

CASE STUDY – TGIF

The Grievance

The grievant, Howard, “Howdy” Mamm, a driver/operator employed by Universal City Trucking, was discharged without just cause, in violation of Article 5.01 of the Collective Bargaining Agreement.

Universal City Trucking did not have just cause for a number of reasons, including the fact that Mr. Mamm was not insubordinate nor did he refuse a work assignment on the day in question, did not violate any company business practices or violate the rule requiring permission to leave work. In addition, the company did not provide prior notice that Mr. Mamm was being insubordinate or that said activity was subject to discipline, the “rule” supposedly being violated was not reasonably related to the company’s operation, they made no attempt to investigate fairly and objectively, and finally, the degree of discipline was not reasonably related to the employee’s alleged offense and previous service record.

Relief Sought: Reinstatement with full back pay for wages lost and full credit for seniority.

Management’s Negative Response:

After a complete and thorough investigation, it was determined that Howard “Howdy” Mamm was found to have been grossly insubordinate in his duties when he knowingly refused numerous direct orders to return to work. In accordance with Articles 5.01, 14.01 and 16.01 of the Collective Bargaining Agreement, the Company discharged Mamm for violating Article 5.03 and the Company’s work rule for releasing employees from work. Mr. Mamm was given ample notice that he was violating said rule, the

incident was investigated fairly and objectively and the degree of discipline meted out was consistent with the serious nature of the offense and with the grievant's previous work history.

Union Theory of the Case

Howard, "Howdy" Mamm, a veteran driver/operator working for Universal City Trucking was suspended and subsequently discharged after events that took place at the HardRock-LA plant. It was alleged by Universal City Trucking that on the day in question, Mamm was insubordinate, refused to perform his assigned work, failed to meet company business practices and violated the rule on getting permission to leave work. The union challenges all four allegations.

Mamm arrived at the HardRock-LA plant to pick up a load of cement after having just completed his third load of the day. As is customary, Mamm entered the chaotic lot at the HardRock-LA plant and awaited instructions by radio from the dispatcher. When he was directed to pull up immediately to the separator to get rinsed out and get loaded with a set of "quick set", he did so, which required that he pull in front of another waiting truck driven by a Century City driver, George Fenneman. The other driver reacted very negatively to Mamm's actions and began honking the horn, making obscene gestures and remarks towards him. When Mamm went back to see if he could settle the disagreement between himself and Mr. Fenneman, Fenneman reacted very negatively, making threats to Mamm. As most people would react to such a situation, Mamm attempted to resolve the situation in a legal and orderly fashion, reporting it to management and then calling 911 to report the incident. At the request of a police officer, Mamm filed a complaint and was prepared to complete his assignment when he was released from work by Universal

City owner Tom Bradley, who was also a co-owner of HardRock and was working the separator and managing traffic in the yard that day. He followed Bradley's directive and was subsequently discharged.

Management specifically charged Mamm with four violations, which will be addressed and refuted. In addition, this treatise will identify a number of factors and factual events that will demonstrate that disciplinary action in this instance was unfounded.

First, let's address the issue of insubordination and refusal to perform work since these are the most serious allegations and, in our opinion, have little or no merit. Insubordination is defined as "rebelliousness" and "defiance of authority". Obviously, "refusal to perform work" is self-defining. It is our position that a careful review of the events of the day in question prove that in fact Mamm was not insubordinate, nor did he refuse to perform work. Admittedly, he did not immediately respond to several requests from his supervisor, albeit for perfectly understandable reasons, however, he never refused an order, and was perfectly willing to perform his assigned duties until he was released by Mr. Bradley to go home.

Let's look at the specific "orders" given by Bradley to Mamm. When Mamm arrived at the HardRock-LA plant, he was directed to pull in front of the Century City driver, apparently without any attempt by management to let Fenneman, the Century City driver know what was going on. Mamm did as instructed. When this activity upset Fenneman, Mamm got out of his truck to see if he could resolve the problem between them. When Bradley ordered Mamm to get back in his truck, Mamm completed the conversation with Fenneman and returned to his truck. He did not immediately get in the

truck, however, because he wanted to report to Bradley what had transpired between him and Fenneman and find out what would be done about it. When Bradley told him to get in the truck he did, after making a call to 911 on his cell phone. Even if there was a short delay in his getting back in the truck it was minimal and he was in the truck and ready to go when it was his time to pull up to the rinser. At this time, Bradley directed him to stay in the truck, pull around to the loader, and get loaded.

When Mamm made the 911 call it went to Sergeant Joe Friday. After taking the necessary information, Friday informed Mamm that he would be there in five minutes to take Mamm's complaint of the incident. After Mamm got rinsed and he was preparing to pull up to the loader he saw Sergeant Friday and his partner, Officer Harry Gannon, pull onto the property. This was the only time that Mamm deviated from Bradley's orders. At the direction of the police officers, Mamm left his truck and got in the police wagon to answer questions. After a few minutes, Bradley came over to the wagon and asked, "What's going on? There's no problem here," and said to Mamm, "Howdy, I need you to get back to work, now." After Officer Friday explained to Bradley the nature of their presence and asked him who he was, Bradley identified himself and told Friday the problems he was having managing the yard. He again looked at Mamm and said, "Howdy, get back in your truck." Before Mamm could react, Sergeant Friday responded, asking Bradley to "step aside . . . while we finish taking this report". To this, Bradley replied, "OK, sergeant, but I'm telling you, Howdy, if you're not going to get back in your truck and get loaded, you need to go home." Judging from this exchange that Bradley was agreeing with the sergeant, Mamm remained to finish filing the complaint. After completing the complaint, Mamm followed Bradley's orders to go home, having

assumed that he had been released according to the posted work rule on leaving work. When Bradley observed him leaving he called on the radio and asked Mamm, “what he thought he was doing?” After Mamm responded that he was going home as instructed, Bradley told him he was going to call the union steward and to wait at the Universal City office for him. Assuming that he was released from work, Mamm correctly responded that if Bradley needed to tell him anything, he could tell it to the steward or tell him the next day when he reported to work. It was at this time that Bradley informed Mamm that he was being suspended, subject to discharge.

It should be clear from these events that Mamm was never insubordinate, nor did he refuse to perform a work assignment. Admittedly he did not act immediately in every instance due to mitigating circumstances. However, it is hard to argue that any of his activities seriously disrupted the plant operation that day. After all, the amount of time that transpired from Mamm’s arrival at the plant at 10:45 until Bradley observed him at 11:30, leaving after he was released from work, was less than 45 minutes.

In the Tenth Edition of the “Grievance Guide” published by BNA it states that, (in determining insubordination) “arbiters generally consider not only the magnitude of the offense and prior occurrences of such behavior, but also whether, 1) The order or procedure in question was clearly expressed; 2) The employee was made aware of the possible consequences of the action; and 3) The discipline was applied in a nondiscriminatory and progressive manner.” It is our position that, in fact, Bradley’s orders were not clearly expressed, or that at least he was not clear when they were to be completed. Simply saying “Now”, under the circumstances that day certainly was not very clear. “Now” could be construed in many ways with one reasonable one being as

soon as possible while not disrupting the work at the plant. Mamm followed all of Bradley's orders right up until he was asked by Friday to get in his vehicle. Addressing the second point, at no time, up until the very last words he spoke to him, did Bradley make Mamm aware of the consequences of his actions. If he had said at any time that if Mamm did not immediately get into his truck he would be considered insubordinate, Mamm could have taken the appropriate action.

Therefore, we believe that the allegation that Mamm was being insubordinate and refusing to perform work is unfounded and without merit.

We now turn to the issue of failure to meet Company business practices. This is difficult to refute because the company fails to identify what business practices are alleged to be violated. What is known is that Mamm was faced with a threat to his safety and with an apparent violation of the law. All of his actions that day were influenced by these facts. It is hard to imagine any company business practices that would require an employee to not follow his civic duty to report an apparent crime or take safeguards to protect himself and his family. When Fenneman stated that he had his (Mamm's) "license number and I intend to defend myself if you don't get the hell out of my way", while wielding a tire iron, this could be construed to mean he could come after Mamm after work as well. Besides, Mamm was simply following the directions of a law enforcement officer when he filed the complaint.

Article XIV of the Collective Bargaining Agreement states that "The Company and the Union will cooperate in the continuing objective to eliminate accidents and health hazards. The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment." Failing to

address the threats made to Mamm that day, or not even allowing him to take the necessary actions to defend himself, does not make “provisions for the safety and health of its employees” as agreed upon by the company and the union in the CBA.

To the issue of the alleged violation of the rule requiring permission to leave work, as already noted, Mamm believed he had been given permission to leave work as stated in the rule. He was not told that he should leave because he was being suspended. When Bradley agreed with Sergeant Friday that Mamm could stay and finish filing the complaint and then turned to Mamm and told him that if, (in following Friday’s instructions and staying to file the complaint) he was not going to get back in the truck and get loaded, he needed to go home, Mamm assumed that he was being released from work. Though it wasn’t his responsibility to determine why he was being released from work, a logical assumption would be that Bradley had determined that if Mamm was going to remain and file the complaint he would need to assign someone else to deliver the load of quick set and Mamm’s services wouldn’t be needed any more that day. Section 5.01 of the CBA clearly states that management retains the “right to direct the working force.” Also, again, had Bradley said that if Mamm did not immediately get out of the car and return to his truck he would be considered insubordinate and suspended, Mamm could have made a decision as to whether to stay and file the report or leave and get in his truck. Under the circumstances, we believe this still would have been grossly unfair and subject to a grievance for violating Article XIV, but at least Mamm could have done so and avoided this unjust suspension and discharge. Finally, the Company’s argument that Bradley was not the dispatcher and therefore could not release Mamm from work is disputable. Surely as the owner of Universal Trucking he could supersede

the dispatcher and release one of his employees to clock out. It is important to note that at the time he released Mamm, he had already left the separator-rinsing operation and was in the dispatcher's office. It's not unlikely that he and the dispatcher could have conferred about the work that day and how to best manage it with the available drivers. Finally, if as the Company maintains, Bradley could not relieve Mamm without causing serious disruptions to the plant, then how could he suspend him without first informing the dispatcher?

We believe the above facts present the strongest case that Mamm was not insubordinate, did not refuse a work assignment and did not violate any company business practices or rules. However, even if that were not the case, it is our contention that if Universal City believed that they had just cause to suspend and discharge Mamm, they did not follow universally accepted practices for disciplining for just cause. Specifically, 1) Mamm was not given prior notice that he was violating a work rule or being insubordinate nor was he told what the possible or probable disciplinary consequences of his conduct would be. 2) If Mamm's actions that day violated a work rule or were considered insubordinate, the "rule" was hardly reasonably related to efficient and safe operations when it has been proven that the total amount of time that transpired during these events on the day in question was less than 45 minutes and there was little if any interruption in production. 3) The company failed to make an effort to discover whether Mamm violated or disobeyed a rule or order of management. 4) As noted above, there was not a fair and objective investigation. The company did not interview Mamm, Officer Friday, or anyone else to the Union's knowledge. Bradley's own words, . . . "I'm not talking with you tomorrow or anytime. You're suspended,

subject to discharge. . .”, indicate that there was no attempt to make a fair and objective investigation. 5) We contend that the company did not obtain substantial evidence or proof that the employee was guilty as charged even if they did conduct an investigation as required. 6) We do not think the company has applied its rules, orders, and penalties even-handedly and without discrimination to all employees. It is well-known that the yard is not an organized place. It is understandable and should be expected that there will be disagreements, trucks out of order, misunderstandings, etc. We do not think the company disciplines every driver that does not get their load immediately in order, nor should they. 7) The degree of discipline was not related to the seriousness of the offense. It has already been noted that Mamm was only delayed for a short time and for very good reason. These days it is often joked that you can get a pizza delivered quicker than you can get a policeman, and yet Sergeant Friday responded within five minutes and completed the complaint very quickly, resulting in little disruption to the plant’s operation. To discharge Mamm for such a minor offense was disproportionate. In addition, Mamm has had a very good service record. He has been with the company long enough to be in the middle of the seniority list and yet has had only two instances of tardiness for a total of 65 minutes, offenses unrelated to those alleged in this case.

Given all of the above, it is the Union’s position that the allegations against Mamm are unsubstantiated and unwarranted. Even if one were to assign any merit to the company’s claims of misconduct, it has been demonstrated that the company did not follow accepted practices for administering discipline for just cause. Therefore, Mamm should be reinstated to his position with full back pay and seniority.

Management Theory of the Case

Universal City Trucking (Company) contends that it had just cause to suspend and subsequently discharge Mamm for his actions on the day in question. A concrete loading plant requires an orderly process of trucks to be rinsed, loaded and dispatched to the site. Not following orders in a timely fashion can lead to bottlenecks, wasted product, unsafe situations and flared tempers in the yard. In addition, HardRock-LA has an obligation to provide concrete for a number of projects in LA. They are time-sensitive in that the concrete has to be delivered on time or it throws the entire project off. Concrete already poured will begin to set up and concrete finishers will be standing around with nothing to do. For these reasons neither HardRock or its subcontractors can afford the luxury of having drivers determine themselves when they are going to get loaded.

On the day in question, Mamm's actions undoubtedly impeded the efficient operation of the plant. As a result, he was suspended and subsequently discharged for insubordination, refusal to perform assigned work, failure to meet Company business practices, and violation of the rule requiring permission to leave work. The Collective Bargaining Agreement speaks to each of the violations included in the disciplinary action taken against Mamm.

Article 5.01 "Management Rights" in the Collective Bargaining Agreement states: "The Union agrees that the Company shall continue to have and retain the sole and exclusive rights and authority to direct the working force in addition to other functions and responsibilities not specifically mentioned in this Agreement. Without attempting to list all Management Rights, prominent among such rights are the right and the authority of the Company to discipline, suspend or discharge employees for just cause and the right

to make and enforce such rules and regulations as the Company may consider necessary or desirable for the operation of this business. (Emphasis mine.)

Article 5.03 states: “Discipline and Discharge: No Employee shall be discharged except for just cause and the Employer may from time to time post working rules, not inconsistent with this Agreement, governing the conduct of Employees and the progress of the work. Only by way of illustration, it is specifically recognized that Employees may be dismissed for inefficiency, dishonesty, failure to perform assigned work tasks, insubordination, gross or repeated carelessness, intoxication on the job, engaging in a deliberate slowdown, using a non-doctor prescribed drug, or destruction or abuse of the Employer’s property. Employees may be dismissed for failure to comply with Company’s standards of business conduct.”

The union not only contends that Mamm’s insubordination that day was not sufficiently disruptive, but they actually claim that he was not even insubordinate at all. This position is clearly wrong.

The person responsible for maintaining a safe, efficient order in the plant yard on the day in question was Tom Bradley, Universal City owner and co-owner of HardRock-LA. Bradley was working the separator and managing traffic in the yard. As the traffic manager, it is not only his responsibility to determine the order of loading based on the specific needs of ongoing projects, but he also needs to keep an eye on all trucks and operators, ensuring they follow safe procedures and stay in their trucks. After Bradley directed Mamm to pick up a load of “quick set” to be delivered to a project, he observed that Mamm had gotten out of his truck and approached a Century City truck driver, George Fenneman, whom he had moved in front of. Bradley used the loudspeaker to

inform the Fenneman of Mamm's intentions and ordered Mamm forcefully (to) "get back in your truck – NOW!" He observed Mamm walk back to his truck, but rather than follow the direct order to get in the truck, Mamm stood beside it, blocking other truck traffic, including Fenneman, and subjected himself and others to a safety hazard. Bradley again ordered Mamm to get in his truck and prepare to move into position to get rinsed. Again, rather than complying with the order, Mamm continued to stand next to his truck while relating what had transpired between him and Fenneman. Bradley again ordered him to get in his truck, obviously frustrated by now that Mamm was making it difficult to maintain order in the yard. To this third direct order, Mamm responded that he would get in the truck "in a minute", after he made a call on his cell phone. Bradley somehow managed to keep focused on his job and completed rinsing a truck in the rinser. After he done so, he observed Mamm in his truck. After rinsing out Mamm's truck, Bradley went to his window and ordered him to "stay in your damn truck, pull around to the loader, and get that load over to the bridge site."

When the dispatcher asked where the truck for the load of quick set was, Bradley went to look for Mamm. When he found him he discovered that he was not in his truck, as ordered, he had not pulled over to the loader, as ordered, and he had not gotten the load over to the bridge site as ordered, but instead he was sitting in a police wagon. Keep in mind that at this time, Bradley had no idea why Mamm was in the police wagon. Mamm had not informed anyone of his intentions and had not reported off work. For all Bradley knew, Mamm may have been being arrested himself. When he went over and asked the officer what was going on and assured him there was no problem, Bradley told Mamm he needed him to get back to work. A reasonable person would consider that

statement, particularly in the context of the previous four orders, to be the fifth direct order to get back to work. After identifying himself to the police officer, Bradley again ordered Mamm for the sixth time (to) “get back in your truck.” When the officer responded that it would only take a few minutes to complete the report, Bradley acknowledged the officer, stating, “OK sergeant”, then turned to Mamm and said, “but I’m telling you, Howdy, if you’re not going to get back in your truck and get loaded, you need to go home.” Bradley then left, assuming that he had made it very clear to Mamm that if he did not follow this, his seventh direct order, he was suspended. Rather than following that order, Mamm chose not to get back in the truck and get loaded, but rather to complete his personal business with the police officer and go home.

Mamm had one more opportunity to follow Bradley’s orders and perform his work assignment. When Bradley learned that Mamm left the plant, he called him one last time on the radio and asked him what he was doing. When Mamm informed him he was going home, Bradley ordered him to return to the office and wait for him and the union steward. Mamm replied that he was not waiting, defying Bradley’s eighth order that day.

Clearly the argument that Mamm was not insubordinate and was not refusing to perform a work assignment is totally without merit when he clearly refused a direct order to perform a work assignment eight times.

The position taken by the union on the issue of the rule regarding releasing employees from work is equally spurious. This rule, which was properly promulgated and communicated to all employees via posting, is intended to ensure that when there is additional work to be done, e.g., an unexpected load to be delivered, the Company does not have to call out a driver, but rather can offer the additional work according to

seniority. It was never intended to allow an insubordinate employee to consider a suspension for just cause to be “released” from work. Besides, the rule clearly states that employees must be released by the (HardRock or Universal) dispatcher. The dispatcher is responsible for assigning work based on orders needed. If any of the dispatcher’s superiors could release employees from work, it would create disruptions in the plant operation and an untenable situation for the Company that clearly was not considered when the rule was written. Otherwise it would have stated so. It is the Company’s contention that, even if one were to accept the Union’s argument that Mamm did not realize he was being insubordinate up this point, he was very well aware that he was not being released from work and was leaving the job without permission and refusing to perform the work Bradley directed him to do.

The union contends that the Company is required to spell out the business practices Mamm failed to meet. We believe that Mamm’s actions that day speak for themselves, what with the insubordination, refusing work assignments and leaving work without permission, all violations of the Company’s business practices. In addition, Mamm’s getting out of his truck in the busy plant yard and perpetuating if not instigating the disagreement with Fenneman exposed him and others to “accident and health hazards” as specifically mentioned in Section 14.01 of the CBA, which also failed to meet the Company’s business practices.

We believe that all of the above provide the necessary just cause to discipline Mamm as provided for in Section 5.01 of the CBA. Section 5.03 clearly identifies insubordination and failure to perform assigned work tasks as two of the activities that meet the just cause requirement for dismissal, as well as inefficiency and gross or

repeated carelessness, among others. A review of the facts of the case indicate that Mamm's actions that day were not only examples of the former but could also be characterized as inefficient and grossly careless as well. However, the Company maintains that, though they clearly had the right to discipline Mamm under 5.03, they also met widely accepted practices for administering discipline for just cause.

We'll now address those practices as they relate to this case 1) Regarding prior notice, as already mentioned, insubordination, failure to perform assigned work tasks, and failure to comply with Company's standards of business conduct are all specifically addressed in the CBA as dismissible actions. We do not believe that every order given requires a full explanation of the consequences of refusal and that failure to do so constitutes a failure to provide prior notice. Besides, after numerous orders were given, Mamm was finally told what the consequences of his failure to follow them would entail.

2) The expectation that Mamm would not be insubordinate and would follow the rules that day was not unreasonable, and as has already been proven, these behaviors did impact efficient and safe operations, regardless of how much time they required. In addition, given the circumstances, it was not unreasonable to expect Mamm to take care of the personal business of filing a police complaint after normal business hours. 3-5)

Taken in total, the Company made all of the effort necessary to discover whether Mamm violated or disobeyed a rule or order of management and conducted the investigation required to do so. If an employee violates a rule and is insubordinate, we maintain that it is not necessary to uncover every stone to determine the employee's intentions or personal motivations for doing so. Section 5.01 provides the Company with the "sole and exclusive rights and authority to direct the working force". No additional investigation

was necessary to determine that Mamm's actions were dismissible. 6) There has been no evidence presented by the Union that the Company has not applied its rules, orders, and penalties even-handedly and without discrimination to all employees. We agree that the yard is not a perfectly organized place. As already noted, that is why following orders and remaining in trucks is so important. However, Mamm's conduct on the day in question was hardly a normal part of the occasional misunderstandings and trucks getting out of order that may occur from time to time so we do not believe it is fair to compare his actions and the subsequent action taken by the Company to these other situations.

7) We maintain that the degree of discipline was related to the seriousness of the offense and justified as well by Mamm's previous work history. The need for efficiency and order in the yard has already been noted and the amount of time and disruption involved in this instance are, in our opinion, immaterial. Also, we have taken into consideration the fact that Mamm's disciplinary record already included a written warning and a three day suspension for tardiness accompanied by a warning that another occurrence will result in discharge. We believe this should be taken into account as evidence that Mamm has a history of not following Company business practices and rules, and while he was not specifically in violation of the rule on tardiness in this instance, his actions had the same effect.

Taken as whole, we believe there was ample evidence of just cause for the dismissal and maintain that it should be upheld.

BATNA Analysis CAN WE WIN (At arbitration) ?

Union

Our case will hinge on our ability to prove several key issues. First, that Mamm was not insubordinate nor refusing a work assignment but was merely trying to comply with Bradley's directions while dealing with very difficult circumstances, and that Mamm was merely following the rule regarding releasing employees from work when he left work that day. We will also need to prove that Mamm's actions that day did not violate any other Company business practices besides the work release rule. Finally, so as to not put all of our eggs in one basket, we will need to prove that even if Mamm was being insubordinate, the Company did not follow accepted practices for disciplining for just cause.

I believe we argue from a very strong position in maintaining that Mamm was not insubordinate. If we consider what either party could have done in order to make their case airtight in this matter, I believe that the Union's position is stronger. Let's first examine what Bradley could have done to make insubordination an open and shut case. If he had stated to Mamm on any one of the alleged eight times he gave Mamm an order that failing to follow the order in a specified time would be considered insubordination and result in discipline, we would have little standing to argue on the issue of insubordination and quite possibly, on the refusal to perform a work assignment. (It should be noted that the two, insubordination and refusing a work assignment, in this case are essentially one and the same. The only distinction that can be made between the two is that refusing a work assignment suggests an outright refusal to do something whereas in the area of insubordination, an argument can and has been made that failure to perform

the assignment in a timely manner constitutes insubordination.) However, in either case, as we all know, Bradley never gave any of his orders in that way, and the only one that was close, the last one, we have argued could be interpreted as releasing Mamm from work. At the very least it can be argued that Mamm knew he was suspended and under no obligation to attend the investigatory meeting on his own time. On the other hand, our case against insubordination and refusing a work assignment would only be stronger if Mamm had not had any reaction to the events that day. In other words, the only way our argument against insubordination could be any stronger is if Mamm had stayed in the truck, got rinsed and loaded, delivered the load and then at the end of the day, reported the incident (i.e., the obscene and threatening gestures and remarks made by Fenneman) to management and notified the police. In that scenario it's hard to imagine that any discipline would have been administered at all, so the argument that it would make our case stronger is a moot point. However, I think that any reasonable person would realize that under the circumstances, that would have been a very unusual reaction and one that could have been detrimental to Mamm's safety and security. Therefore, I believe our strongest argument is that there were very significant mitigating circumstances that day that influenced Mamm's behavior and resulted in his having difficulty immediately reacting to Bradley's directions, but that a simple delay in completing a task as ordered does not rise to the level of insubordination and Mamm never refused a work assignment. A risk of arguing that Mamm was delaying in completing a task is that it can tend to establish a stronger nexus between the events of this day and Mamm's previous offenses for tardiness, a nexus the union should try to avoid at all costs.

Our argument regarding Mamm's interpretation of Bradley's directive to him to go home as releasing him from work also has merit though it is not as strong. In order to persuade an arbitrator of that position, we first need to convince him that Bradley was in a position to release Mamm from work. If he was not, we still have a chance to win if we can prove that Mamm thought that Bradley could release him from work by nature of his position in the Company, whether that was the intent of the rule or not. That position will hinge on how well the rule had been communicated to employees and past practices. If releasing employees from work has never been that big a deal and primarily involved the dispatcher contacting someone before they go home to ask if they want to work rather than a formal process of telling everyone they can go home, then our argument that Bradley, rather than a dispatcher, could release Mamm might be more persuasive. Also, winning this argument would depend on how common it was to send employees home at mid-day rather than at the end of their workday. If it was a common practice, then our argument would be stronger. However, if it was not, then a reasonable person would likely conclude that Mamm should have realized that, when Bradley told him if he was not going to load his truck he should go home, he was not being released from work but instead was being given notice that failure to load his truck was an order and that failing to follow that order would result in suspension. Obviously this argument depends a great deal on the arbitrator's decision on the insubordination issue. All things considered, I believe we are slightly more likely to win this argument than lose it, though again it would hinge on past practices and a judgment of Mamm's state of mind when he made the decision to go home. If nothing else we have the fallback position of arguing that at

the point Bradley told Mamm that he “need[ed] to go home” he was essentially suspended and therefore not obligated to go to the office on his own time.

Including the allegation that Mamm did not follow Company business practices was, in this writer’s opinion, simply piling on. The Company does not cite any specific business practices that Mamm did not follow other than the work release rule which was specifically mentioned. We can show this has no merit in the dismissal by proving in the previous argument that Mamm did follow the specified business practice of the work release rule and point out that there is no other business practices cited in the dismissal.

Finally, to prove the dismissal was without just cause, we have to show that the Company did not follow the majority of the tests for just cause. Our arguments that Mamm was not given prior notice will mirror those we make to prove Mamm was not insubordinate or violating the work release rule so the outcome may depend on the strength of those arguments in this aspect as well. However, we should be able to prevail in making our point because Bradley was so unclear about what he wanted done, the time he wanted it done in and the consequences of failing to do so. In order to prevail in the argument that the second test, i.e., the order was reasonably related to safe and efficient operation, was not followed, we will need to prove that the amount of time that transpired, 45 minutes, was not a significant amount of time and that under the circumstances, it was unreasonable for the Company to expect Mamm not to take the actions he did. The third, fourth and fifth tests, basically addressing the investigation, will be proven by first asserting that for all intents and purposes, there was not an investigation, and secondly, showing that had there been one, the outcome might have been different. Since there is no dispute that there was no significant investigation other

than an internal management one, a persuasive argument needs to be made that there should have been a broader one. The fact that there were so many extenuating circumstances that day that Bradley made no effort to learn about and even after the decision was made to turn the suspension to dismissal no further investigation was conducted to determine what Fenneman said to Mamm and how that may have influenced his behavior, is a very compelling one in the Union's favor. This argument is tied to whether Mamm was insubordinate or not. If the union's argument that he was not insubordinate does not carry water and they are left to argue that while he was insubordinate, he had reasons to do so based on mitigating circumstances, then the level of investigation conducted will be an issue. If an arbitrator determines that the employee was insubordinate but is considering mitigating circumstances and their relationship to just cause, he'd likely find the investigation insufficient. The sixth test, whether enforcement has been consistent in the past is worth stating but probably does not have a lot of merit absent proof that, in similar circumstances, the Company had reacted differently. There being no evidence to prove it, this will probably not be given much weight. Finally, proving that Mamm's discipline was not related to the seriousness of the offense will be similar to the argument for the second test, i.e., that the disruption in loading was minimal. We will have to prove that it in fact was minimal and Mamm's delay in loading was not a serious offense and that it was understandable given the circumstances. The Company will probably argue that loading disruptions in the yard are a serious problem and that Mamm's reaction to the threats was excessive. Given the strong management rights language in 5.01 and 16.01, this is probably not a very compelling argument for the Union. Likewise, had Mamm had a "clean" record over the

last three years, it would be much easier to argue that the discipline was not related to his past record. Management has argued that he is an employee prone to not follow management's rules and while it is difficult to discount that allegation given the progressive discipline already administered, this could create a very troubling precedent for the union. In order to win this argument, and it is worth fighting for, the union needs to prove that the contract does not provide for, and the language in the earlier suspension letter was not intended to apply to, linking insubordination or any other violation with the prior tardiness.

As already stated, I think we have a very strong argument on the issue of insubordination, refusal to perform a work assignment and failure to follow the work release rule and Company business practices. I think we are most likely to prevail in those arguments. If, however, the arbitrator would find the Company's arguments compelling on the specific issues cited and we are left to argue that the Company did not follow accepted practices for just cause, most of the seven "tests" are not that strong and we may be less likely to prevail.

Company

In order to win this case at arbitration, management will have to prove that Mamm was knowingly insubordinate and refusing to perform a work assignment on the day in question. This is the central issue in the case and the Union is arguing that Mamm was not insubordinate and never refused an assignment. Secondly, management has to prove that Mamm was aware that Bradley was not releasing him according to the work release rule in question but rather was using it as a convenient way to avoid suspension and subsequent dismissal. Management will need to prove some other secondary issues,

such as making a compelling argument that the so-called “threats” to Mamm by Fenneman that day were not that serious and that all of these matters could have been handled in another way less disruptive to the work operation. Also, the Company will have to show that the resulting delays in the plant operation that day were sufficiently disruptive to counter the Union’s argument that this was an insignificant issue. However, the central question, and the one that wins or loses this arbitration is whether Mamm was insubordinate and refusing work or not. There will be no issue of whether insubordination is a dismissible action or not because of the clarity of the language in 5.03. Evidence that the Union has no stomach for the argument that it (insubordination) is not a dismissible action is demonstrated by the absence of any mention of it in their prior arguments. Also, the very strong management rights language in 5.01 and 16.01 make it very clear that the right of the Company to direct the workforce and the prohibition against the Union interfering with the operation of the Company are not in dispute.

Unfortunately, Bradley’s actions on the day in question, while understandable given his frustration, do not make for a very persuasive case against the Union’s denial of insubordination. According to a checklist prepared by the AAA Department of Education and Training, to constitute insubordination, a directive has to be given, it must be related to safe and efficient operations and be clear, the employee must understand it, be warned of the consequences of disobeying it and knowingly and intentionally do so. While Bradley gave several directives that were related to the safe and efficient operation of the plant, he was certainly not as clear as he should have been and it is not clear that Mamm understood the directive, or at least understood the need to complete it without

delay. Also, until the very end of the exchanges between Mamm and Bradley, Mamm was never informed of the consequences of disobeying and considering the heat of the circumstances, the Union has found a persuasive argument that the grievant did not knowingly or intentionally disobey the directive. In light of these issues, and the fact that in a dismissal case like this the Company bears the burden of proof, I do not think that management has proven insubordination and the corollary allegation of refusing to perform a work assignment. However, assuming the case were to go to arbitration, there is a case to be made for some disciplinary action, though the dismissal would probably not prevail. In that event and assuming there is consideration given to the other elements of the grievance, i.e., the failure to follow the work release rule and failure to follow Company business practices, the company would have to prove that when Mamm left the plant, he was not doing so in accordance with the work release rule. Based on past practices, the Union's argument that Bradley was releasing Mamm from work in the middle of a busy day is weak and probably wouldn't carry much weight from an arbitrator. In order to prove that Mamm failed to follow Company business practices, the Company needs to specify the business practices it is referring to and prove that they had not been followed. Other than the work release rule, no other business practices or rules have been cited and the allegation is a very broad one, taking into account Mamm's behavior that day. I don't think the reasons stated in management's theory of the case presents a particularly compelling counter argument to the Union's allegation that this was an "add-on" and not based on violations of specific business practices or rules. Therefore I don't think an arbitrator will give it much credence.

Finally, if the question of the discipline comes down to the merits of just cause, I believe the Company has to prove that they followed, for the most part, the generally accepted tests for just cause. I don't believe they must prove they satisfied all of them to the nth degree, but rather show that their intent was to, and for the most part they did, have just cause. One argument that could have been made in the theory of the case (and it is interesting to note was not) was that the Company did not need just cause to dismiss, given the language in Section 5.03. However, I don't think that would have been a winning argument and was most likely why the Company did not make it. The Union probably would have countered that the "illustrations" given were for the purposes of defining the gravity of allegations that would rise to the level of just cause rather than providing the Company with a carte blanche reason to dismiss for their occurrences absent any other evidence of just cause. In my opinion, the weakest link in the chain of proving just cause is whether the employee was warned of the consequences of his conduct. As already noted, this was undoubtedly not as clear as it should have been. However, given that this analysis is being prepared based on the assumption that the arbitrator has given some merits to the Company's position that Mamm was insubordinate and refusing work assignments and not thrown out the company's arguments entirely, it is safe to assume that the arbitrator would give some merit to the argument that Mamm should have known, if nothing else after the last directive, the consequences of his conduct. To prove that the directive was related to safe and efficient operations, the Company has to show that delays and failure to rinse and load trucks quickly will seriously disrupt the plant operations. Given the nature of construction projects and the fact that mixing loading, delivering and pouring concrete is a dynamic

process and it cannot just sit for periods of time without setting up, it shouldn't be hard to convince an arbitrator that delays have that effect. The fact that there was not an investigation sufficient to satisfy the grievant does not mean that it was not sufficient to satisfy just cause. The Company will need to prove that there was nothing else that needed to be known other than the fact the grievant was insubordinate and refusing to load his truck with concrete and that his reasons for doing so are not an issue. In retrospect, after learning the facts of the case, a compelling argument has been made in the management theory of the case that Mamm did not have sufficient reasons for failing to follow Bradley's orders. However, there could have been other, very serious issues involved, such as had Fenneman had a gun and threatened to shoot Mamm, or if it was learned that Sergeant Friday had ordered Mamm to remain in the car under threat of impeding an investigation. Absent a full investigation, the company had no knowledge of what transpired outside their presence. For this reason, an arbitrator may question why the company did not conduct a more investigation than they did before administering discipline. As far as even-handedly applying rules, the Company only has to disprove any specific allegations that they have had similar circumstances in which disparate discipline was administered. Other than a general assertion that there is disorganization and disputes among drivers in the yard, the Union has made no specific allegations and the Company satisfies this test. Finally, with the demonstration by the Company of the serious safety and operational problems presented by behavior like Mamm's that day, the Company has argued that it warranted discipline, and considering Mamm's past record, discipline beyond three days. However, it is my opinion that while an arbitrator would concur that discipline was appropriate, he would likely consider the dismissal

administered to be too severe given the circumstances. Also, the linkage that the Company is making in regards to these violations and the prior tardiness which resulted in discipline certainly has the union concerned. If the case goes to arbitration, the odds are that an arbitrator would not permit the two to be linked due to the very specific language in the first suspension letter.

In light of all of the above, I believe the best outcome the Company can expect in arbitration is returning the employee to work with some level of suspension short of dismissal and back pay.

BATNA Tactics: Can the Other Party's BATNA Be Changed?

Union

The union can take advantage of the law and order issue and publicize their case in ads, signs, etc., making the point that one of their members was fired for exercising his constitutional rights. An attempt should be made to enlist the aid of unionized law enforcement officers, perhaps getting them to be included in the publicity campaign.

Since both Mamm and Fennemen are brothers with the Teamster Local No. 714 they might be able to “kiss and make up” and present a united front against the company in this case.

The union could toss some not-too subtle hints that the police may not be quite as quick to respond when the company calls if they feel management is showing an anti-union and anti-law enforcement sentiment in their continued insistence on dismissal of one of their union brothers for filing a police complaint.

The union could offer to settle for a suspension short of dismissal if the company agreed not to link the events in this incident to Mamm's prior discipline for tardiness.

Company

The company could take out advertisements in the newspaper pointing out the importance of speedy and efficient delivery of concrete for road and bridge construction projects. They could attempt to show how delay tactics and the type of inefficient work practices demonstrated by Mamm can affect timely completion of projects.

The company could offer to make conflict resolution available to all employees so that they know how to react to disputes in the yard.

They could also make a donation to the Police Benevolent Society and offer free coffee and donuts to on-duty police to get on the good side of law enforcement.

The company could offer to not link Mamm's actions in this incident to his prior discipline and offer to consider language in the next contract to make it clear how progressive will be administered.

Identifying and Articulating Interests

Union

The union has an interest in ensuring that its members are not disciplined without just cause. Also, the company is arguing that Mamm's past record of a three day suspension for tardiness can be used as evidence that progressive discipline should dictate a greater degree of discipline for his actions that day in the yard. Since the language in the prior suspension for tardiness stated another "occurrence" will result in discharge, the union has a strong interest in preventing the company from making that linkage.

It also has an interest in its members having the means to resolve disputes as occurred in this instance without exposing themselves to harm and without running afoul of company rules and business practices. The union also has an interest in making the

work release rule clearer for its members so that there will be no misunderstandings in the future regarding when an employee is released from work.

Finally, obviously the union has an interest in not losing this case in arbitration. Besides the monetary cost, it would cause great harm to the union's reputation if they could not get a dismissal reversed or at least modified to a suspension considering the events that took place that day. Even though the relief sought by the union in the grievance was for reinstatement with full back pay and no loss of seniority, the union has an interest in settling the case to avoid arbitration and the uncertainty it brings.

Company

The company has an interest in maintaining order in the yard. In order to do so, it's dispatchers and supervisors must have the authority to direct the working force. If the company were to settle the case too lightly, it would undercut the authority of supervisors and dispatchers. On the other hand, losing the case in arbitration would have a similar effect, though the company could claim that they fought for their dispatchers and supervisors. Also, the company has an interest in protecting the reputation of its owner, Bradley. If they gave away too much in a settlement or lost the arbitration, it would tarnish the reputation of the company.

For these reasons, the company needs to consider very seriously whether it is in their best interests to take this case to arbitration.

Shared Interests: Opportunities for Mutual Gain

Both parties share a common interest in having an organized system for rinsing and loading trucks. The company will have a more efficient and productive business and employees will have a safer and less stressful work environment. Employees that are

paid based on the mile or load driven will make more money as well. Both parties could explore improvements in the rinsing, loading and delivery process. Examples could include some type of traffic signaling devices or channelizing devices to better direct traffic.

Both parties would benefit from improved communication and conflict resolution skills, both sorely needed in this instance. Perhaps they could work together to schedule seminars and workshops for labor and management to improve these skills. Universal Trucking should contact Century City and any other HardRock companies to join in this effort and Teamsters Local No. 714 should include all of their bargaining unit employees in the sessions.

Both parties also have a shared interest in having a positive public image. The public often takes a dim view of road and bridge construction workers and hates the delays and traffic jams resulting from road and bridge closures. If the two parties can work together to improve operations and minimize delays both realize a benefit. Finally, both parties have a common interest in the reputation of Universal Trucking. If it is seen as having bad labor/management relations and the owner of the company comes out of the process in a bad light it could affect their ability to secure contracts.

Both parties have an interest in retaining employees. Obviously, the union has an interest in protecting their members and the company has a significant investment in an employee with the amount of time and experience with the company that Mamm had.

Specifying Prospective Acceptable Settlements

Union

The union should attempt to settle this case prior to arbitration, however, they cannot settle at any cost. Even though the union has a very strong case, if it were to go to arbitration and they were to lose on the basis of the allegations stated in the grievance it would be bad enough, but if the company should prevail in making the argument that Mamm's previous discipline for tardiness and the language that another occurrence will lead to discharge should be linked to his behavior in this case, they would be in a very weak position in future disciplinary cases. Losing at arbitration would also not advance the union's interest in having a means to resolve differences and conflicts among drivers and would weaken the union's strength among its members.

Given the circumstances in toto, including the importance of the company standing behind their owner, it is unlikely that they would settle for anything less than a suspension of some duration. On the other hand, any settlement that was greater than three days suspension would weaken the union and wouldn't be much better than losing at arbitration, particularly if it is considered as progressive discipline based on the prior suspension. In order to make sure there is no nexus to the earlier discipline for tardiness, it is important that the union hold out and make their bottom line for a negotiated settlement no more than a three day suspension unless the company would agree to language removing reference to any progressivity in discipline, in which the union would settle for as much as five days.

Company

Unless the only option available to the company is one with little or no suspension involved, they should not take this case to arbitration. The chances of losing are too likely and reinstatement with full back pay would be a significant setback. On the other hand, if they cannot get the union to agree to any suspension, or if so no more than a day or two, they have to take it to arbitration in order to stand up for their dispatchers, supervisors and company owner. Therefore, the company should fight very hard for a settlement that includes a five day suspension, knowing the union will probably take no more than three days. To sweeten the pot, I would agree to separate this incident from the prior suspension if necessary, but would agree to no less than three days under those terms.