

FEDERAL MEDIATION AND CONCILIATION SERVICE

SEP - 9 2014

OCSEA - OFFICE OF  
GENERAL COUNSEL

ARBITRATION

#13

In the Matter of an )  
 Arbitration Between: ) FMCS Case No. 14-53717-6  
 )  
 Office of the Trumbull County Engineers) )  
 ) Matthew Barker: A 30-day  
 ) Suspension  
 and )  
 )  
 )  
 OCSEA/AFSCME )  
 Local 11, AFL-CIO ) Before: Richard J. Colvin, Arbitrator

Appearances

For the Union:

Dennis A. Falcione	Union Advocate
Matt Barker	Grievant
Anthony Johnson	Chief Steward
Robert Curtis Click, Jr.	Truck Steward
Walter Emrick	Shop Foreman
Timothy L. Davis	Hoseman
Benjamin D. Hill	Labor 1

For the Employer:

Matthew J. Blair,	Attorney
John Emanuel	Consultant for the Employer
Herb W. Laukhart, Jr.	Director of Finance/Personnel
Eric Brown	Crash Tech
Gregg Alberini, Sr.	TCE Superintendent
Stephen J. Moss	Foreman/Hoseman

The Hearing in this matter was convened in the City of Warren, County of Trumbull and State of Ohio the 9<sup>th</sup> day of June 2014. The Arbitrator was appointed by the Federal Mediation and Conciliation Service on March 12, 2014.

1.

**Exhibits**

**A. Joint Exhibits:**

**Exhibit 1. Labor Agreement from July 1, 2013 through June 30, 2016  
Section 7. Arbitration.**

“The arbitrator shall act in a judicial, not legislative capacity and shall have no right to recommend to amend, modify, nullify, ignore, add to, nor subtract from the provisions of this Agreement. He or she shall only consider and make a decision with respect to the specific issue submitted to him or her. In the event the arbitrator finds a violation of the terms of this Agreement, he or she will fashion an appropriate remedy.

The arbitrator shall submit in writing his or her decision within thirty (30) calendar days following the close of the hearing or the submission of briefs of the parties, whichever is later, unless the parties agree to a written extension. The decision shall be based solely upon his or her interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented. A decision rendered consistent with the terms of this Agreement shall be final and binding on the parties.

The fee and expenses of the arbitrator shall be divided equally between the Employer and the Union; each party shall be responsible for compensating its own representatives and non-employee witnesses.<sup>1</sup>”

There have been no allegations by one party that the other party has in any manner violated the terms and conditions of the Grievance Procedure found in Article 9.

Joint Exhibits

1. Labor Agreement
2. Trumbull County Employee’s Manuel July 2008
3. Pre-Disciplinary Hearing Notice (December 30, 2013)
4. Pre-Disciplinary Recorded Transcript (January 3, 2014)
5. Pre-Disciplinary Hearing (January 3, 2014)
6. Pre-Disciplinary Hearing Recommendation (January 14, 2014)
7. Stipulated Issue Statement June 9, 2014

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<sup>1</sup> The Arbitrator mailed to each party via U.S. Postal Service Signature Confirmation Receipt the other parties Brief on July 30, 2014. The parties have agreed that under FMCS rules the Arbitrator will send to them his Award within sixty (60) days from the closing of the Record in this matter, July 30, 2014.

### **Employer Exhibits**

1. Matthew Barker Resume
2. Job Title: Labor 2
3. Memo: Pre-Trip Inspections
4. Heavy Equipment Pre-Trip Inspection
5. Harshman & Sons, Inc. Towing Receipt
6. Accident Report (September 5, 2013)
7. Photographs
8. Accident/Incident Report Witness Description (Dale Onstott)
9. Accident/Incident Report Witness Description (Cory Freeman)
10. Accident/Incident Report Witness Description (Timothy L. Davis)
11. Accident/Incident Report Witness Description (Benjamin Hall)
12. Accident/Incident Report Witness Description (Robert Click)
13. Accident/Incident Report Witness Description (Willie Holmes)
14. Crash Tech Reconstruction Report
15. Reprimand Forms

### **Union Exhibits**

1. Trumbull County Engineer Accident/Incident Report Witness Description

Injured Worker Name: Matt Barker  
Date of Injury: 9-5-2013  
Witness Name: Steve Moss Witness Job Classification: Hoseman

Witness Statement: (Be specific. What did you observe about the incident?) Matt was pulling the small Roller off to the side of the road because it was stalling on him. As he pulled to the side of the road it began to tip to his right the roller kept tilting to the right then rolled on its side, Matt jumped off as it began to tilt "too" far. He had told me he hurt his wrist as he jumped off and hit the ground also at the accident there is loose gravel and soft grassy berm.<sup>2</sup>

2. On September 5, 2013, I was driving back from CH 45 with Unit 217 not running properly and Steve Moss phoned me (because the radio in his truck 357 does not transport) and reported 714 Roller was not running right (engine flooding out) I told him I would send Dan back to look at it. About 5 min. later Steve called back and reported the 714 Roller was on its side in the ditch. Dan not gotten to the job to check the running problem at that time. This Roller has had the same problem in the past and we have only found the problem to be of the operator not opening the choke and choking out the engine.

Walter Smith  
9/6/2013

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<sup>2</sup> The Witness meant "berm"

**3. Trumbull County Engineer Daily Work Schedule:**

**Wednesday, July 31, 2013**

**WARREN – FOREMAN**

BELLINO Jr.	Crack Seal-CH 158
DELAQUILA	Flush Truck-CH 92, CH 193 @ Firestation (Bazetta)-CH 223
FORD, James R.	Ditching-CH 223
GIVENS, James R.	Building Forms Fowler # 18

**WARREN – HOSEMAN**

DAVIS, Timothy L.	NW
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**WARREN – OPERATORS**

EVANS, John D.	Roller (Bomag) (Moss)
GATTI, JR., Robert J.	Bradall 315 (Ford)
JOHNSON, Anthony	Vacation: 8
SHERIDAN, Sean P.	Sick Leave: 8

**WARREN – LABORERS**

BARKER, Matthew R.	(Sparks)
CICCHILLO, Joseph R.	Boom Mower-Hubbard Myron St.
DAVIS, Shawn E.	NWWC
DOBAY, Mark W.	Tandem # 8 (Moss)
FREEMAN, Cory A.	Hoseman (Bellino)
FREEMAN, Michael L.	Water Truck (Bellino)
HOLMES, Willie J.	Shovel (Sparks)

**SEASONAL**

BRADFORD, Leroy	NW
HOLKO, Andrew R.	NW
MILLS, Michael	Lute (Sparks)
MONOLAKIS, John	Mowing NW Quad

**CORTLAND - FOREMAN**

**WARREN - LABORERS**

JENKINS, Deborah L.	Labor (Moss)
KUCHTA, Ryan	(Tandem #8 (Moss)
LOMMIS, Jason K.	Tandem #8 (Moss)
ONSTOTT, Dale R.	Tandem (Ford)
PATRICK, Tracey	Parts Inventory
Peterson, Davis R.	Hot Mix Truck (Sparks)
SMITH, Terry O.	Fill Crack Sealer (Bellino)

**SEASONAL**

RICHARDS, Robert	Mowing SW QUAD
Rumple, Jr., James	Mowing SE Quad
SMITH, Lindsay C.	Labor (Training) (Moss)

**Trumbull County Engineer Daily Work Schedule**

Thursday, September 05, 2013

**4. WARREN - FOREMAN**

BELLINO JR.	Culvert Replacement-Replace, Finish, Unload
DELAQUILA,	Seat-CH 45 Start At CH 329 Go South
FORD, James R.	County Parking Lot Pull Rebarb
GIVENS, James R.	Signs/Remove Loose Stone Signs

**WARREN - HOSEMAN**

DAVIS, Timothy L.	Shovel #8 BF (Moss)
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**WARREN - OPERATORS**

EVANS, JOHN D.	CAT Loader/Loading Trucks (Delaquila)
GATTI, JR. Robert J.	Chip Spreader/Take Tandem to Job
	For Brown (Delaquila)
JOHNSON, Anthony	CH 192 Finish (Bellino)
SHERIDAN, Sean P.	Bomag Roller (Delaquila)

**WARREN – DRIVERS**

ALBERINI, JR., Gregg	Tandem (Delaquila)
BROWN, Emmanuel	Hauling Chip Spreader
CHARNAS, Chris A.	Vacation: 8
CLICK JR., Robert C.	Tandem #8 BF (Moss)

**WARREN – LABORERS**

BARKER, Matthew R.	Small Roller (Moss)
CICCHILLO, Joseph R.	Boom Mower-Hubbard Myron St.
DAVIS, Shawn E.	NWWC
DOBAY, Mark W.	Tandem #8 (Moss)
FREEMAN, Cory A.	Hoseman (Bellino)
FREEMAN, Michael L.	Water Truck (Bellino)
HOLMES, Willie J.	Shovel (Sparks)

**SEASONAL**

BRADFORD, Leroy	Labor On Machine (Delaquila)
HOLKO, Andrew R.	NW
MILLS, Michael	Labor On Machine (Delaquila)
MONOLAKIS, John	Mowing NW Quad

**CORTLAND – FOREMAN**

**WARREN – LABORERS**

HOLMES, Willie J.	Shovel #8's (Moss)
JENKINS, Deborah L.	Flagman (Moss)
KUCHTA, Ryan	Vacation: 8
LOMMIS, Jason K.	Tandem (Delaquila)
ONSTOTT, Dale R.	Shovel #8 BF (Moss)
PATRICK, Tracy	Parts Room
PETERSON, David R.	Comp Leave: 1.25 Tandem (Delaquila))

**SEASONAL**

RUMPLE, JR., James	Mowing SE QUAD
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2.

**The Issue**

**DID THE EMPLOYER DISCIPLINE THE GRIEVANT WITHOUT JUST CAUSE (30 DAY SUSPENSION)? IF SO, WHAT SHALL THE REMEDY BE?**

3.

**Position of the Union**

The basis of the Employer's charges are set forth on the bottom page of Joint Exhibit 3. and, near the top of the page of Exhibit 5.

"On 9/5/13, you were operating the mini Roller on County Highway 329, Warren Sharon Road.<sup>3</sup> As you attempted to pull off onto the side of the road with the Roller, you turned too far, left it running and jumped off causing the roller to tip over. According to an investigation performed by Professionals, you caused the Roller to tip over due to operator error."

The Union has established through credible eyewitness testimony that the Employer disciplined the Grievant without just cause. When making your decision as to guilt or innocence, only consider eye-witness testimony, eye-witness statements gathered immediately following the accident, not reenactment, which was performed weeks following the accident and based solely on a theory of what might or could have happened, or the Grievant's prior disciplinary history.

The only consistent testimony presented at the Hearing was that of the eyewitnesses. All eye-witnesses testimony, (Employer Exhibit 10, Timothy Davis), Employer Exhibit 11, Benjamin Hall), and (employer Exhibit 12, Robert Click), including the Foreman assigned to the job site, (Union Exhibit 1. Stephen Mass), and Mr. Moss's testimony at the Re-Disciplinary Hearing (Joint Exhibit 4, page 19, lines 10 1nd 11) described what they saw first-hand, that was the foreman instructed the Grievant to move the Roller from the roadway towards the direction of the berm and out of harm's way where it is not obstructing traffic.

1. The Employer cannot establish that the Grievant was the only person responsible for the Roller tipping over or, that it was the Grievant's slight deviation from the road surface that caused the accident. If the ground was so unstable that it would gave way as attested to by the eye witnesses and documented in their written statements taken the day of the accident, when the Roller was slightly overlapping the berm, it stands to reason that it also would have tipped over if it had not been overlapping the berm. This is critical because management's entire case against the Grievant is based on his alleged failure to keep the Roller on the asphalt as

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<sup>3</sup> The address shown was changed to County Highway 45, Sodom Hutchings Road

instructed by the Foreman. If, however, the Roller would have tipped over anyway, even if it had been stopped on the asphalt as supposedly ordered by the Foreman, than the Grievant did not cause the accident and so he cannot be disciplined for it.

2. The Grievant cannot be faulted for allegedly stopping the Roller so that it slightly overlapped the berm because he was operating the Roller as directed by the Foreman. The Foreman was observing the Grievant as he parked the Roller, basically giving him moment-to-moment instructions. If the accident happened because it was parked incorrectly, the fault is the Foreman's, not the Grievant's. Even if we assume that the Foreman told the Grievant to stay on the asphalt and the Grievant was not following his instructions when he stopped overlapping the berm, the Grievant still cannot be faulted because the Foreman should have told him he was positioned incorrectly and that he needed to move the Roller slightly.

Employees are entitled to rely on the instructions they receive from foremen and supervisors. When they do as they're told and something goes wrong, it is not the fault of the employees it is the fault of the people directing the employees.

Management bears the burden of proof in this case and it must be able to show that the Grievant caused the accident, that it was operator error. If it cannot, it has not met its burden of proof and the Grievance must be upheld.

Management has not met its burden of proof! As a result, the Grievance should be sustained in its entirety and the Grievant awarded the following remedies:

1. **The Grievant's record to be expunged of the thirty (30) day suspension;**
2. **The Grievant is to receive all lost wages, seniority, vacation, sick and personal leaves;**
3. **Any lost Holiday premium pay**
4. **Any lost overtime;**
5. **To be made whole.**

In addition, the Union requests that the Arbitrator retain jurisdiction until all remedies can be calculated.

4.

#### **Position of the Employer**

The sole issue for the Arbitrator to determine is whether there was "just cause" to discipline the grievant, Matthew Barker, for a violation of the following work rules:



1. Inefficiency, Incompetence
2. Misfeasance, Malfeasance, Nonfeasance
3. Failure to follow Workplace Safety Rules

The Arbitrator's attention is directed to Article G of the Agreement that is found in Joint Exhibit 1, which reads in pertinent part as follows:

**Article G: Corrective Action**

**Section 1.** Disciplinary action shall not be imposed Upon an employee except for just cause and until the Employee has exhausted his/her grievance procedure rights through Step 2. The employer has the burden to establish just cause for any disciplinary action...

The term 'just cause' is not specifically defined in either the Collective Bargaining Agreement nor the Trumbull County Engineer's Employee Work Rules, Policies and Procedures Manual. "Just cause, however, is a common standard utilized in the interpretation of labor contracts. The formula or test utilized in reaching the conclusion of whether just cause exists to impose discipline and, whether the method of discipline should be upheld or modified, was developed by an Arbitrator, one Professor Carroll Daugherty, who developed a seven (7)-part test as follows:

1. Was the employee forewarned of the consequences of his or her action?
2. Are the employer's rules reasonably related to business efficiency and performance the employee might reasonably expect from the employer?
3. Was an effort made before discipline or discharge to determine whether the employee was guilty as charged?
4. Was the investigation conducted fairly and objectively?
5. Did the employer obtain substantial evidence of the employee's guilt?
6. Were the rules applied fairly and without discrimination?
7. Was the degree of discipline reasonably related to the seriousness of the employee's offense and the employee's past record?

The seven (7) part test was also at least given tacit approval by the Ohio Supreme Court in Summit Cty. Children Servs. Bd. v. Communication Workers of Am., Local 4546, 113 Ohio App. 3d 495: 2009-Ohio-6591, which provided as follows:

"the contractual right of the employer to discipline and discharge employees for 'just cause' requires the arbitrators to make two determinations in considering cases: (1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances.."

For purposes of analysis, the “Daugherty Test” has been utilized in this Brief.

The only defense presented by the Grievant and his Union Representative at the Arbitration for the incident which occurred on September 5, 2013 when he was allegedly thrown and/or jumped from a Wacker RD-12 roller was that he was not properly qualified to operate the machine and/or that the Roller was mechanically not functioning properly. He also testified that his job foreman gave him improper instructions.

The Grievant could have avoided two of the issues by simply following Article 16 of the Agreement in regard to training and by performing a pre-trip inspection on the roller as mandated by the Trumbull County Engineer in regard to maintenance of the machine.

**Article 16, Section 3** of the Agreement provides in pertinent part as follows:

Any time an employee is directed to perform a job out of their classification for which they feel they are not qualified or do not have proper training, he/she will perform said duty, but may inform the immediate supervisor that the work is being done under protest and at that point will proceed through the grievance procedure with the protest...

In this case, testimony was presented by Highway Superintendent Gregory Alberini and by the grievant himself that the grievant had operated the roller on at least one other occasion for a full day. Both the grievant and the Highway Superintendent testified that at no time did the grievant give notice to his supervisor pursuant to his Collective Bargaining Agreement that he did not deem himself qualified to operate the roller.

Further, Matthew Barker testified that he was aware of the need to perform pre-trip inspection on the roller as mandated by the Memo which is included below as Employer’s Exhibit 3” and reads as follows:

**“MEMO**

**COPY**

To: Highway Department Employees  
From: Gregg Alberini Sr., Highway Superintendent  
CC: Randy Smith, Herbert Laukhart, Donald Barzak, and James DiCenso  
Walt Emrick, Nicole Klingeman, Ken Kubala, Anthony Johnson,  
Bulletin Boards

Date: December 10, 2012  
Re: Pre-Trip Inspections

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All Employees are required to perform a Pre-Trip inspection on all County Equipment with the appropriate Pre-Trip Inspection Forms. These Inspections will be performed at the beginning of every day or shift. Also, a reminder that all trucks are required to have a shovel on them at all times, and plow shoes are to be in the top position after attaching it to your truck

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Thank you for your cooperation.

Gregg Alberini, Sr.  
Highway Superintendent

GAA/hir

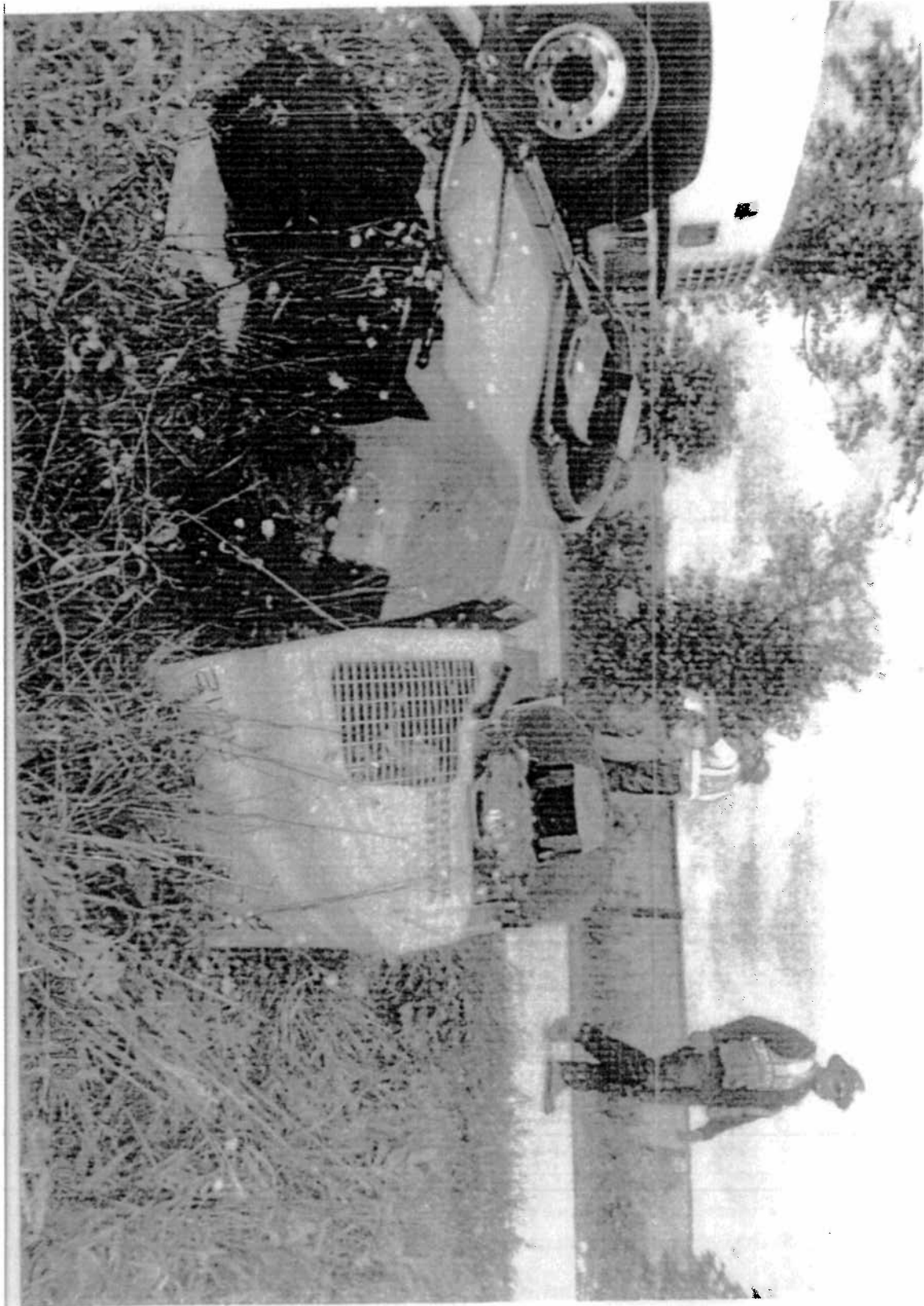
Exhibit  
Emp 3"

Employee Matthew Barker and Highway Superintendent Gregory Alberini both testified that Matthew Barker failed to perform the mandated pre-trip inspection that would have revealed the mechanical defect alleged by Matthew Barker. Not only did Matthew Barker have actual knowledge on the inspection requirement, Highway Superintendent Gregory Alberini produced a pre-trial inspection performed on the roller by Matthew barker on a previous date. See "Employer's Exhibit 4."

Employee Matthew Barker not only knew what was mandated by the Collective Bargaining Agreement and the Trumbull County Engineer Memo, he also testified, as did Highway Superintendent Gregory Alberini, that he was aware of the Trumbull County Engineer's Employee Work Rules, Policies and Procedures, "Joint Exhibit 2." The policy manual at Page 20 in the Section captioned "Disciplinary Actions" provides for enforcement of not only the Collective Bargaining Agreement, but also employment work rules.

Clearly, given these facts, the **1<sup>st</sup> and 2<sup>nd</sup> prongs** of the Daugherty Test for determining "just cause" have been met. Employee Matthew Barker knew the requirements and the work rules involved were both necessary and reasonable.

The **3<sup>rd</sup> prong** of the Daugherty Test is to determine whether a reasonable and thorough investigation was performed regarding the incident giving rise to discipline. In this case, the pictures from the incident speak for themselves, as do the circumstances leading up to the incident. Refer to Employer's Exhibit on page 12:



Simply put, how does an employee drive and tip a roller over into a ditch unless he is guilty of gross incompetence in operating the roller or, in fact, intentionally cause the incident? Employees Matthew Barker testified that he was instructed to pull the roller off the road to the berm by his job foreman, Steve Moss, and seemed to imply that job foreman, Steve Moss, was responsible for the incident. Steve Moss, however, testified that he instructed employee Matthew Barker to pull to the side of the road, but not off the road. A common sense review of the photographs of the incident scene reveals that any attempt to leave the road would be hazardous.

Another aspect of this case that cannot be ignored is that employee Matthew Barker had been notified prior to the incident that he was being terminated at the Trumbull County Engineer's Office as the result of a prior incident. Accepting these facts, an independent expert was employed to investigate the incident. Eric Brown, from Crash Tech testified that given the numerous safety devices on the roller, he could not provide a logical explanation of how the incident occurred if he accepted Matthew Barker's recorded statement (Employer's Exhibit 6) given after the accident to Highway Superintendent Gregory Alberini, which reads as follows:

**Gregory Alberini, Sr.**

Ok. **QUESTION #5 from the accident report:** In your words can you tell us what happened? Tell us how the injury occurred.

A. Matt Barker: The roller started to not run properly so I was directed to pull the roller from the middle of the road, the center of the road, I was directed to pull off onto the berm, the side of the road so we would not be in a hazardous way and try to be clear of the roadway. **When I attempted to do so the roller tipped over into the ditch and therefore throwing me off and I went in the opposite direction, 6-7 feet on the opposite direction, landing on the blacktop road with both of my left and right wrists taking the impact of my whole body weight. (Emphasis added)**

**Eric Brown** in **Section 12.0 OPINION** (Employer's Exhibit 14) addressed Employee Matthew Brown's explanation as follows:

A. In my opinion, based on the witness statements and interviews from employees on the scene, Matthew Barker was indeed operating the Wacker roller northbound on Sodom Hutchings Rd NE. He was operating the same roller on three previous job sites. Prior to this incident, he had several opportunities to advise supervision that he was uncomfortable with the operation of the Wacker roller. He had enough prior "on the job" training with the roller to be a competent operator of it. Furthermore, the actions taken by Matthew Barker are known as a complex discriminative reaction due to the multiple evasive actions that he could have taken, and the mental thought process necessary to choose one and act on it. However, his actions were not consistent with a complex reaction.

**B. The incident is more consistent with a preplanned simple response.  
(Emphasis added)**

There clearly was an effort to determine whether the employee (Matthew Barker) was guilty as charged. The investigation was substantial and was conducted fairly and objectively by an independent expert as well as by internal personnel. Furthermore, there was no evidence that rules were not applied fairly and without discrimination. The evidence was also substantial, satisfying the **4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> prongs** of the Daugherty Test.

In fact, by the time employee Matthew Barker was disciplined, there was a last chance agreement in place. Out of a sense of fairness to employee Matthew Barker, he was not terminated pursuant to the last chance agreement solely because the incident in question occurred before the signing of the last chance agreement. Employee Matthew Barker could have been terminated pursuant to the last chance agreement.

**Was the 30-Day Suspension Justified?**

The conclusion of the independent investigation conducted by Crash Tech reads as Follows:

**13.0 CONCLUSION**

The cause of the vehicle crash, which occurred on Sodom Hutchings Road Northeast 1250 feet north of County Highway 329, (in) the Township of Vienna, Trumbull County, Ohio was operator error on the part of Matthew Barker for failing to operate the Wacker mini asphalt roller in a safe and proper manner. Also, Matthew Barker failed to wear recommended safety equipment, and chose to jump from the moving roller instead of steering away from the ditch, or utilizing one of the two emergency shutdown switches factors affecting the crash. Furthermore, no evidence was found of any mechanical or equipment failure on the Wacker mini asphalt roller.

See "Employer Exhibit 14."

Testimony was provided that progressive discipline had been imposed on Employee Matthew Barker as follows: (See Employer's Exhibit 15)

The grievant has the following prior discipline on his record:

- |    |                          |          |
|----|--------------------------|----------|
| 1. | Written reprimand        | 01/02/13 |
| 2. | 2-Day Suspension         | 03/22/13 |
| 3. | 3-Day Suspension         | 04/03/13 |
| 4. | 4. Last Chance Agreement | 09/06/13 |
| 5. | 15-Day Suspension        | 08/06/13 |

The 30-Day suspension is not only justified but was also quite lenient given Employee Matthew Barker's employment history and the serious issues raised by the incident itself satisfying the **7<sup>th</sup> prong** of the Daugherty Test.

5.

### **The Grievance**

“On September 5, 2013, you were operating the mini roller on C.H. 329 (Warren Sharon Rd.). As you attempted to pull off onto the side of the road with the roller, you turned too far, left it running and jumped off causing the roller to tip over. According to an investigation performed by professionals, you caused the roller to tip over due to operator error.”

6.

### **OPINION**

The Arbitrator’s practice in any disciplinary procedure to make sure the Grievant is afforded his rights under the labor Agreement throughout the disciplinary process and that he has received the benefit of representation by his labor Union. I find no fault in these proceedings. The parties have exceeded their duties and obligations.

In analyzing this matter, the Arbitrator has started with the Grievant’s hire. Matthew R. Barker, is a young man of 29 years. He completed his Application for Employment with the Trumbull County Engineers on March 26, 2008 and was subsequently employed as a Labor 1. Later he was promoted to Labor 2. He attended the University of Northwestern Ohio in Lima, OH, completed 3 years, and was graduated as an AAS – Agricultural, Equipment, and Technology.<sup>4</sup>

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<sup>4</sup> A manual Labor 1 position which requires the ability to perform and adapt to a variety of assignments while assisting with the routine maintenance and construction and repair of county roads, bridges, ditches and culverts.

Essential duties and Responsibilities: Duties will include (but are not limited to) flagging traffic, paving, patching, brush removal, ice and snow removal from bridges, and/or sidewalks, working closely with various types of equipment, machinery and tools; Responsible for the quality of all work performed; Responsible for safe maintenance and operation of any assigned vehicle.

JOB TITLE: Labor 2

General Purpose: A manual labor position which requires the ability to perform and adapt to a variety of assignments while assisting with routine maintenance, construction and construction and repair of country roads, bridges, ditches and

The Grievant participated in an Accident Report Meeting on September 5, 2013. In his description of the accident when responding to a question posed by Mr. Gregg Alberini, Sr. he said: "The roller started to not run properly so I was directed to pull the roller from the middle of the road, the center of the road, I was directed **to pull it off onto the berm, the side of the road** so we would not be in a hazardous way and try to be clear of the roadway. When I attempted to do so the roller tipped over into the ditch and therefore throwing me off and I went in the opposite direction, 6-7 feet on the opposite direction, landing on the blacktop road with both of my wrists, my left and right wrists taking the impact of my whole body weight." (Emphasis added)

The bargaining unit employee witnesses present at this accident gave statements:

1. Timothy Davis said: "first the roller would not start. Steave said lets get it off the road after a few more try's the roller started up. Steave was inching Matt to the berm. Roller started to stall-out into the berm. Berm gave way at the time Matt jumped off the roller and fell on his wrists and hard. **The roller was still on the road when it started to tip.** (Emphasis added)

2. Benjamin Hall said: "Operator was getting roller equipment as far to side road as possible to minimize danger. Roller was not running right. Mechanic was on the way. Lose stones and sloping berm caused the roller to tip over on Matt. He was able to get clear of the machine bumping his wrist doing so."

3. Robert Click said: "I saw Mat Barker go up to Steve Moss, Steve directed Matt off the road. Pointed (?) to get off the road and the roller slip over."

There were three other employees present but they indicated that they saw nothing of the accident.

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culverts. The labor 2 may be required to be in charge of a crew in temporary absence of the foreman. At the time of the incident the Grievant was a labor 2.



The Union's Advocate rightfully commented on the great value that should be attached to "eye witness testimony". This Arbitrator, however, was not favorably impressed by the testimony of the three witnesses for the Union at this Hearing.

There was serious confusion about terminology. By way of example, the term "berm" was misunderstood. The testimony of these three employees was, on its face, inconclusive, and at times, possibly confused as was on occasion the testimony of the Grievant.

The Investigation of the September 5, 2013 incident during which the Grievant was injured was made by CRASH TECH, Reconstructionists, at the request of the Employer. **Their Reconstruction Report and Analysis, consisting of 9 pages, Employer, Exhibit 14, is incorporated by reference in this Arbitration Award.** In my opinion, it is professional.<sup>5</sup>

The CONCLUSION of this investigation and reconstruction is also presented here:

13.0 "The cause of the vehicle crash, which occurred on Sodom Hutchings Road Northeast, 1250 feet north of County Highway 329, in the Township of Vienna, Trumbull County, Ohio was operator error on the part of Matthew Barker for failing to operate the Wacker mini asphalt roller in a safe and proper manner. Also, Matthew Barker failed to wear recommended safety equipment, and chose to jump from the moving roller instead of steering away from the ditch, or utilizing one of the two emergency shutdown switches on the roller. No evidence was found of the berm giving way or environmental factors affecting the crash. Furthermore, no evidence was found of any mechanical or equipment failures on the Wacker mini asphalt roller.

Eric R. Brown  
Lead Reconstructionist  
Crash Tech Reconstruction Services"

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<sup>5</sup> In the OPINION section of the document at 12-0, the Arbitrator has not afforded significant weight to the author's comments regarding "complex discriminative reaction" or a "preplanned simple response."

A further review of the Grievant's testimony during the Accident Report on September 5, 2013 (Employer 6) has Matthew Barker making the following statement in response (in part) to Gregg Alberini:

"Gregg Alberini, Sr.: ..."Ok. Question #5 from the accident report: In your words can you tell us what happened? Tell us how the injury occurred."

Matt Barker: "The roller started to not run properly so I was directed to pull the roller from the middle of the road, the center of the road, I was directed to pull it off onto the berm, **the side of the road** so we would not be in a hazardous way and try to be clear of the roadway. When I attempted to do so the roller tipped over into the ditch and therefore throwing me off and I went in the opposite direction, 6-7 feet on the opposite direction, landing on the blacktop road with both of my wrists, my left and right wrists taking the impact of my whole body weight."...(Emphasis added)

In reading and in re-reading the testimony and evidence, and the Reconstruction and Analysis of Crash Tech I am convinced that the Grievant was disciplined for just cause and the penalty issued to him was both reasonable and justified under the facts as established in this Arbitration.

There is no basis upon which the Arbitrator could or should modify the judgment of the Employer in disciplining the Grievant with a thirty (30) day suspension. Nor does either the Grievant's term of employment or service record warrant any mitigation of his disciplinary suspension.<sup>6</sup>

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<sup>6</sup> The Grievant's Application for Employment was dated 3/26/08 and his thirty-day suspension was dated January 20, 2014 through February 18, 2014.

The Union has not proven to the Arbitrator that the Employer failed to meet its burden of proof though evidence presented or testimony given at this Arbitration. The Grievant's testimony both at the Pre-Disciplinary Hearing of January 3, 2014 (Joint Exhibit 4) and during this Arbitration has not impressed the Arbitrator as being at all times creditable.

The Employer 's use of what it has designated the "Daugherty Test" for determining just cause was determinative in my opinion: The Grievant was discharged for just cause.

This Arbitration was concerned with what is generally referred to by Arbitrator's as *ordinary discipline* as opposed to cases involving criminal conduct or stigmatizing behavior where many arbitrators apply a higher burden of proof, typically, a "clear and convincing" evidence standard.<sup>7</sup> The Arbitrator has applied as the quantum of proof in this Arbitration the **preponderance of the evidence standard**.

The Arbitrator has at all times attempted to comply with the terms and conditions of Article 9: Grievance Procedure, Section 7. Arbitration in the parties labor Agreement.

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<sup>7</sup> See "How Arbitration Works, Sixth Edition, by Alan Miles Ruben

## **Award**

**The Grievance is denied in its entirety.**

/s/ Richard J. Colvin  
Arbitrator

Signed in the City of Mason, County of Warren and State of Ohio this 4<sup>th</sup> day of  
September 2014.

## CERTIFICATION

**I CERTIFY THAT A COPY OF THIS AWARD HAS BEEN SENT BY ELECTRONIC MAIL THIS 5<sup>TH</sup> DAY OF SEPTEMBER 2014 TO THE FOLLOWING TWO PERSONS:**

Dennis A. Falcione

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[lorik@blairlatell.com](mailto:lorik@blairlatell.com)

/s/ [Richard J. Colvin](mailto:richard.j.colvin@me.com)  
Arbitrator  
September 5, 2014

[richard.j.colvin@me.com](mailto:richard.j.colvin@me.com)