

ARBITRATION DECISION NO.:

13

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation

DATE OF ARBITRATION:

DATE OF DECISION:

March 25, 1987

GRIEVANT:

Randal W. Fullenkamp

OCB GRIEVANCE NO.:

12-86-D3-U6

ARBITRATOR:

Nicholas Duda, Jr.

FOR THE UNION:

Linda Fiely

FOR THE EMPLOYER:

Rachel Livengood

KEY WORDS:

Accidents
Disciplinary Suspension
Just Cause Notice
Requirement

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
Article 25 - Grievance
Procedure
 §25.09-Expedited
Arbitration Procedure

FACTS:

The Grievant, a Highway Worker 2, was a five (5) year employee of the Ohio Department of Transportation. As a result of an accident on January 13, 1986, Grievant was given a one-day

suspension on May 29, 1986. As a result of the suspension, Grievant filed a grievance which is covered by the Union's 1983 contract with ODOT. Additionally, Section 25.09 of the present agreement was utilized.

The accident in question occurred while the Grievant was plowing snow on State Route 96, while traveling east. The plowing was done with a dump truck equipped with a plow. After passing each intersection on the highway, Grievant would stop the truck, raise the plow, back into the intersection, and plow the mound of snow which the edge of the blade had left. The warning lights and sound alarm were operating normally.

In clear daylight in the mid-afternoon on the day in question, Grievant proceeded through the Hinesville Road intersection. Grievant proceeded through, stopped 15 to 20 feet past the intersection, and began to backup. No cars were viewed through the mirror, but a car traveling north on Hinesville Road could not be seen. The driver of that car failed to stop at the intersection as required by the stop sign, failed to look to the right and proceeded to turn before he saw the truck in his path. The vehicles were traveling quite slowly when they collided. The accident was reported both to the Highway Patrol and to ODOT.

On May 20, 1986, the Director notified Grievant that he was being suspended for one day for carelessness in the operation of a state vehicle and damage to state vehicle as a result of failing to operate it in a safe manner.

ARBITRATOR'S OPINION:

The Arbitrator sustained the Grievance, rescinded the one-day suspension, and ordered that the Grievant be paid for that day. The Arbitrator based this decision on a number of reasons. First, according to everyone who testified at the hearing, there was no damage to the truck. This voided one of the reasons behind the suspension. Secondly, the Grievant violated no traffic laws, nor any of the civil service laws regarding neglect of duty although he was charged with the same. Thirdly, Grievant was properly performing his duties, and, in the opinion of the Arbitrator based on all testimony and evidence presented, gave proper warnings and exercised vigilance in the performance of those duties. Finally, ODOT charged that Grievant violated the "Procedures for Effective Snow Plowing" in the Department's "Snow Plow Operation Manual." However, the evidence showed that not only did Grievant never receive this manual, but was never even trained in snow plow operation other than observing others. Also, it was offered that all drivers routinely back their vehicles and otherwise operate their vehicle in the manner Grievant did.

For all of these reasons, and because the direct cause of the collision was just as probably the fault of the other driver, the Arbitrator found that the discipline was not for just cause.

AWARD:

The grievance is sustained.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION
UNDER THE 1983 CONTRACT

Between:

**The Ohio Department
of Transportation**
THE EMPLOYER

-and-

**The Ohio Civil Service
Employees Association,
Local No. 11, AFSCME,
AFL-CIO
THE UNION**

Grievance No.:
12-86-D3-U6

ND 480

Grievant:
Randal W. Fullenkamp

Before:
NICHOLAS DUDA, JR.
ARBITRATOR

OPINION AND AWARD
March 25, 1987

CASE DATA

SUBJECT

Suspension.

APPEARANCES

FOR THE UNION

Linda Fiely, Attorney, Presenting the Case
Randal W. Fullenkamp, Highway Worker 2, Grievant
Donald Yunker, Witness, Route Marker 1

FOR THE STATE

Rachel Livengood, Labor Relations Specialist - District 8, Presenting the Case
Eugene Brundige, Deputy Director for Labor Relations, ODOT
William T. Johnson, Labor Relations Specialist
Lynn Ginzer, Safety Inspector
Herbert Shively, Garage Superintendent
Linda Dillard - Safety Officer
Nancy Conklin, Intern - Observer

JOINT STIPULATIONS

1. [Grievant] is an employee of the Ohio Department of Transportation.
2. [Grievant] has been employed with the department as a Highway Worker 2 since July 12, 1982.
3. [Grievant] was suspended from employment for one day on May 29, 1986 as the result of an accident on January 13, 1986.
4. This grievance is properly before the Arbitrator.
5. In addition to the 1983 Labor Agreement, the provisions of Section 25.09 of the 1986 Labor Agreement are to be applied in this case at the joint request of the Parties.

STIPULATED ISSUE

Was the disciplinary action, a one day suspension, imposed on [Grievant] for "just cause"? If not, what shall the remedy be?

EVALUATION

In the winter one of the duties of Highway Worker 2 is to operate "equipment involved in snow and ice control, including plowing snow and treating pavement with chemicals and abrasives". There is no showing that Grievant had ever been trained in operations of plowing equipment and he testified that he had learned on the job without any training whatsoever although he had ridden with other workers operating a snow plow.

On January 13, 1986, Grievant was assigned to plow highways using a dump truck equipped with a snow blade. Another State employee was riding with him.

Grievant was plowing State Road 96, traveling from west to east. Immediately after passing each intersection which had a significant amount of snow he would stop the truck, raise his blade, back into the intersection and plow out the mound of snow which his blade had made in the intersection before proceeding down 96. The truck warning lights were operating and when the truck was backed, the sound warning alarm sounded automatically.

At about 2:45 P.M. in clear daylight, Grievant approached the Hinesville Road intersection which had a considerable amount of snow drift. In anticipation of backing to eliminate the mound of snow in the intersection he braked in the normal manner and came to a stop fifteen to twenty feet beyond the intersection. When he looked into both sideview mirrors he saw no cars behind the truck on Route 96. Unbeknownst to Grievant, at about the same time a car traveling northward on Hinesville Road south of 96 reached the intersection just as the truck passed through; without stopping as required by the stop sign, the automobile operator looked left for traffic on Route 96 approaching from the west and made a right turn into 96 eastbound without first looking to the right. As the car entered Route 96 its driver saw the truck immediately in his path. Probably each vehicle was traveling less than 5 m.p.h. when they collided.

Grievant immediately reported the accident to the State Highway Patrol which came to the scene. He also made a written report to the employer.

On May 20, 1986 the Director notified Grievant in writing that he was suspended for one day. The letter stated:

In accordance with Directive A301, Violation 7,19 (Carelessness with equipment resulting in the loss, damage, or an unsafe act; Damage to State vehicle as a result of failure to operate vehicle in a safe manner) you are hereby suspended for...Thursday, May 29, 1986...

You were guilty of violation of the Ohio Revised Code, Section 124.34 (Neglect of Duty) when on

January 13, 1986 while plowing snow from an intersection you backed into a vehicle making a right turn.

Directive A-301, issued January 10, 1986 was addressed to "Assistant Directors, Director's Office Staff, Chief Engineers, Deputy Directors, Assistant Deputy Directors, Bureau Chiefs and District Deputy Directors". The directive states the two cited violations as follows:

7. Carelessness with tools, keys and equipment resulting in the loss, damage, or an unsafe act.
19. Damage to State Vehicle as a result of failure to operate vehicle in a safe manner.

There is a question whether Directive A-301 or the specific violations cited had ever been communicated to Grievant. Even if not, Grievant should have known he was subject to discipline for careless or unsafe operation of State vehicles resulting in damage to the State equipment.

According to each of the Employer's Inspector, the Grievant and the State Highway Patrol, there was no damage to the State vehicle. For that reason one could question whether the requirements of violation 7 and/or 19 apply. Whether the admitted damage to the automobile met the damage requirement need not be decided in this case which will be decided on more substantial grounds.

The discipline letter alleged that Grievant was "guilty of violation of the Ohio Revised Code, Section 124.34 (Neglect of Duty)." That portion of the Ohio Revised Code was not even submitted in this arbitration. Furthermore there was no showing that Grievant was found guilty of or even charged with violating anything in the Ohio Revised Code.

The only submission concerning the Ohio Revised Code was Section 4511.38 of the Traffic Laws. That section concerns "Rules for Starting and Backing Vehicles" The section requires that before backing, operators of vehicles "shall give ample warning and while backing they shall exercise vigilance not to injure person or property". According to the only direct evidence presented, Grievant's testimony, he did give warning and did exercise vigilance; in other words, he complied with the submitted section. There is no showing that he didn't comply or was found in violation of Section 4511.38.

The section also recognizes that public works employees, such as Grievant, may back vehicles, even on an expressway, in the performance of official duties. Grievant was performing his duty.

At the arbitration hearing the State suggested that Grievant violated item 4 of the "Procedures for Effective Snow Plowing" in the Department's "Snow Plow Operators Manual". According to Grievant he had never seen and didn't receive this manual until after the accident. The State's only evidence on distribution was that the manual was distributed sometime during the winter of 1985-1986.

Item 4 says "clear snow past intersection before making turnaround". That wording does not prohibit backing a vehicle on a highway. Furthermore Grievant was not disciplined for violating a procedure in the Snow Plow Operators Manual.

Grievant testified without contradiction that he and the other drivers with whom he has ridden, routinely back their vehicles on the highway at intersections to plow out the intersection.

The State may have the authority to prohibit its drivers from backing vehicles on the highway provided that such a rule could be complied with consistent with highway safety. There is no showing that any such prohibition existed before January 13, 1986.

It is not clear that the proximate direct cause of the collision was unsafe or careless operation by Grievant. It is at least as probable that the accident happened because the other driver went through the Stop sign and turned right without even looking right, simply because he assumed that

the truck which he had seen from a distance, had continued east on Route 96. The collision probably would have occurred if Grievant had not started to back but remained parked.

CONCLUSION

The Employer has not shown just cause for the one day suspension of Grievant.

AWARD

The grievance is sustained. The Department is directed to rescind the one day suspension issued May 20, 1986. Furthermore the State is directed to make Grievant whole by providing him one days' pay for May 29, 1986.

Nicholas Duda, Jr., Arbitrator