report indicates that the damage was light, that the road was wet and that there were no adverse conditions.

The entire incident was investigated and the factual circumstances were reviewed by Management. No specific damage was done to the truck itself in this accident, however, three hydraulic fittings under the front bumper were broken off and had to be replaced; these fittings connect the hydraulic system of the truck to the plow and the frame. The repair work entailed welding three new fittings and reconnecting the hoses. The Supervisor talked to the Trooper and, as a result of their conversation, the Supervisor concluded that the accident was caused by driver inattention and excessive speed. Management also concluded that the accident could have been prevented if the grievant had not been driving so fast and if he had operated the plow properly. Management further determined that the grievant failed to follow established procedure for plowing the approach to the railroad tracks; as a driver nears the tracks, he should empty the plow along the right side of the berm, then he should raise the plow and back up, and finally, he should go forward across the tracks. This procedure is designed to ensure plowing uniformity within the district and to keep snow and slush off the tracks.

Also included in the investigation was a review of the grievant's past disciplinary record. As set forth in the Order of Suspension, he had been disciplined on numerous occasions for similar offenses. Management determined from this review that the grievant had a history of carelessness, inattentiveness, neglect of duty and disregard for procedure. Based upon the record of progressive discipline, Management concluded that a thirty day suspension was the appropriate corrective action in this instance.

The State contends that there was just cause for the issuance of a thirty day suspension. The State contends further that the accident was caused by driver inattention and excessive speed and, as such, was preventable.

The State is adamant in its position that the accident was not due to faulty equipment. Even assuming that this was a possibility, the State maintains that if the grievant had followed proper procedure for plowing in advance of the railroad crossing, any problems which might have been caused by the plow pin coming out would have surfaced at this point, and the grievant would not have struck the tracks with the plow. Because he failed to follow established procedures, the grievant became a danger to himself and to others, adds Management.

The State requests that its position be sustained in this matter.

The Union, however, maintains that the grievant was unjustly disciplined and the Union requests that the suspension be rescinded and removed from his record. The Union also asks that he be made whole for all his losses.

The Union insists that the State did not substantiate the charges set forth in the Order of Suspension. The evidence presented at the hearing in no way supports the claim that damage to the vehicle was extensive; the vehicle itself was not damaged and the replacement of three hydraulic fittings was relatively minor, says the Union.

The Union insists further that there was no proof that the grievant failed to lift the plow, as claimed by Management. There can be no doubt that the plow and the frame slid off the truck, and the testimony of the State's witnesses demonstrates that the plow frame cannot slide off if the

vehicle is moving forward with the plow down. There was also testimony to indicate that the frame can slide forward and come off if the plow pin is out and the brakes are applied while the plow is up. This testimony substantiates the grievant's claim that he attempted to comply with the procedure of lifting the plow while crossing the tracks, says the Union.

The grievant was not charged with traveling at an excessive rate of speed, states the Union; nor was he charged with failing to follow the procedure of emptying the plow prior to crossing the tracks. It is improper to add these elements to the charges, claims the Union.

The Union maintains that Management was unable to prove that the cause of the accident was the grievant's failure to lift the plow. The Union submits that the incident at issue was caused by faulty equipment, and the grievant cannot be held responsible for any deficiencies in this regard. No discipline was warranted for what occurred here, says the Union.

OPINION

The Arbitrator finds from the evidence that the State failed to establish within reasonable limits that the accident at issue was caused by the grievant's negligence.

The notice of charges references a failure to raise the plow. However, the grievant testified that this was not the case. The grievant's statements to the Highway Patrolman also reflect that he pulled the lever, but the equipment did not respond as expected.

After considering the testimony of all the witnesses, the Arbitrator finds that the cause of the accident was "indeterminable". The one fact that is indisputable is that the plow and the plow frame separated from the vehicle. Two State witnesses testified that if the plow is down and the vehicle is moving forward, the plow and frame cannot slide forward and come off. The fact that the plow and frame slid forward and came off while the vehicle was moving suggests that this plow had been raised to some degree, and this lends credence to the grievant's account of what transpired.

There was also testimony from the State's witnesses which suggested that when the plow is raised and the brakes are applied, it is possible that the plow and frame could slide forward and come off if the plow pin is out. The grievant testified that as he applied the brakes, he saw that the plow and the frame had come off the truck, and then the plow hit the tracks, thereby causing him to lose control of the vehicle. The grievant's account of the incident occurring as he applied the brakes is plausible.

The testimony of two mechanics indicated that the hydraulic fittings were damaged when the plow and plow frame separated from the truck. The bottom edge of the plow was not damaged, as might have been the case if the accident occurred as Management alleged.

Upon a review of the various aspects of this case, the Arbitrator finds that there was insufficient evidence to establish the grievant's culpability. The possibility of equipment failure, rather than neglect of duty, exists here. The separation of the plow frame and plow from the truck is an undisputed fact, but the evidence surrounding the cause of the separation is inconclusive.

While it is true that the grievant failed to follow the procedure relating to emptying the plow prior to crossing the railroad tracks, it cannot be held that the separation of the plow frame and plow from the truck would have been prevented had he done this, especially if there was an equipment problem. The evidence indicates that road conditions were mainly wet, with a few snowy spots, consequently, it is possible that there was no snow to be emptied on to the berm. The failure to follow procedure under the circumstances of this case does not justify the imposition of a thirty day suspension.

The element of speed was also considered by Management as a contributing factor to the accident. It is true that the grievant admitted to driving approximately 10 m.p.h. faster than the State deemed reasonable for an approach to the tracks while plowing near the berm. The

Arbitrator cannot, however, sustain the discipline based on this element, especially in view of the possibility of the existence of faulty equipment and the fact that the grievant did not exceed the speed limit for plowing a two-lane highway.

It is also true that the grievant has a record of carelessness and inattentiveness on the job. Regardless of his prior record, there must still be just cause for any further discipline. The evidence here does not establish that the grievant was negligent.

One further point should be addressed. The notice of charges indicates that "extensive" damage was done to the vehicle, however, this was clearly refuted by the evidence.

AWARD

It is the award of the Arbitrator that the thirty day suspension be rescinded and removed from the grievant's record. It is further the award of the Arbitrator that he be compensated at the straight time rate of pay for the days he would have been scheduled to work had he not been suspended.

LINDA DILEONE KLEIN

Dated this 10th day of April, 1987
at Cleveland, Ohio.