

**IN RE ARBITRATION BETWEEN:**

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**SYSCO SYSTEMS, INC.**

**and**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 120**

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**DECISION AND AWARD OF ARBITRATOR**

**FMCS CASE # 070617-57235-3**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**June 23, 2011**

IN RE ARBITRATION BETWEEN:

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Sysco Minnesota,

and

DECISION AND AWARD OF ARBITRATOR  
FMCS CASE # 110203-53078-3  
Rogerio Espitia grievance matter

Teamsters Local 120.

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**APPEARANCES:**

**FOR THE UNION:**

Martin Costello, Hughes & Costello  
Rogerio Espitia  
Bryan Rademacher, Recording Secretary, Local #120

**FOR THE EMPLOYER:**

Richard Dryg, Trusight Inc.  
John Madison, Dir. of Transportation  
Pat Cavanaugh, Transportation Mgr.  
Doug Gronert

**PRELIMINARY STATEMENT**

The hearing in the above matter was held at Trusight, Inc. in Plymouth, Minnesota on May 10, 2011 and the evidentiary record closed at that time. The parties submitted post-hearing Briefs dated June 10, 2011. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

**ISSUE PRESENTED**

Did the Employer have just cause to suspend the grievant? If not what shall the remedy be?

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement from August 8, 2010 to August 10, 2013. Article 22 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service.

**RELEVANT CONTRACTUAL PROVISIONS**

**ARTICLE 21 – DISCIPLINE**

21.1 Disciplinary actions, including warning letters, suspensions and/or discharges, shall be assessed for just cause only and will be subject to the grievance procedure. Whenever possible, the Employer shall take disciplinary action within ten (10) days of the day of the activity which gave rise to the discipline. This time may be extended by the Employer by issuing a letter indicating that an investigation is on-going.

21.2 Disciplinary action will be disregarded in determining past records for assessing new discipline after twelve (12) months.

21.4 Employees shall comply with all reasonable work rules, which the Employer shall have the right to implement and to make changes to those rules; Employees may be disciplined for violations thereof under the terms of this Agreement, but only for just cause. In any dispute of the propriety of any disciplinary action taken against an employee, or the reasonableness of any Rule, it shall be subject to the provisions of the grievance procedure and arbitration, as well as the application or enforcement of any such Rule.

### **ARTICLE 31 – MANAGEMENT RIGHTS CLAUSE**

The right to manage the business remain solely vested in the Employer, except as limited by the express provisions of this Agreement and then only to the extent of such limitation. \*.\*.\*.

#### **EMPLOYER’S POSITION:**

The Employer took the position that it had just cause to suspend the grievant for one day due to an accident he had with his truck on November 24, 2010. In support of this position the University made the following contentions:

1. In addition to the above cited contractual provisions, the Employer relied on the provisions of its work rules, which it asserted were properly promulgated in accordance with the labor agreement and which they also assert are reasonable and related to the operation of the Employer’s business. These rules are as follows:

#### **SYSCO MINNESOTA WORK RULES – 8/7/2005 – VEHICLE ACCIDENTS –**

With any driver accident a driver’s accident record will be reviewed. The following guidelines will be used in determining discipline:

First occurrence = Warning letter

Second occurrence = Suspension

Third occurrence = Termination

In each instance, the daily event will determine the 12 month period being used for discipline, in accordance with the Bargaining Unit Agreement.

Upon review some weight will be given for extenuating circumstances such as length of time between occurrences, type, damage, and whether it was preventable. In all cases, if a pattern of abuse is noted; stricter discipline may be applied at any time.

Definition of accident: Any improper contact between our vehicle and any object, whether or not damage is caused.

2. The Employer noted that the grievant had an accident with his vehicle on October 9, 2010 when he backed his truck into an electrical box at a customer's location. See Employer exhibit 3a and 3a1. The grievant was given a written warning for this incident, See Employer exhibit 3b. This was not grieved and as such is part of his official record with the Employer for purposes of assessing discipline for any subsequent incidents in the following 12-month period.

3. The grievant had yet another accident on November 24, 2010 when his truck slid on ice in a parking lot at a customer location in Wayzata and hit a snow bank causing damage to the front end of the vehicle. The Employer noted that there is no doubt that the grievant was driving when this happened and even though it was in a parking lot at a relatively low speed, the grievant was at fault in this accident.

4. The Employer asserted that it interviewed the grievant and underwent a thorough investigation of the incident and determined that he should have simply been going slower in the parking lot given the conditions and should have been more careful in proceeding through the lot that day. Employer investigators went out to the actual parking lot to examine where the grievant was and tried to verify the grievant's story about making a left turn and sliding into the snow bank. They determined that he was going too fast for conditions and that the accident was preventable.

5. Accordingly, the accident was preventable and the grievant was subject to the next step of the progressive discipline steps in the rule set forth above. The Employer maintained that the rule is both certainly reasonable and designed to educate and drive home the point that its drivers are professional drivers and must be extra cautious in operating their large vehicles especially in inclement weather. The grievant must simply have been going too fast for conditions or his truck would not have slid into the snow bank.

6. The Employer made the additional point that it trains its drivers on how to operate their vehicles safely, including the grievant, see Employer exhibit 5 and 7. The Employer specifically trains its driver to make sure they know the conditions before proceeding – “if you don’t know don’t go” is the rule. This of course would have benefitted the grievant in the first incident where he backed up into an electrical box but he obviously did not learn from that incident and proceeded too fast through the parking lot on November 24, 2010. The Employer made the point that its progressive disciplinary steps are designed to be rehabilitative, not necessarily punitive, and to make sure that drivers practice safe driving habits all the time and to be extra cautious if road conditions present a dangerous situation and to drive accordingly, this of course means to slow down in parking lots, especially where other vehicles may be backing up or pedestrians walking around between cars. While this accident caused minor damages to the truck, one can imagine that it could have been worse and that the suspension here is necessary to make the grievant aware of his responsibility to slow down and be careful.

7. Finally, the Employer pointed to the fact that the grievant had two preventable accidents in a two month period and must be more careful. It investigates all such incidents thoroughly and has meted out disciplinary action accordingly, see Employer exhibit 6. There is thus no disparate treatment here – all drivers who have had preventable accidents are treated equally under the Rule cited above and receive the appropriate level of discipline depending on where they fall on the grid contained within it.

8. The essence of the Employer’s case is that this was a simple set of facts showing that the grievant was at fault for a preventable accident that caused damage to the vehicle and that he was subject to the same set of rules as everyone else. Here that translates to a suspension of one day.

The Employer seeks an award of the arbitrator denying the grievance in its entirety.

## **UNION'S POSITION:**

The Union's position is that there was insufficient just cause for discipline and that the accident in question was unavoidable due to icy conditions over which the grievant had no control. In support of this position the Union made the following contentions:

1. The Union pointed out that the grievant is a professional driver with an "A" class license, which is very nearly the "highest" licensure one can possess in the State of Minnesota. The grievant has undergone extensive training and education to maintain this license and is in fact a very good driver.

2. The Union noted that none of the Employer's witnesses were actually there nor did anyone who may have witnessed the accident on November 24, 2010 come forward with any evidence, other than the grievant. On this record, the Union asserted that the only evidence that may be considered relative to the accident itself is that of the grievant since he was the sole person testifying at the hearing who was there and competent to testify about the actual conditions in the lot that day or his speed. The Union noted that by the time the Employer investigators got there, days later, the weather had obviously changed and the road conditions were quite different.

3. The Union also asserted that the rule upon which the Employer relied is a "guideline" only and that there is no requirement per se that a second accident must result in a one day suspension. The Union noted too that the rule was not a negotiated rule between labor and management but is rather a unilaterally promulgated rule by the Employer. As such, it is always subject to the just cause standard and need not be taken as any sort of absolute requirement.

4. Moreover, the rule itself requires that certain "extenuating circumstances such as length of time between occurrences, type, damage, and whether it was preventable" be taken into account in determining whether any discipline at all is warranted.

5. The Union noted that the rule specifically takes the question of whether the accident was preventable into account. The Union argued most vehemently that this accident was not preventable. The grievant did everything reasonably possible to avoid it. He was driving very slowly, perhaps 3 to 5 MPH at the time, and took great care given the extremely slippery conditions that were present that day.

6. The Union noted that some mishaps are simply unpreventable and that if the grievant had been going any slower he would have been literally stopped. The Union also asserted that the grievant's version of the facts is the only one that should be taken into account since no one else witnessed but him. In addition, the minor nature of the damage further supports his claim as to how fast he was travelling.

7. Further, there was no speed limit posted in the parking lot and no allegation that he was operating outside of the law or in an inherently dangerous manner. He took all reasonable precautions but the road was simply glare ice and when he turned his wheels they slid out from under him and there was nothing he could do about it, especially in light of the fact that he was driving a heavy truck which by the laws of physics simply cannot stop on a dime.

8. The Union also pointed out that the damage was so minor that the grievant was directed to complete his route. Obviously if the Employer had believed that the grievant was acting in such a dangerous manner they would not and should not have allowed him to continue his route that day.

9. The Union pointed to Minnesota negligence law and argued that the mere fact of an accident does not necessarily prove driver negligence. There must be a showing that the driver failed to exercise reasonable care in operating a motor vehicle for there to be a finding of negligence. Here there was no such showing and the only evidence on this record was from the grievant, who testified that he did everything he could to go slowly and cautiously through the parking lot but that there was ice on the ground that was obscured by snow and that his truck simply slid on it.

10. The Union also argued that the Employer failed to conduct a thorough investigation of the accident and simply assumed that because there was a collision with a snow bank the grievant must therefore have been at fault and that the accident was preventable. The Union argued that it was quite apparent that the Employer failed to consider any other possibility for this accident and that it effectively determined that the grievant was guilty before ever talking to him or looking at the site.

11. The essence of the Union's argument is thus that the accident was unpreventable and that the grievant made every reasonable effort to drive safely but that the road was simply too slippery that day and the truck slid into a snow bank at a very low speed. Under the rule the accident must be “preventable” to warrant discipline and this was not preventable.

The Union seeks an award sustaining the grievance and awarding the grievant any back pay with accrued benefits and purging his file of any discipline herein.

### **DISCUSSION**

The facts of this matter are quite straightforward and were for the most part undisputed. The Employer is a food distributor serving Minnesota as well as many other states. It employs some 50,000 people nationwide and some 550 in Minnesota. Sysco delivers food items to restaurants and other establishments throughout the State. The Employer relies on drivers such as the grievant to drive trucks of various sizes to customer locations on a schedule to deliver the company's products. The grievant is a driver and drives a semi type truck and trailer delivering these items. He has a class “A” license allowing him to operate the large vehicle he was driving on the date in question.

The Employer's rule, set forth above, governs discipline for accidents in their vehicles. The Employer trains its employees on safe driving techniques and the grievant has attended those sessions. The rule provides for a written warning for a first occurrence in a 12-month period. See Article 21.2 of the labor agreement set forth above. The rule then provides for a “suspension” for a second offense in a 12-month period. For a third occurrence within 12 months, it provides for termination.

One of the well-established standards of determining just cause is whether the rule is reasonable, usually in its application. The rule does not set forth the length of the suspension for a second offense but since we are dealing on this record with a one-day suspension the question of whether the rule is reasonable as it relates to the degree of discipline is not involved. A one-day suspension following a written warning is not unreasonable either per se or in its application here.<sup>1</sup>

A review of the rule itself reveals that it is not, as the Union suggested, “absolute” and does not require discipline for every accident an employee may have. The Employer representatives discussed this and used the hypothetical where a company vehicle is rear-ended by another vehicle or is struck while it is parked. These are obvious examples of “accidents,” as that term is defined in the rule but do not cover all possible scenarios. Accordingly, the rule gives some leeway to the Employer, and thus to an arbitrator, to determine in appropriate circumstances whether an accident was “preventable” and thus subject to the discipline set forth within it.

The question here is whether this accident was “preventable” and whether on this record the grievant deserved discipline for what happened.

First, it is clear that he had a chargeable accident under the terms of the rule in October 2010 when he backed into a customer’s electrical box while delivering product to that location. The parties spent some time discussing the details of that accident but on this record those details were not strictly material. The fact is that he was given a written warning for that incident and it was not grieved. There was evidence to suggest that the warning for that was indeed warranted since the grievant backed into a stationary object in contravention of the training he got to “look before going” but the reality is that the October 2010 incident is part of the grievant’s disciplinary history and must be taken as fact on this record.

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<sup>1</sup> It should be noted though that no decision whatsoever is made with regard to whether a termination for a third offense would be reasonable or not under this rule. That determination must be made on the facts of such a case and those were not presented here. Thus, the mere fact that this degree of discipline is found to be reasonable for a second offense under these circumstances does not necessarily mean that a third such accident would automatically result in termination.

The facts of the accident on November 24, 2010 were also fairly clear. The grievant had delivered to several other locations that day and was in Wayzata in a parking lot that was fairly constricted due to its configuration and due to snow that had fallen thereby narrowing down the lanes somewhat. The grievant testified that the parking lot was snow covered and that because of the freeze/thaw cycle there was ice built up underneath a thin layer of snow that had fallen making it difficult if not impossible to see what the conditions of the lot were underneath. He further testified that he was going approximately 3 to 5 MPH through the parking lot and needed to make a left turn to position his truck for the delivery. As he did that the truck slid into a pile of snow and ice damaging the front bumper.

He reported this incident to his supervisor who directed him to complete his deliveries since the damage was minor and involved a crack to the bumper. The evidence showed that the damages were in the \$650.00 to \$700.00 range to repair. That amount of damage adds some support to the testimony that the speed was very low, perhaps 5 MPH or thereabouts. A low speed however does not absolve the grievant either; the question is whether the accident was preventable and whether there was just cause for discipline – not whether the grievant was negligent under the common law of Minnesota.

Contrary to the assertion by the Union that there was no site visit or attempt to ascertain the facts of the accident, the evidence showed that the Employer did go to the lot itself to view the area but did so days after the incident. The conditions were by then not the same so there was no way to definitively determine whether the grievant had been going too fast or not on the date of the accident or whether there was some way he should have known that the lot was so icy at that very spot.

The evidence showed too that the grievant was familiar with this parking lot and had delivered to this location in the past but may not have known that the lot was as icy as it was at that exact spot on the day in question. There was evidence that there were a number of other vehicles parked in the lot and that none of them were shown to have had a problem in that spot nor was there evidence that other drivers had slid into the snow bank or had problems maneuvering in the lot that day.

As the Union suggests, the rule cited by the Employer does not absolutely require that discipline be meted out for every accident. As noted above, the more obvious examples involve a situation where the driver would clearly not be at fault under any circumstances. This case presents a much thornier problem in that the grievant was driving and an accident occurred. The Employer asserted that this essentially speaks for itself and that generally a person must be in control of their vehicle at all times irrespective of the circumstances. The Union on the other hand argued that some accidents are truly unpreventable and occur due to no fault of the person operating the vehicle and that the grievant took every reasonable precaution of driver safety and was the victim of unknown conditions present under a sheath of snow he could not see through.

The Employer's assertion is akin, although by no means a perfect analogy, to strict liability type of analysis whereby the mere fact of the accident equates to a penalty. Just cause, as noted herein, requires a more detailed analysis of the underlying facts of a case to determine whether there was conduct on the part of the employee that rises to the level of a disciplinable infraction and then whether the penalty imposed is appropriate for that given infraction.

Employee discipline is generally meant to correct the employee's behavior and educate the employee on the proper way to perform their jobs. While some discipline may be considered punishment for violating the rules, much like a traffic ticket, the most reasonable reading of the rule in question demonstrates that this rule is meant to correct and conform behavior. This rule was meant to encourage good driving behavior and correct any bad behavior and not to simply mete out punishment for every accident.

Further, it is clear that the rule provides for several factors to be used to determine if discipline should be meted out in the first place. Just cause under the labor agreement requires that only upon a finding that the rule has been violated and that the employee's action warrants discipline, after reviewing all of the factors set forth in the rule, and perhaps others as circumstances dictate, that the grid set forth in the first part of the rule comes into play.

The Union asserted that the sole witness to the accident was the grievant and that his testimony must be accepted as fact on this record. The Union argued that the arbitrator must accept that he was going 5 MPH or less and that there was nothing he could have done to avoid this unpreventable accident. The Union further asserted that there was no showing that he “did” anything incorrectly and that the mere fact of an accident does not equate with fault. See e.g. *Van Tassel v. Hillerns*, 311 Minn. 252, 248 N.W.2d 313 (1976); *Lenz v. Johnson*, 265 Minn. 421, 122 N.W.2d 96, (1963); *Carpenter v. Nelson*, 257 Minn. 424, 101 N.W.2d 918 (1960).

Initially though the question is not whether there was traditional “negligence” under Minnesota common law but rather whether there was just cause for the discipline here under the labor agreement and thus whether the accident was preventable under these facts. Second, the cases cited by the Union were either not particularly helpful or were based on very different facts. *Lenz* involved a highway worker who was injured when he suddenly jumped out in front of a moving car without looking and where the driver of the car had slowed and was maintaining a proper lookout. *Carpenter* involved frankly a very different question from that presented here and was a matter dealing with evidentiary weight rather than negligence per se. *Van Tassel* involved a police vehicle that was following too closely during a high speed pursuit of a suspect.

The remainder of the cases involved different facts and the Union appears to be relying on the general proposition that the mere fact of a collision does not equate with negligence. In stark contrast to this assertion, the general rule of the road that one must maintain control over their vehicle and react accordingly to weather and road conditions to maintain that control.

While the mere fact of the accident may not mean that the accident was preventable, on these facts the accident was more likely than not preventable. There were many other cars in the lot that day and none were reported to have had trouble negotiating it without hitting a snow bank, at least there was no evidence of that here. There was clear evidence of a collision but very little damage done to the truck. This supports the conclusion that the grievant was driving slowly.

On the other hand, the grievant was the only person that day out of the Employer's other 125 drivers who were also out delivering product that day for the Employer despite the inclement conditions whose truck ran aground. Further, an accident of this nature was reasonably foreseeable because of the snowy conditions that day making it all the more important that the grievant exercise additional caution.

Further, the fact that the conditions were snowy and icy cuts in both directions. Clearly vehicles can hit "black ice" or other patches of ice under snow and cannot be seen. Clearly too, such condition warrant even more caution given the very foreseeable likelihood that such conditions can exist, especially when the wheels of a large vehicle are turned thus losing some of the traction in the tires. When an accident occurs, even at slow speed, the driver is presumed to be at fault.<sup>2</sup>

The determination of truth is perhaps the hardest thing arbitrators do, especially where there are conflicting versions or even where there is one but there are conflicting inferences that can be drawn from other known facts. Much the same can be said for whether this accident was "preventable." That would require transportation back in time to November 24, 2010 to watch this unfold as it happened.

What we are left with is the clear fact of a collision with a snow bank but the rule requires more than that to sustain disciplinary action – this rule, as do virtually all such rules, requires that the grievant be shown to have done something improper for which corrective discipline is appropriate. Here, despite the grievant's claim that he was going very slowly, the evidence points to the conclusion that something went wrong that day and since the grievant was driving the presumption is that it was due to some decision in driving that caused the accident. Perhaps he really was going faster than he said or perhaps it was some other maneuver that caused it. That may never be known – what is known is that the accident occurred and that the grievant was at the controls.

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<sup>2</sup> The Union made much of the fact there was no set speed limit in the lot. That was not a significant factor here. The question is whether the accident was preventable or not and even if there had been a posted speed limit and clear evidence that the grievant was driving under that limit; that fact alone would not render the accident unpreventable. Much like a rear end accident in a 60 MPH zone that occurs at 50 MPH, the driver of the vehicle behind is charged with the duty of keeping his/her vehicle under control, irrespective of the road conditions.

Further, this scenario is vastly different from one in which the truck is parked or is struck by a vehicle from behind or that is being operated unsafely by another driver. Clearly, the Employer's conclusions were understandable and their admonition to the grievant to be more careful; and to go slower in parking lots as appropriate was well intentioned. Hopefully too the grievant will indeed have learned from this incident and watch out for certain areas where ice may accumulate, especially on routes with which he is familiar, so he can better avoid such incidents in the future.

On this record the determination based on these unique facts is that the accident was preventable and that appropriate corrective discipline was warranted under the terms of the Employer's rule here. As noted above, the rule has been determined to be reasonable both in its terms and in its application to these facts. Accordingly, on these facts the grievance must be denied.

### **AWARD**

The grievance is DENIED.

Dated: June 22, 2011

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Jeffrey W. Jacobs, arbitrator