#16

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

And

Trumbull County Engineer

Before: Harry Graham

APPEARANCES: For OCSEA/AFSCME Local 11:

George L. Yerkes
Staff Representative
OCSEA/AFSCME Local 11
390 Worthington Rd.
Westerville, OH 43082

For Trumbull County Engineer:

John Emanuel
Herb W. Laukart
Trumbull County Engineer's Office
650 North River Rd. NW
Warren, OH 44483

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present evidence and testimony. Post-hearing briefs were submitted by both parties. They were exchanged by the Arbitrator on September 19, 2012 and the record was closed.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

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

BACKGROUND: The Grievant, Chris Charnas, has been employed by the Trumbull County Engineer since June, 2001. On December 28, 2011 he was spreading ice control material on a County road. Early that morning a citizen called to complain that a pile of material had been left on the roadway. Greg Alberini, Highway Superintendent and Ken Kubala, Safety and Compliance Manager, went to the scene. They found a mound of material they estimated to be 6' x 12" x 5." They regarded that mound to constitute a safety hazard. Mr. Charnas was contacted and directed to return to the site and clean up the spilled material. He did so. As he lacked a shovel on his vehicle he distributed the material on the roadway by kicking it and running over it with his truck.

The Employer regarded the spilled material to constitute a safety hazard. Mr. Charnas was given a five day suspension. A grievance protesting that suspension was filed. It was not resolved in the procedure of the parties and they agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE EMPLOYER: The Engineer points out that the Grievant lacked a shovel when he left for his route on December 28, 2011. He should have had one on his truck. Further, he should have known, or reasonably have been expected to have known, that leaving a mound of material on the roadway constitutes a hazard. Never did the Union assert that the material was less than five inches high. A pile of material that high on a road is unmistakably a hazard, one the Grievant should have been able to cope with. Nor did Mr. Charnas ever deny he had dropped the material or that he did not clean it up until after being directed to by supervision.

No matter what the height of the material, that it was on the road constitutes a hazard. Motorists are unaware of its presence and the speed bump unexpectedly in the road.

When determining upon the five day suspension to Mr. Charnas the Employer took into account his previous disciplinary history. On September 9, 2011 he received a three day suspension for improper use of county equipment. Given the proximity of that discipline to the ice control material spill the five day suspension administered to the Grievant was proper the Employer contends.

In support of its action the County cites the famous Seven Tests of Just Cause promulgated by Arbitrator Carroll Daugherty.[1] In this situation the Employer has issued various rules and directives dealing with its work rules, policies and procedures. (Jt. Ex. 3). It cannot be said that Mr. Charnas was unaware of them or that he was responsible for maintaining safe and passable roads on December 28, 2011. Further, the rules of the County Engineer are reasonably related to its business and the performance it might reasonably expect from its employees. One of the tasks of the County Engineer is to improve infrastructure in the County. It follows that clear, snow and ice-free roads are necessary in furtherance of that task.

When the Employer learned of the spill two supervisors, Mr. Alberini and Mr. Kubala went to the scene. They saw the site and spoke with Mr. Charnas. At no time did he deny being responsible. Nor did he deny leaving the scene and failing to report the spill. There is no allegation the Employer acted other than fairly and objectively in gathering information about this event. Further, no matter what standard of proof is

[1] Grief Brothers Cooperage, 42 LA 555, Daugherty, 1964, Whirlpool Corp., 58 LA 421, Daugherty, 1972.

required, there can be no doubt that Mr. Charnas acted as claimed by the Employer. He admitted as much.

Arbitrators should be circumspect in substituting their judgment for that of the Employer in matters of discipline. The determination of discipline should be left to managerial discretion unless it is unconscionable. That is not the case in this situation. The Engineer is responsible for maintaining the safety of County roads. Mr. Charnas did not clean up the spill nor inform the Employer a spill had occurred. Given the serious nature of the event a five day suspension was warranted the County contends.

At arbitration the Union asserted the spilled material was not as high as claimed by the Employer. It contended the material was two inches high, rather than the five inches claimed by the County. That is belied by Mr. Charnas' statement during the pre-disciplinary interview when he referenced leaving a mound of material five inches high. The management officials who went to the scene, Messrs. Alberini and Kubala, indicated their view that the amount of material was five inches high. Even if the material was two inches high, it was unsafe. The determination of safety is within the authority of management. As Mr. Charnas had prior live discipline on his record and failed to report or remedy a hazardous situation the Employer asserts the grievance should be denied.

POSITION OF THE UNION: As seen by the Union the Employer cannot substantiate its claim that Mr. Charnas was responsible for creating a hazardous condition on December 28, 2011. After arriving at the scene of the spill management officials departed. They did not deal with the hazard in any way. Nor did the Employer present

any evidence concerning what amount of material would constitute a hazard. Neither was disciplined for leaving the scene in the scene in the same fashion as Mr. Charnas.

When the Employer documented this event, Employer Exhibit 1, it cannot be determined when the document was created. More significantly, the document does not refer to a hazardous situation. Nor does it reference any possible discipline for Mr. Charnas. Those omissions indicate the lack of the serious nature of the December 28, 2011 event in the eyes of the Union. Further, the Employer did not complete a Service Request Form, (Un. Ex. 1) which is used to document requests for service received from the public. That no such form was created is indicative of the minor nature of this event.

Mr. Charnas did not have a shovel with him on December 28, 2011. In fact, there is no requirement that he have one with him. That he did not have a shovel on December 28, 2011 cannot be held against him in the absence of a requirement that he do so.

It is the case that the Grievant gave differing accounts of the height of the spilled material. That said, the Employer did not measure it nor provide photographic evidence regarding it. That such a record was not made suggests that on December 28, 2011 the Employer did not regard the spill to constitute a hazard to motorists.

As seen by the Union the Employer acted precipitously in this situation. Prior to the pre-disciplinary conference on January 10, 2012 there was no investigation of the incident other than the report of the management officials, Mr. Alberini and Mr. Kubala. The spill at issue in this proceeding was cleaned up by another employee. That employee was not interviewed. Nor was Mr. Charnas interviewed prior to the decision to

impose discipline. In fact, it is common for material to spill on the roadway. There is no specific procedure for dealing with such spills. In this situation Mr. Charnas made a judgment call to leave the scene. As he did not have a shovel on his truck, he intended to get one, return to the site and clean up the area. Absent a written policy on how to deal with spills, he cannot be disciplined for his action according to the Union.

Never has an employee been disciplined in similar circumstances. Given the situation in this case, the Union contends the Employer lacked just cause to levy a five day suspension on Mr. Charnas. It urges he be reinstated with a make-whole remedy.

DISCUSSION: It is true that arbitrators should be circumspect in substituting their judgment for that of the employer in discipline matters. If the discipline given to an employee meets the standard of reasonableness it should not be disturbed, even though the arbitrator might have administered a different penalty.

Just cause is an amorphous concept. The best statement of that principle was enunciated by Arbitrator Harry Platt. It was his view that:

> To be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question (the presence or absence of just cause for discipline) and, therefore, perhaps the best he can do is to decide what reasonable men, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the employee was defensible and the disciplinary penalty just.[2]

That Mr. Charnas did not have a shovel on his truck on December 28, 2011 cannot be held against him. Joint Exhibit 8 represents the pre-trip inspection to be completed by drivers prior to their run. It does not show that a shovel is required equipment on trucks. Page 2 of Joint Exhibit 4 shows the statement of Mr. Alberini that an operator should have a shovel on his truck. Absent a directive to that effect discipline

[2] Riley Stoker Corp., 7 LA 764, Platt, 1947

may not occur for his failure to have a shovel on December 28, 2011. In light of the events of that day having a shovel would have been desirable. That does not support discipline in light of the absence of a requirement that a shovel be on the vehicle when it leaves the yard.

Further, the Employer does not have a policy on how to deal with spills of material. Nor are drivers trained concerning how to respond to spills. At arbitration Mr. Charnas testified that he has spilled material prior to this incident. He has kicked it off the road to clean it up. He did so in this instance and found the material too wet to move readily. In order to cope with the mound of material he ran over it with his truck. He did not regard the spill to constitute a hazard. In essence, Mr. Charnas made a judgment call on how to deal with the problem. He has eleven years experience in dealing with ice and snow removal. His judgment carries weight in this proceeding.

Nor are employees directed to inform supervisors of a spill. Neither are they required to mark the area. In the absence of a policy for dealing with the situation he found himself in on December 28, 2011 Mr. Charnas cannot be disciplined. This situation is unlike those involving theft or unprovoked violence in the workplace where discipline may be imposed even in the absence of a rule. Here, the absence of a protocol for response to a spill as well as the lack of requirement that employees have a shovel on the truck makes discipline for this event problematic.

Hearkening back to the observation of Arbitrator Platt in *Riley Stoker* the best the arbitrator can do is evaluate what Mr. Charnas "ought to have done" and whether his conduct was defensible. Given the lack of a shovel on his vehicle, which was not his responsibility, as well as his efforts to deal with the mound of material on the roadway,

his conduct on December 28, 2011 was defensible. What else he "ought to have done" is indeterminate given the lack of a policy for dealing the situation he found himself in on that day as well as his lack of equipment for dealing with it. Thus, the discipline of the Grievant cannot stand.

AWARD: The grievance is sustained. The five day suspension administered to the Grievant, Chris Charnas, is to be removed from his record. All straight time pay lost as a result of this incident is to be paid to him. Any loss of seniority is to be credited to his account.

Signed and dated this 16th day of October, 2012 at Solon, OH.

Harry Graham
Arbitrator