

**IN RE ARBITRATION BETWEEN:**

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**INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 120**

**and**

**AGGREGATE INDUSTRIES**

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**DECISION AND AWARD OF ARBITRATOR**

**FMCS # 110830-58398-3**

**JEFFREY W. JACOBS**

**ARBITRATOR**

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**January 3, 2012**

IN RE ARBITRATION BETWEEN:

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IBT #120,

and

Aggregate Industries

DECISION AND AWARD OF ARBITRATOR  
FMCS case 110830-58398-3  
Troy Mathison Grievance

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**APPEARANCES:**

**FOR THE UNION:**

Martin Costello, Hughes and Costello  
Troy Mathison, grievant  
Dave Schrunk, Business Representative

**FOR THE EMPLOYER:**

Brad Williams, Holland and Hart  
Brian Mumaugh, Holland and Hart  
Officer Chris Goodreau, Burnsville Police Dep't  
Officer Jeff Klingfus, Burnsville Police Dep't  
Tom Burrows, Driver Supervisor  
Mike Anderson, Dispatch Manager

**PRELIMINARY STATEMENT**

The hearing in the matter was held on November 8, 2011 at 9:30 a.m. at the Marriot Courtyard Hotel in Mendota Heights, MN. The parties presented oral and documentary evidence at that time at which point the evidentiary record was closed. The parties submitted its post hearing Briefs dated December 16, 2011 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement dated May 1, 2009 through April 30, 2012. The grievance procedure is contained at Article 25. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

**ISSUES**

Did the Company have just cause to terminate the grievant pursuant to the last chance agreement in this matter? If not what is the appropriate remedy? The parties stipulated too that the sole issue is whether the grievant was wearing his seat belt on the morning of July 28, 2011.

## COMPANY'S POSITION

The Company took the position that there was just cause for the termination. In support of this position the Company made the following contentions:

1. The Company asserted that the grievant was subject to a Last Chance Agreement, LCA, due to a number of prior disciplinary issues, warning and performance problems. The LCA provides in part as follows:

### LAST CHANCE AGREEMENT (LCA)

[The grievant's] egregious violation of Aggregate Industries' Anti-Harassment and Discrimination policy have resulted in a 10-day suspension (see attached documentation for details of the incident).

All parties agree and understand that, following [the grievant's] return to work on November 19, 2010, he must meet all established standards of conduct and job performance and follow all Aggregate Industries' policies. Specifically all parties agree that these standards include, but are not limited to the following:

- **Non-Discrimination and Harassment-free Environment** – [The grievant] will be expected to adhere to all aspects of the Non-discrimination and harassment-free Environment policy attached to this agreement.
- **General conduct** – [The grievant] will be expected to act as a front line representative and conduct himself in a professional manner including but not limited to refraining from using abusive, profane, harassing or threatening language or behavior in the workplace OR being argumentative or discourteous with customers, general public, other employees or management.

Therefore (on a non-precedent setting basis Aggregate Industries, the Union and [the grievant] agree to this **Last Chance Agreement** vs. termination of his employment. This document will serve as a **Last Chance Agreement**. [The grievant] will return to work on November 19, 2010. Any violation of the collective bargaining agreement, Company policies/procedures/work rules with-in (sic) 12 months of his return to work will result in his immediate termination of employment with Aggregate Industries.

All parties understand and agree that [the grievant's] future employment depends upon his adherence to this **Last Chance Agreement**. This Last Chance Agreement is afforded to him by Aggregate Industries and is conditioned accordingly.

Date 11/08/2010 (signed by the grievant, the Union representative and the Driver Supervisor and HR Manager).

2. The Company argued that the LCA is clear and provides that any violation of Company policy within a year is grounds for immediate termination. There was no question thus that the seat belt violation herein occurred well within that period. There was also no question that the failure to wear a seat belt is a clear violation of Company policy. See Company exhibit 11, 12 and 13.

3. The Company noted that the clear terms of the LCA prohibit the arbitrator from applying a standard just cause analysis and that there is no discretion to fashion a remedy. The sole issue is whether the grievant violated a Company rule by failing to wear a seat belt on July 28, 2011. The Company asserted that it is clear too that the Company policy is crystal clear that employees must wear seat belts while operating Company vehicles. The Company further asserted that the failure to wear a seat belt is both a violation of Company policy and of the LCA.

4. The Company argued that there is no doubt that the grievant was caught by police not wearing a seat belt on July 28, 2011. Testimony from two Burnsville sworn police officers showed that they were in fact looking for seat belt violations on the morning of July 28, 2011 and that they were stationed at a 4-way stop sign that day when Officer Goodreau saw that the grievant was not wearing a belt. The grievant was clearly visible inside the cab of his truck and was wearing a reflective vest, which would certainly have shown the seat belt if he had been wearing it. The belt is a dark grey/black color and would have been easily seen but the officer was abundantly clear that there was “no doubt” that the grievant was not wearing a belt.

5. Moreover, the minor differences between Officer Goodreau’s initial report and the final Court records were also not material. Officer Goodreau did not write the final Court documents; someone else did. There was no testimony given or other basis for the change; these were merely someone else’s interpretations of the documents. Officer Goodreau on the other hand did write the initial report and that clearly shows a failure to wear the belt and corroborates the other statements the grievant was alleged to have made. Finally, these so-called “discrepancies” are trivial at best and do not change the underlying fact that the grievant was not wearing a seat belt. Officer Goodreau had a clear opportunity to observe and view the cab of the truck and saw clearly that the belt was not on.

6. Officer Goodreau gave clear testimony that when he saw that the grievant was not wearing his seat belt, i.e. that he could not see the shoulder belt going across the grievant's chest, he waved the grievant over to the curb and stepped onto the running board and asked the grievant to unlock and open the door. He wanted to check to see if the truck had only a lap belt, as some commercial vehicles do, but he saw that the belt was indeed a shoulder type belt and that it was hanging next to the grievant. He further indicated that he never saw the grievant unlatch the belt to reach over to unlock the door. The Company posited that there is no question that the grievant was not wearing his belt.

7. The Company noted that the grievant never indicated to the police that he was wearing a seat belt and that he only made some flippant comment about them trying to raise money. He was cited by police for failure to wear a seat belt, a violation of State law, and sent on his way.

8. The Company indicated that the grievant does not deserve any sort of sympathy for reporting this citation right away since it is his duty under policy to do so. When he reported it though he again never disputed that he was wearing his belt, he merely reported it and again made a flippant comment about "Burnsville's finest" having stopped him. It was not until well over an hour later that he made any comment about wearing his belt but having to release it to unlock the door of his truck to let the officer talk to him. The Company asserted that by this time he likely recalled the terms of the LCA and realized that if he were found to have failed to wear his belt, he would be fired.

9. The Company asserted that it conducted a thorough investigation of this and even contacted the officers to verify what had happened. Officer Goodreau indicated there was "no doubt" that the grievant was not wearing his seat belt. The Company asserted that this boils down to a simply credibility determination and that the grievant's story cannot be credited over that of a sworn police officer who was very clear in his testimony all along versus the grievant who has a strong incentive to make up a story that might exonerate him.

10. The Company asserted that the fact that the ticket was dismissed is irrelevant, since the question is whether there was a violation of the LCA. Further, the prosecuting attorney dismissed it only because state law did not grant her any discretion to plead this down to some other offense or other disposition. Based on that lack of discretion she made a prosecutorial decision to dismiss the ticket since the grievant had lost his job over it. It was not dismissed due to lack of proof or lack of evidence – there was no question that the grievant was not wearing a seat belt that day.

11. The essence of the Company's case is that the terms of the LCA are clear and call for immediate termination if there are any violations of Company policy within a year. Failure to wear a seat belt is such a violation and there is no question that the grievant failed to wear his seat belt on July 28, 2011. His termination follows from the clear evidence and the clear terms of the LCA.

The Company seeks an award denying the grievance in its entirety

#### **UNION'S POSITION:**

The Union took the position that there was no just cause for the discharge of the grievant for his actions on July 28, 2011. In support of this the Union made the following contentions:

1. The Union acknowledged that the sole issue here is whether the grievant was wearing his seat belt. The Union did not question the terms of the LCA or that it calls for termination if there is a violation of Company policy.

2. The Union's claim is that the grievant was in fact wearing his seat belt on July 28, 2011 and that he always does for safety reasons and to comply with the law and policy.

3. The Union and the grievant asserted strenuously that when Officer Goodreau waved him to the side of the road, the grievant unlatched his belt in order to reach over and unlock the passenger side door of his cab to let the officer talk to him. The Union asserted that the officers falsified their report in order to bolster their case for a conviction but that the officers did not observe the failure to wear the belt until he got up on the running board. By that time the grievant had already unlatched it to open the door.

4. The grievant asserted that it was his understanding of policy that due to the need to secure radios and other equipment inside the truck he was to have the doors locked. He further indicated that he is a large person and was not able to reach the door latch of the passenger door to unlock it without having to undo the seat belt.

5. The Union questioned the officer's story and noted that there are some discrepancies between his initial report and the final Court documents and that there are significant omissions in the final documents that show that the officer may not in fact have seen the grievant release his belt immediately before reaching over to unlock the door.

6. These documents provide in relevant part as follows: Company exhibit 2 provides in relevant part that: "Did not observe shoulder belt on cement truck's approach to stop sign; verified no seat belt on after stepping onto pass side and opening door; directed to 108 (Officer Klingfus) where he was ID'd W MN DL; 108 later advised he made comments about us just trying to raise revenue and also said his load was going to dry if he didn't get going." In contrast Union Exhibit 9 provides in relevant part as follows: "Observed by me after stepping up onto pass side and opening door; directed to 108 where he was ID'd W MN DL; comments about us just trying to raise revenue to 108; no log turned in ... this was only violation found in approx. 30 mins at this location." The Union asserted that the statement about not observing a seat belt was significantly not on the official citation submitted to the Court. The Union asserted that this is more than a mere typo or inadvertent omission. It was a material omission that shows that the officer may well not have observed the seat belt violation.

7. The Union further asserted that the investigation done by the Company was lax and did not take into account that the grievant almost immediately indicated that he was wearing his seat belt that day. The grievant did not argue with the police that morning, A. because he had a load that needed to be delivered and B. because arguing with a police officer in that setting is completely inappropriate. Thus, he took the ticket, reported as he was supposed to and went off to do his job. The fact that he did not argue with the police at the moment is thus of no consequence.

8. The Union asserted that the ticket was dismissed and that he was never actually found guilty of the seat belt violation. The Union asserted that the fact that there was no violation found by the Court is strong evidence that there were in fact evidentiary problems with this case and that the discrepancies in the Court documents noted above support that.

9. The Union also asserted that the Company must show an intentional violation of the policy in order to establish a violation of the LCA and that it did not. See Union exhibit 5, which showed that the Company discharged the grievant for “intentional violation of Federal, State and local laws as well as company policy regarding your actions in failing to use your seat belt.”

10. The essence of the Union’s case is that the Company has not sustained its burden of proof by showing by clear evidence that the grievant was not wearing his seat belt and that the grievant was in fact wearing his seat belt on July 28, 2011. He took it off briefly to allow a police officer to speak to him after he waved him over. There was thus no violation of the contract or of Company policy.

The Union seeks an award reinstating the grievant to his former position with full back pay and accrued contractual benefits.

#### **MEMORANDUM AND DISCUSSION**

Parties stipulated to the LCA, to the rule requiring seat belt use and that failure to wear a seat belt was a violation of Company policy and rule and of the LCA. Further that such a violation would be grounds to terminate grievant if it were true. The parties further stipulated to the training that grievant received on seat belt use and that he knew of the requirement to wear belt. The sole issue in this matter was whether the grievant was wearing a seat belt on the morning of July 28, 2011.

The evidence shows that the grievant was dispatched to an address in Burnsville to deliver a load of cement and was in a line of traffic at the intersection of Crystal Lake Road and Lac Lavon Drive. Two officers from the Burnsville police department were standing at two locations at that intersection specifically looking for seat belt violations. They were both on foot and Officer Goodreau was at the southeast corner of the intersection and Officer Klingfus was at the northwest corner.

The evidence showed that the grievant was on his way to an address on Carriage Lane in Burnsville and was in a line of traffic at the four-way stop sign going north on Lac Lavon drive. Officer Goodreau testified credibly that he looked inside the cab of the grievant's truck and noted that he did not see a shoulder belt on him.

The evidence further showed that the belt in the truck was a dark grey in color and that the grievant was wearing a Tee Shirt with a reflective vest over it. He did not have the vest buttoned/zipped up but it was on and it was clear from the evidence that if the shoulder belt had been attached it would have been across the grievant's vest and been visible as it crossed the grievant's upper shoulder. It was further clear that Officer Goodreau had an unobstructed view of the grievant in the driver's seat of the truck and that he was in fact looking for seat belt violations. If the grievant had been wearing the belt it was clear that Officer Goodreau would have seen it and he testified both persuasively and credibly that he looked for a shoulder belt and did not see the belt.

Officer Goodreau waved the grievant over and stepped onto the running board of the truck on the passenger side. The grievant leaned over to unlock the door and Officer Goodreau indicated that he then looked to see if the truck had a shoulder belt. Some large commercial vehicles apparently only have a lap belt and he wanted to verify that this particular truck had a shoulder belt. The evidence clearly showed that it had a shoulder type seat belt and that when he looked into the truck after the door opened the shoulder belt was not on the grievant and was hanging next to him.

The grievant indicated that he was wearing a seat belt and that he unlatched it to reach over to unlock the door. The grievant is in fact a large person and likely would have had difficulty reaching over to unlock the door if he had been wearing a seat belt. On balance however, his story simply was not credible. First, Officer Goodreau was looking for seat belt violations and did not see it on the grievant as he approached the intersection. Had the belt been on it would have been easily visible. Officer Goodreau's testimony is accepted that he did not see it because the grievant was not wearing it.

Second, Officer Goodreau had no incentive to fabricate his story and indicated that he did not see the grievant unlatch the belt prior to unlocking the door. While the Union raised the scepter that the officer actually lied under oath and in documents to the Court there was absolutely no evidence of this. On this record the mere fact that there was a slight discrepancy between the two documents described herein by Officer Goodreau did not support the Union's claims in this regard.

Officer Klingfus also gave credible testimony that the grievant made the comments about needing to get going and raising revenue to him but again made no comment that he was innocent or that he had been wearing his seat belt but took it off to allow Officer Goodreau to talk to him. The grievant indicated that he did not have time to argue and that he needed to get his load delivered. On this record, that was credible. That the grievant did not profess his innocence in that setting is not uncommon and likely would have been fruitless. This evidence did not have much probative value. The evidence that did was that of Officer Goodreau regarding what he saw and why he pulled the grievant over in the first place.

Finally, when the grievant first called in he made no comment that he had been wearing his seat belt. It was only after he returned that he had been wearing his belt. While the grievant might well have thought better of standing in the middle of the street arguing with two cops about whether he was guilty, it is far more likely that he would have indicated his innocence to the Company when he first reported it. It was not until he had had time to consider the ramifications of this that he began telling people the story about unlatching the belt.

The Union asserted that the discrepancies between the initial report and the official citation that went into the Court show that the Officer may be mistaken about the seat belt. These minor differences did not undercut the officer's clear testimony nor did it cast any significant doubt on the accuracy of the initial report he made following the citation.

Further, the two versions are consistent with each other; there is nothing in the second version of the written report that flies in the face of the first, nor of the officer's testimony at this hearing. On this record there was little doubt that the officer saw that the grievant was not wearing a seat belt and that his version of the story is more credible than that of the grievant.

Whether the grievant was lying to save his job (as the Employer implied) was simply mistaken or whether he truly thought he was wearing his seat belt was not relevant. What is clear is that he was not wearing his seat belt on the date in question. On this record, that is all that matters.

The Union claimed that the Company needed to show an intentional failure to wear the seat belt and that simply unbuckling it cannot be considered an intentional failure to wear a seat belt when it was occasioned by the need to unlock the door to talk to a police officer. Several things undercut this assertion. First, it is based on the notion that the grievant was wearing his belt until the moment the officer got up on the truck. The evidence did not support this conclusion. Rather the evidence showed that the grievant was observed not wearing the belt well before the first officer ever got on the truck; which of course was why he flagged the vehicle over and got up on the running board in the first place.

Second, it is difficult to imagine how failing to wear a seat belt could be considered anything other than intentional but on this record it was not necessary to establish intent. All that was necessary, given the stipulations of the parties, see Tr. at p. 97,<sup>1</sup> and the clear terms of the LCA, was that the grievant was not wearing his seat belt. The fact that the Company used the word "intentional" in its termination letter did not alter the clear terms of the LCA.

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<sup>1</sup> The parties agreed on the record in response to a question from the arbitrator that the sole issue factually was whether the grievant was wearing his seat belt on the date in question. See Tr. at page 97. No mention was made of the need to prove intent in that stipulation on the record.

Finally, the Company rules make it clear that wearing a seat belt is required and that failure to do so is considered a violation without regard to intent. See Company exhibits 11 & 12 and Article 22 of the CBA. Under the clear terms of the LCA intent is not required – all that is required is a showing of a rule violation.

The Union further claimed that there was an inadequate investigation in this instance and that the Company failed to get the grievant's side of the story before making the decision to terminate him. This argument did not find sufficient support on this record. Managers did discuss this with the grievant. They further contacted the Officers and were told that there was no doubt that the grievant was not wearing his seat belt. On this record there was both an adequate investigation and adequate proof of the offense with which the grievant was charged.

Finally, the Union noted that the matter was dismissed by the Court and argued that there must have been a lack of evidence of a chargeable crime leading to the decision to dismiss the matter. Much was made of this and why the criminal matter was dismissed. Professors Hill and Sinicropi discuss this at some length in their work on Evidence in Arbitration. Hill & Sinicropi, *Evidence in Arbitration*, BNA, Inc., 1980 at pp. 64-66. The standard of proof may well be different from a criminal proceeding to a contractual arbitration. Thus an acquittal on a criminal charge may well not be dispositive of the arbitration over the identical facts. An arbitrator could thus consider the criminal proceeding but come to a different conclusion.

Elkouri also supports this conclusion and notes that “arbitrators generally do not view themselves as bound by a judicial determination of guilt or innocence. The reasons behind this view include (1) the purposes of the two proceedings are different, (2) the burdens of proof that generally govern the two proceedings are different, and (3) the determination of the existence or absence of ‘just cause’ is to be based on the evidentiary record adduced at the arbitral hearing.” Elkouri and Elkouri, *How Arbitration Works*, 6<sup>th</sup> Ed. at p. 388. See accord, *Common Law of the Workplace*, 2d Ed., St. Antoine, BNA Books, Inc., 2005 at p. 52, section 1.90.

In most cases, while arbitrators will admit the outcome of a criminal proceeding especially if it pertains to the identical facts, criminal proceedings are generally not taken as *res judicata*. Under the broad definition of relevance, it is very likely relevant but may be assailable as to its probative weight. Thus, the fact that the case was dismissed was given very little weight on this record.

The Company submitted an affidavit of the prosecuting attorney as to why the criminal case was dismissed. Frankly, affidavits of this nature, especially those pertaining to material facts, which are not subject to cross examination or laying of foundation for veracity are given no probative or evidentiary weight. Thus, Ms. McCarron's affidavit was given no weight. It does not matter why the criminal case was dismissed. What does is whether the grievant was wearing his seat belt and the evidence that was considered on that question was the testimony of the Police Officers involved.

As noted above, once that determination has been made there is virtually nothing else to decide. There was no question that the LCA calls for the grievant's termination if there were any violations of Company policy during the year after the LCA went not effect. The Union acknowledged the validity of the LCA, acknowledged that the incident was well within the year and acknowledged that if the grievant had violated the seat belt policy it would be a violation of the LCA. While a seemingly minor violation of Company policy would not on its own have likely resulted in the termination of a long-term employee; the LCA deprives the arbitrator of the discretion to fashion a remedy. The LCA clearly calls for the grievant's "immediate termination" for any violation of Company policy. Thus, the arbitrator has no discretion to fashion a remedy under these unique facts; once the determination has been made that the grievant violated Company policy by failing to wear his seat belt the result under the LCA follows. Accordingly, the grievance must be denied.

### **AWARD**

The Grievance is DENIED.

Dated: January 3, 2012  
IBT 120 and Aggregate Industries

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Jeffrey W. Jacobs, arbitrator