IN THE MATTER OF ARBITRATION	)	
BETWEEN	)	BEFORE MARK W. SUARDI, ARBITRATOR
TEAMSTERS, AUTOMOTIVE, PETROLEUM AND ALLIED TRADES, LOCAL UNION NO. 50	)	FMCS No. 14-50866-A
AND	)	
BEELMAN READY MIX, INC.	)	Michael Chatterton, Grievant

APPEARANCES:

For the Union:

Mark Potashnick, Attorney at Law
Eli Karsh, Attorney at Law
Marc Archer, Business Representative
Bill Williams, Driver
Jack McHenry, Driver
Michael Chatterton, Grievant

For the Company:

Andrew J. Martone, Attorney at Law
Adam Doerr, Attorney at Law
Michael Atchison, Plant Manager
Kevin Whipple, Assistant General Manager

AWARD OF ARBITRATOR

PREFACE

This is a voluntary labor arbitration between TEAMSTERS, AUTOMOTIVE, PETROLEUM AND ALLIED TRADES, LOCAL UNION NO. 50, hereinafter referred to as

"Union" and BEELMAN READY MIX, INC. hereinafter referred to as "Company." The arbitration pertains to a October 1, 2013, grievance filed by employee Michael Chatterton, hereinafter referred to as "Grievant." The grievance protests the Grievant's termination from employment for alleged incompetency.

When the parties were unable to amicably resolve the grievance, it proceeded to arbitration before Mark W. Suardi, a neutral arbitrator selected through the Federal Mediation and Conciliation Service. The Arbitrator's selection was in keeping with the parties' collective bargaining agreement (the "Agreement") which has effective dates from September 1, 2011, through August 31, 2014.

An arbitration hearing on the grievance was held at the Holiday Inn Fairview Heights in Fairview Heights, Illinois on May 2, 2014. At that time, each side presented its respective case through sworn and transcribed testimony, plus various exhibits. Following the hearing, each side submitted a capable brief.

BACKGROUND

The Company is engaged as a ready mix supplier with facilities in Sandoval, Illinois and elsewhere. The Union represents the Company's drivers. Grievant is a bargaining unit member who had some eleven (11) years of service at all times relevant.

The incident precipitating the Grievant's termination occurred around 6:00 a.m. on September 30, 2013. That morning, Grievant reported in ahead of his shift. Plant

Manager Michael Atchison told Grievant that when he clocked in he should take a tandem truck (hereinafter "D2") to Mt. Vernon, Illinois. By all accounts, D2 was facing forward in the Sandoval garage and had not been backed in prior to commencement of the shift. Also, there is no dispute that a lower portion of the passenger side mirror on D2 had earlier been duct taped by employee Bill Williams.

There is a good deal of conflicting testimony as to what transpired after Mr. Atchison told the Grievant to take D2 to Mt. Vernon. All of this testimony is set forth in the certified transcript of the case.

For his part, Mr. Atchison recalled the Grievant becoming very angry and screaming at Assistant General Manager Kevin Whipple, claiming discrimination. Mr. Atchison recalled Mr. Whipple telling Grievant to get into D2 and drive to Mt. Vernon, whereupon Grievant said, "I'll play your game," and he stormed into the garage area. At no time, according to Messrs. Atchison and Whipple, did Grievant ever complain about the safety of D2. Nor did Grievant formally report a defective condition.

Grievant, by contrast, said he had a problem with Mr. Whipple's instruction since he had performed a pre-trip inspection on D2 while off the clock and saw that there were no sight mirrors on either side of the truck. Also, the passenger side mirror could not be adjusted because of the duct tape.

Grievant said he told Mr. Whipple that he could not drive the truck, whereupon Mr. Whipple ordered him to do so, saying it was his job and his assignment. To this, Grievant suggested that a new mirror be purchased and installed, but Mr. Whipple refused saying, "Get your ass in the truck and take it to Mt. Vernon right now." When Grievant said he could not do that task, Mr. Whipple told him to "move the truck outside because it's blocking everybody's point of view."

Grievant then got into D2. Again, there is conflicting testimony as to what occurred thereafter. Grievant said he had to rev the engine in order to build up air pressure so he could operate D2's air brakes. He added that D2 had transmission problems which prevented him from backing out of the garage very fast. According to Mr. Atchison and Mr. Whipple, Grievant exited the garage at a fast rate of speed and failed to check his surroundings.

As Grievant was exiting the garage he hit a mixer truck which was parked to the right. There was a good deal of testimony and evidence developed at the hearing as to what the Grievant could or could not see as he exited, the lighting conditions at the time and his awareness or ignorance of the presence of the mixer truck. There is no dispute that D2 made contact with the mixer at D2's hood level causing damage to the fiberglass hood. Evidence included that the damage to D2 was approximately $7,000.00.

Following the collision, Mr. Atchison prepared an Incident Form. Grievant was instructed to shovel rock until he took a drug test, which he passed. On returning to the facility, Grievant again shoveled rock and was later notified of his termination.

Additional evidence at the hearing concerned the Company's safety and pre-trip training, other accidents involving both Management and bargaining unit employees, the punishment imposed when accidents occur, the origins of the duct tape on the passenger side mirror and various photographs and documentation related to the case and Grievant's record.

ISSUE

The parties agreed to the following issue:

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

UNION CONTENTIONS

The Company bears the burden of proving that Grievant engaged in misconduct and that its disciplinary decision was appropriate. The Company has proven neither.

The undisputed evidence indicates that Grievant had eleven (11) years of employment with the Company and no prior accidents. It is also undisputed that the Company instructed Grievant to drive D2 knowing it had a broken mirror. These facts alone warrant sustaining the grievance.

Applicable Department of Transportation regulations prohibit driving a vehicle in a condition similar to that of D2 on September 30. The relevant regulations require stable supports for outside mirrors along with adjustability in both a horizontal and vertical direction toward the rear. As it is, Mr. Williams testified that the passenger side mirror could not be adjusted for the height of the driver, even without tape. It is also doubtful that the mirror was installed in a stable manner, since it had been taped to the frame for quite some time, owing to its loss of stickiness. It follows that the Company was at a minimum partially at fault for the accident that occurred. This, too, is a mitigating circumstance in Grievant's favor.

The Company has not shown that Grievant was incompetent. One driving accident cannot establish incompetence. Moreover, whatever the testimony may be as to the condition of D2's transmission, it could in no way be driven at the lowest speed when moving in reverse.

The Grievant was subjected to disparate treatment. The evidence indicates that Mr. Smith broadsided the Grievant's truck when it was parked, causing extensive damage. But no discipline was imposed. Accidents involving both Mr. Atchison and Mr. Whipple's also resulted in no discipline whatsoever.

Grievant's long service with the Company and lack of prior accidents militate any claim of just cause for his termination. By contrast, there are several credibility issues and

inconsistencies associated with the Company's case. For example, Mr. Atchison recorded nothing about speed on his September 30 "Incident Form." Only at the hearing did he claim to have heard sounds which supposedly indicated excessive speed.

Mr. Atchison's testimony about the lighting conditions in Sandoval are contradicted by the friendlyforecast.com evidence presented by the Union. On this point, it was only after such evidence was presented that the Company shifted its effort to try to show that light was "spilling out" of the facility. Such testimony should be rejected. Likewise, Mr. Atchison's testimony about the presence of a sight mirror on the driver's side of D2 was contradicted by the photographs which Grievant took that day.

Mr. Atchison's testimony regarding DOT compliance for the taped mirror should be rejected. Indeed, his testimony is wholly contradicted by the relevant requirements. Further, the testimony of Mr. Atchison and Mr. Whipple to the effect that Grievant did not express concern about the mirrors or safety of D2 is belied not only by Grievant's testimony, but also by the photographs he took on the day in question.

The grievance should be sustained and the Grievant made whole.

COMPANY CONTENTIONS

The Grievant was discharged for just cause. Incompetence is listed as a dischargeable offense in the Agreement. Grievant was in a safety-sensitive position, and he was familiar with safe driving skills and procedures. Nonetheless, he failed to meet the

minimum standards of his position on September 30, placing himself and others at risk of injury or death, as well as causing several thousands of dollars of damage.

Grievant's incompetence is aggravated by his refusal to show remorse or to accept responsibility for the collision. There are no mitigating factors in Grievant's favor. His work record is riddled with instances of disrespect.

Grievant's testimony was self-serving and should not be credited. Grievant's defense is simply to blame others and to claim that darkness prevented him from seeing the mixer. The fact is that it was not "pitch dark" outside when the collision occurred. There was also sufficient interior light for Grievant to avoid the collision.

The Grievant's claim that the duct tape at the bottom of the passenger side mirror prevented him from being able to see the mixer should not be credited. Not only does the size, visible area and physical proximity of the mixer contradict Grievant's explanation, but his testimony regarding the mirrors was refuted by Mr. Williams' testimony that the tape on the mirror did not impair its function.

Grievant was going at an excessive rate of speed when he left the garage. His claim that he was only going one or two miles per hour should be rejected. Again, Union witness Williams contradicted Grievant's testimony. Mr. Williams credibly testified that D2 could be operated at a high rate of speed, as occurred. Similarly the testimony of the Company witnesses was that they heard two loud "booms" in rapid succession. This, too,

supports a finding that the Grievant was going fast.

Grievant was not subjected to disparate treatment. The circumstances involving Mr. Smith, Mr. Atchison and Mr. Whipple did not involve the same type of fault and culpability as the Grievant's misconduct. Nor were there similar disciplinary histories or aggravating circumstances in any of the cited collisions. It follows that the Union has not proven that the Company's handling of the cited employees was either arbitrary or discriminatory.

The grievance should be denied.

DISCUSSION

As in any disciplinary case, the Company must prove both the fact of misconduct on the Grievant's part and the appropriateness of the discipline imposed. The Company states it has done so through proof that Grievant backed out of the garage on September 30th in an excessive and incompetent manner and that he caused no less than $7,000.00 in damage, this along with loss of use of D2. The Union and the Grievant counter that he did absolutely nothing wrong; that various Management failings amounted to contributing causes of the collision; that other employees were never punished for similar events, and that no discipline whatsoever is warranted. The issue is joined.

First things first. The Company's October 1, 2013, termination letter alleges gross insubordination as an independent charge for the Grievant's discharge. However, Mr. Whipple's testimony at the hearing was quite clear that the Grievant's discharge was for

incompetence (Tr. p. 81). In their briefs, both sides offer case authority which defines incompetence as a failure to properly perform the basic requirements of particular work (Co. Brief, p. 8 and Un. Brief, p. 11). The Arbitrator accepts this definition as the baseline from which to assess whether the Grievant was, in fact, guilty of misconduct. At the same time, any proper assessment of just cause also requires an objective evaluation of the surrounding circumstances of an event, the parties reaction to it, and how similar cases have been treated. Each side relies on these ancillary considerations in advancing their respective arguments. The Arbitrator has taken all of them into account.

x x x x

In the Arbitrator's opinion, Grievant responded to Mr. Atchison's directive to drive to Mt. Vernon by becoming angry; by yelling at Mr. Whipple; by debating Mr. Whipple and, eventually, by grudgingly agreeing to make the trip, but not without taking a parting shot, (i.e. "I'll play your game today"). All this sets the stage for what happened when Grievant entered the garage.

Evidence as to the Grievant's reaction when given the Mt. Vernon directive serves to explain what was on his mind when he entered D2. Significantly, nowhere in his testimony did he mention the word "discrimination." By contrast, Mr. Atchison (Tr. p. 16), Mr. Whipple (Tr. p. 48) and even Union witness McHenry (Tr. p. 140) *all* stated (credibly) that the Grievant angrily claimed he was being discriminated against when instructed to

drive to Mt. Vernon, and that he was enraged at the time.

The Grievant counters that he made a good-faith effort to call D2's safety failings to Mr. Whipple's attention, to no avail. In the Arbitrator's opinion, the Grievant's testimony is simply not credible. Here, the Arbitrator is willing to accept, for the sake of argument, that drivers are instructed to document safety issues at the end of their shifts rather than at the beginning. But even so, the testimony of Messrs. Atchison and Whipple was very credible, and it contradicted the Grievant's story in all respects.

On four (4) separate occasions in testimony, Mr. Atchison was asked if Grievant mentioned *any* safety issues on September 30. Mr. Atchison credibly said no (Tr. p. 13, 14, 33 and 43). Mr. Whipple, too, denied *any* safety-related complaints (Tr. p. 49). And even Union witness McHenry, in direct testimony, could not recall Grievant saying anything about safety while in the office on September 30 (Tr. p. 138).

Next, a good part of the Union's defense in this matter relies on the non-compliant status of D2's mirrors and the length of time the passenger side mirror was taped. The Union urges that these failings rendered the Company at least partially responsible for the collision that occurred. The Arbitrator cannot agree.

Aside from the Grievant's testimony about the duct tape itself, the most he could offer about the cause of the collision was that it was dark outside and he could not see anything. However, Union witness Williams offered solid contradictory testimony that he

had no problem with the passenger side mirror, had driven D2 in that condition without incident, and that if he *had* had a problem, he would not have driven D2.

Closer to the mark is Grievant's testimony and related evidence about the lack of sight mirrors. But here, too, it is difficult to reconcile such testimony with his claim that he was prevented from seeing because it was pitch black. In the Arbitrator's opinion, D2 was safe to drive on September 30 and Grievant knew so.[1]

The Arbitrator has also reviewed other evidence as to the condition of D2 and the proximity of the mixer to the open bay when Grievant left the garage. This evidence dealt with Grievant's actions behind the wheel and what he may or may not have been able to discern about the mixer under the physical conditions present at the facility at 6:00 a.m. Based on such review, the following findings emerge:

1. The transmission toggle switch on D2 would have allowed Grievant to back out of the garage at any rate he wished.

2. Mr. McHenry's presence in the office within minutes of the time Grievant exited the garage placed Grievant on notice that Mr. McHenry's mixer might be near the garage when he was backing out.

3. Grievant's emotional state and claim of discrimination immediately prior to backing out of the garage left Grievant wanting to "make a point" about driving to Mt.

---

[1]It also bears mention that a statutory violation is only relevant where it has a direct and proximate connection to an injury or accident. As indicated above, that is not the case here. See, *Burmudez v. Martinez Trucking*, 796 N.E. 2d 1074, 1082 (Ill. App. 1 Dist. 2003) (truck collision).

Vernon.

4. The available light, whether emanating from the building, from the garage, from the lights on D2 or from the impending sunrise, would have aided Grievant's view and permitted him to see the mixer had he chosen to back out of the garage more slowly.

5. Grievant acted incompetently when he exited the garage at an excessive rate of speed, a speed sufficient to pose an extreme risk of serious injury to himself or others and to cause the extensive damage and loss of use that happened to D2.

6. Grievant's high rate of speed at the time of impact is supported by the distance D2 traveled following the collision.

What remains of the case are the Union's claim that one driving accident does not establish incompetency and that Grievant suffered disparate treatment. Here, the Arbitrator agrees that accidents and untoward events are a cost of doing business, any business, and that no employee can rightly be held to a standard of perfection. There is indeed a difference between incompetence and negligence, as the Union argues. Even so, arbitrators recognize that when employees understand how to do their job but knowingly refuse to follow procedures, discipline and even discharge is appropriate.[2] This

---

[2]This point is set forth in the *Phillips Petroleum Co.*, 80 LA 1257, 1260 (Yarowsky 1983) case relied upon by the Union. In *Phillips*, Arbitrator Yarowsky wrestled with a contract allowing for demotions in the face of incompetence. He found the term incompetence to be ambiguous and sustained the grievance, admittedly relying in part on the language cited by the Union in its brief. But at the same time, Arbitrator Yarowsky recognized that when an employee demonstrates that he has the ability to perform a job in a proper manner and he thereafter fails or refuses to follow prescribed operating procedures, he subjects himself to discipline.

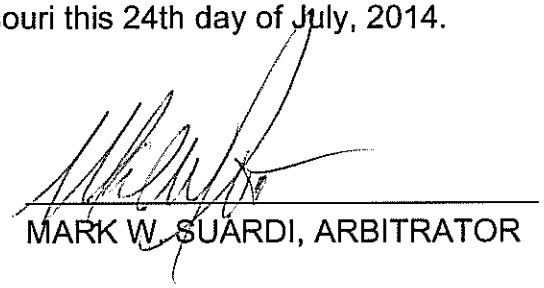
principle, when applied to Grievant's extreme misconduct and the related damage he caused on September 30, serves to offset whatever benefit may inure to him as a result of his years of service.

Finally, the Arbitrator is unconvinced that Grievant suffered disparate treatment at the hands of Management. Specifically, there is nothing to indicate the presence of extreme anger or lack of remorse relative to Mr. Smith's accident. Likewise, the accidents involving Messrs. Atchison and Whipple were minor in nature. So viewed, there is nothing to suggest, much less prove, that the Company's discharge decision was arbitrary, capricious, unreasonable or discriminatory.

AWARD

The grievance is denied. IT IS SO ORDERED.

Signed in the County of St. Louis, Missouri this 24th day of July, 2014.



MARK W. SUARDI, ARBITRATOR