

For the Union;

Katrina Joseph,, General Counsel

III. FACTS AND BACKGROUND

Grievant was employed in the Employer's Public Works Department for approximately 25 years. He began working in the Street Maintenance Division and then worked for 21 years in the Sewer Maintenance Division. In 2012 he returned to Street Maintenance as a Street Services Worker.² As part of his duties as a Street Services Worker, Grievant is responsible for driving trucks hauling various materials and operating a snow plow and sander.³ Grievant has a commercial driver's license, (CDL) and has operated the snow plow for at least 24 snow seasons.⁴

In August 2014 Grievant was disciplined for three instances of misconduct.⁵ At that time the Director of Public Works considered termination of the Grievant for the misconduct. *Id.* Two of those instances involved Grievant's operation of a Employer vehicle. One instance had occurred in August, where the Grievant pulled out in front of a motorcyclist and entered into a verbal altercation where he called the motorcyclist an "ass-clown." The other instance involved an accident where Grievant struck a deer and the Department's Collision Review Board found that May 2014 collision was preventable. *Id.* The collision with the deer was Grievant's fifth preventable collision within the preceding three years.⁶ No other driver had as many preventable collisions over that period of time. *Id.* The matter was grieved. The Union, on behalf of Grievant met with the Public Works Director and entered into a settlement of the grievance which included a Last Chance Agreement (hereinafter "LCA").⁷ That Agreement provided that for a period of one year from the date of the letter, if Grievant engaged in any behavior which rose to the level of discipline, Grievant would be terminated.⁸

The settlement letter also provided that Grievant was to attend MN DOT driver safety training course known as SPOT, (Snow Plow Operator Training) over a period of two weeks held at Camp Ripley Minnesota. This was not Grievant's only training in the safe operation of Employer vehicles including snow plow. Recently Grievant attended courses at Dakota County and was required to

²*Testimony of Grievant, Employer Exhibit 3c.*

³*Employer Exhibit 3b.*

⁴*Testimony of Grievant and John Maczko.*

⁵*Employer Exhibit 5c, Testimony of Maczko.*

⁶ *Employer Exhibit 5d.*

⁷*Testimony of Maczko and Employer Exhibit 5a*

⁸ *Employer Exhibit 5a.*

complete courses in distracted driving. ⁹

Grievant attended SPOT training while on paid status and the Employer paid for the course. ¹⁰ The SPOT course is one of the best driver training courses in the state. ¹¹ At the SPOT training Grievant's performance was recorded. Grievant was unable, on several occasions, to maneuver the truck through the ROADEO Course without hitting obstacles set up as part of the training, and demonstrated a lack of awareness of his surroundings. ¹² According to Trainer Peterson, Grievant seemed "to not want to be there" and showed no improvement from the first day of instruction to the last. ¹³

Employer Accident Review Policy (Policy) ¹⁴. In addition to the terms and conditions of the CBA, the Employer has adopted various rules and policies. Specifically applicable here, the Employer has adopted an Accident Review Policy. First promulgated in July 1980, the Policy was revised in August 1989, and has remained unchanged since that time. The stated purpose of the Policy is to "reduce the frequency and severity of vehicular accidents in the Public Works Department... ." (Id.) The Policy requires that an Accident Review Board (Board) meet at least monthly and review all traffic accidents involving Public Works vehicles to "determine whether the accident was preventable or non-preventable and to also determine whether the accident was chargeable or non-chargeable." (Id.) If the Board decides that an accident was non-preventable, "no action will be taken." (Id.) If the Board decides that an accident was preventable, it recommends certain action as described in the Policy. (Id.)

The Policy, in two places, provides an appeal right to affected employees: 1) in Section VIII.4, the Policy provides that "the involved employee will be advised that he/she may appear before the board if he/she disagrees with their decision and desires to appear before the board at their next regular meeting"; and 2) in the concluding paragraph, states, "if an employee wishes to appeal the decision of the board, he/she has the right to appear before the board." (Id.)

IV. TESTIMONY SUMMONIES

On January 7, 2015, Grievant was involved in sanding operations. As Grievant's lunch break was approaching, he called his supervisor and asked if he could sand the Sewer Maintenance parking

*9*Testimony of Grievant, Maczko, and Employer Exhibits 10a-10g and 11a-11d.

*10*Testimony of Maczko.

*11*Testimony of Maczko.

*12*Testimony of MN DOT Trainer Renee Peterson and Employer Exhibit 10g, MNDOT Student Notes

*13*Testimony of Renee Peterson.

14 ER. Exhibit 12b.

lot.¹⁵ After receiving permission, Grievant sanded the lot at “blast rate” which was recorded disbursing salt at a rate of 1,000 pounds per lane mile.¹⁶ A typical distribution rate is 300-500 pounds per lane mile.¹⁷ Grievant claims that because of his experience working in sewer maintenance he had knowledge of where the slippery spots were located and was salting heavily to relieve the icy conditions. Grievant acknowledged that employees vehicles could have been hit with the salt.¹⁸The Employer investigated this incident and determined Grievant’s application of salt was excessive for the conditions.

Before the investigation of the January 7th incident was complete, Grievant was involved in several collisions on Selby Avenue on February 4, 2015. On the day of the incident Grievant was assigned Truck 547 which was a tandem truck with an attached wing plow on the right side of the vehicle.¹⁹ Grievant was not performing plowing operations rather his assignment was a sanding operation. Grievant conducted his pre-trip inspection and noted no defects.²⁰ He asked his supervisor to help him chain the wing plow up more tightly.²¹ He did not see a need check the wing plow again until he took his break at 9:30 am. and at that time he noted no changes. *Id.* At approximately 10:15 am. Grievant was operating the truck, driving down Selby Avenue. He stated he heard a “strange noise” and observed through his rear view mirror the side mirror from a car spinning in the snow.²² He stopped the truck and got out. A passing motorist then told him he had knocked a few mirrors off vehicles along Selby, west of Western Avenue. *Id.* Grievant walked around the truck and noticed the wing plow had fallen away from its chained position. It was not until that point that Grievant realized the chain system had broken and he did not know how far the plow had fallen.²³ Grievant then called his supervisor to report the collisions.²⁴

When Joe Spah, Manager for Street Maintenance, heard that the Grievant had been involved in

¹⁵*Testimony of Walters.*

¹⁶*Employer Exhibit 8dd*

¹⁷*Testimony of Joe Spah.*

¹⁸ *Employer Exhibit 4d.*

¹⁹*Testimony of Walters, Maczko and Spah.*

²⁰*Employer Exhibit 9g.*

²¹ *Testimony of Walters.*

²²*Employer Exhibit 12e.*

²³ *Employer Exhibit 12a.*

²⁴*Testimony of Walters.*

the collisions he responded to the scene.²⁵ He was briefed by on site supervisors that there were several vehicles involved in the collision. Mr. Spah directed that photos be taken of the involved vehicles. At the hearing the Employer presented those photos which show damage to four vehicles: 1) Chrysler Town and Country Van, Ram license number 751 MCZ with damage to the left side mirror,²⁶ 2) Dodge Ram pickup truck with damage to the left side mirror,²⁷ Toyota RAV4 license number 531 KTP with damage to the left side mirror,²⁸ and 4) Jeep Grand Cherokee, license number 767 MNA with severe damage to the left side of the vehicle,²⁹ Public Works employee Jeff Schichel also received a report from a woman that a 5th vehicle was involved, a red SUV, and Grievant has struck the bumper.³⁰ Vehicles 1-3 were located near the intersection of Selby and Western and the fourth vehicle, (Jeep) was located 3 blocks away at Selby and Kent.³¹

Photos were taken of the vehicle, the Jeep Grand Cherokee, that was most severely damaged. The photos demonstrate that the plow struck the vehicle at 48 inches off the ground.³² It appeared that the plow scraped along the vehicle at an upwards angle, causing dents and scratches, breaking a side window, knocking off the side mirror, and causing a crack to the windshield prior to passing off at approximately 54 inches.³³ Black paint scrapings from the Jeep were observed on the wing plow. *Employer*³⁴. From this evidence, Mr. Spah concluded that the wing had drifted from the stowed position and involved corner of the wing plow impacted the Jeep when it was 48 inches from the ground.³⁵ Mr. Spah also observed that the clip attaching the chain to the plow had broken.³⁶

In the interview following the collisions, Grievant only provided a statement regarding the impact of the plow with the Jeep. He acknowledged he hit the Jeep on the left side with the wing plow.

²⁵*Testimony of Spah.*

²⁶*Exhibit 8b, 8c,*

²⁷ *Employer Exhibit 8d, 3)*

²⁸*Employer Exhibits 8e-8g,*

²⁹*Employer Exhibits 8h-8m.*

³⁰*Employer Exhibit 12f.*

³¹*Employer Exhibit 8a.*

³²*Employer Exhibit 8h*

³³*Employer Exhibits 8n-8p*

³⁴*Exhibits 8p, 8q*

³⁵It is noted that Grievant was not conducting plowing operations at the time of these collisions. This is consistent with the pictorial evidence. When the upper corner of the wing plow is placed and measured at 48 inches from the ground, the lower edge of the plow remains above the pavement by approximately 26 inches. *Employer Exhibit 8r.*

³⁶*Testimony of Spah.*

He told Tom Bosman that he could not recall how far down the wing plow was positioned when he hit the Jeep.³⁷ In his written explanation he claims he heard a noise and looked back to see a mirror spinning in the street.³⁸ In his testimony at the arbitration hearing he acknowledged that he wasn't paying attention to the position of the wing plow.

Following the completion of the investigation pursuant to the Department policy, the incidents were presented to the Collision Review Board. The board was made aware that the clip on the chain had broken.³⁹ The discussion at the meeting related to the board members feelings that the driver of the plow did not maintain a reasonable look out for the position of the plow and maintain adequate distance between the plow and the parked vehicles. Due to the fact that the collisions occurred over the distance of several blocks, the board felt the responsibility for the collisions fell to the driver of the plow. *Id.*

Acting Director for the Department received notice that the Collision Review Board found the collisions to be preventable. Ms. Homans reviewed the circumstances of the accident with Mr. Spah, Mr. Maczko and Courtney Anderson Ewald. She looked for possible mitigating factors and asked whether or not there may be evidence of bias. She looked at the terms of the LCA and determined that termination may be appropriate.⁴⁰ Grievant was notified by letter dated February 24, 2015 that the Department Director was contemplating termination. He was invited to offer his appeal and input prior to the final decision.⁴¹ Grievant provided his input via written statement which was read aloud by his union representative.⁴² Following that meeting, Ms. Homans made her final decision and issued the notice of termination.⁴³

The Union, on behalf of Grievant grieved the matter.

V. UNION POSITION

The Union has asserted that the Grievant did not violate the LCA. Grievant did not over salt the parking lot causing salt to coat an employee's vehicle; rather the rate that salt was applied was result of having a small amount of salt in the box. With regard to the collisions, the Grievant performed safety checks and observed no problems with the snow plow. Although the Grievant hit several parked

³⁷*Employer Exhibit 12a.*

³⁸*Employer Exhibit 12e*

³⁹*Testimony of Blakely, Bosman.*

⁴⁰*Testimony of Homans.*

⁴¹*Employer Exhibit 4b.*

⁴² *Testimony of Maczko and Homans.*

⁴³*Testimony of Homans, Employer Exhibit 4a.*

vehicles, due to the size and ride of a snow plow, striking the side mirrors off parked vehicles would go unnoticed by the driver. Although Grievant was operating the plow in a responsible manner, it was not until he struck the final vehicle did he notice he had struck vehicles. After getting out of the plow the Grievant noticed that his wing plow was no longer chained, but had sagged away from the stowed position. This failure of the chain relieves Grievant from responsibility. Finally the Union asserts that the grievance should be sustained because the Grievant was not provided with an opportunity to appear before the collision review board to appeal of their determination.

VI. EMPLOYER POSITION

The Employer maintains that the Grievant violated the LCA. On January 7, 2015, Grievant applied an excessive amount of salt to the sewer maintenance parking lot resulting in salt coating employees' vehicles and a complaint. Additionally, on February 4, 2015, Grievant, while driving a Employer snow plow, collided with at least four vehicles over a distance of three and one-half blocks resulting in damage to those vehicles. The Grievant failed to maintain an adequate distance between the plow and the parked vehicles thereby failing to operate the plow in a reasonable and safe manner. The Employer conducted full and fair investigations establishing the misconduct. Those collisions were reviewed by a board made up of the Grievant's peers and was deemed preventable by the Collision Review Board. Grievant was given a fair opportunity to appeal to the department director. Because of these two instances of misconduct the Employer asserts the Grievant violated the LCA and the termination is appropriate.

VII. EMPLOYER ARGUMENTS

1. The Employer argues that the Grievant violated the Last Chance Agreement. In September 2014, the Union and the Employer entered into a "Last Chance" Agreement as part of a settlement of a prior disciplinary grievance. That agreement stated:

"The Employer will return Mr. Walters to work with the understanding that he is in a last chance agreement. Specifically, for one year from the date of this letter, if Mr. Walters violates any union contract provisions, civil service rules, Employer or Department policies, which rise to the level of discipline, including discipline resulting from the collision review process, his employment with the Employer of Saint Paul will be terminated."

Employer Exhibit 5a.

Also, while in a usual discipline and discharge case, the arbitral determination of just cause involves two steps,⁴⁴ here the second step, determining the remedial issues, is removed from arbitral

⁴⁴The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether

authority by operation of the LCA.

Employer argues, here the Union has made three separate challenges to the LCA. First, the Union contends that Grievant's conduct cannot be a violation of the agreement because a) minor collisions such as striking side mirrors off parked cars are unnoticeable by drivers and, b) even though Grievant was exercising due care in the operation of the truck, when the plow became unchained causing it to fall away from the vehicle he could not have avoided the collisions. Second, the Union contends that there were procedural irregularities in the collision review process denying him his full opportunity to be heard in this matter. Finally, with regard to the excessive salting of the sewer parking lot, the Union maintains that the Grievant was exercising due care and any over salting, or the coating of another employee's vehicle with salt was due to the fact that the box was nearly empty. Each of these challenges lack merit. The Employer has established that the Grievant was responsible for the preventable collisions and Grievant was granted a full opportunity to be heard in this matter. The Employer has also established that the salt was spread at an excessive rate and the Grievant failed to exercise due care in this salting operation.

2. The Employer also argues that the Grievant Was Responsible For The Preventable Collisions. It is undisputed that the Grievant had worked for the Department of Public Works for at least 24 snow seasons operating snow plows. It is undisputed that Grievant, as a professional driver, was adequately trained in the operation of the vehicle he was driving. It is undisputed on February 4, 2015, Grievant struck at least four legally parked vehicles within three and one-half Employer blocks with the wing plow. It is undisputed the Grievant was the person responsible for the safe operation of the snow plow at the time of the collisions.

The Employer argues, although, Grievant was not operating his regularly assigned truck on the day of the collisions, the drivers are not guaranteed certain trucks and are expected to be able to safely operate all trucks within the fleet. *Testimony of Spah, Maczko and Grievant*. When Grievant was assigned Truck 547 he conducted his pre-trip inspection and noted no defects. *Employer Exhibit 9g*. Prior to beginning work he asked his supervisor to help him chain the wing plow up more tightly. *Testimony of Walters*. Grievant then felt his could ignore the wing plow and according to Grievant's own statement, "I should have no reason to check it any further for the day. It was safely stowed away and chained against the truck." *Employer Exhibit 4d, Testimony of Walters*. However, Grievant does not dispute the testimony of Witness Karl Blakely who stated that these chains often break (on all plows), and as a matter of fact, the chains on Truck 547 had broken on January 3, 2015 and January 28, 2015 and had been repaired . *Testimony of Blakely, Employer Exhibits 9c, 9d, 9e and 9f*. It is undisputed that even if the chain breaks,

the level of discipline imposed is appropriate in the light of all relevant circumstances. See, Elkouri & Elkouri, HOW ARBITRATION WORKS, 948 (6th ed. 2003).

the driver bears the responsibility to continually safely operate the truck.

Employer argues when the chain broke, the wing plow did not immediately and catastrophically fall away from the side of the truck. Clearly any drift in the wing plow from the side of the truck happened over a longer period of time.⁴⁵ The plow system was under hydraulic pressure. *Testimony of Spah*. On the day following the collisions, Spah, along with a qualified driver, took the truck out to the scene and drove the same route driven by the Grievant without adjusting the plow from the upright position. *Testimony of Spah*. At the scene of the final collision, Mr. Spah got out of the truck and observed negligible movement of the wing plow away from the side of the truck. *Testimony of Spah*. He repeated the process again, instructing the driver to not adjust the wing plow from its position after the first run with the same results. *Id.* This led Spah to conclude there was not a catastrophic failure of the plow. *Id.* Further evidence of the fact that there wasn't a catastrophic event causing the plow to immediately fall away from the truck is found by the lack of testimony from the Grievant of any substantial movement of the truck itself either before or at the time of the collisions. Rather, he reported minimal movement of the truck, stating he felt the truck "rock a little" at the time of the final collision. *Testimony of Walters*. This reported rocking was probably as a result of the significant impact of the wing plow against the vehicle involved in the final collision. The wing plow weighs thousands of pounds. *Testimony of Blakely*. If there was a catastrophic failure of the hydraulic system would have caused more than a little rocking in the truck at the time of the collisions.⁴⁶

Employer argues that it is undisputed the collisions occurred because Grievant did not maintain an adequate distance between the truck and the legally parked cars. As a professional driver, Grievant was well aware of his responsibility to maintain a safe distance from other vehicles. Grievant was trained in maintaining appropriate space management, defensive driving and his responsibility to conduct 360 degree checks. Employer Exhibits 10e, 10f, 11a and *Testimony of Renee Peterson, Joe Spah*. A 360 degree check is not the pre-trip inspection but rather is performed from the driver's seat of the vehicle by visually observing that there are adequate the distances between the truck and all other objects. *Testimony of Maczko*. During the investigation Mr. Spah contacted MNDOT and was told the

⁴⁵The alternate explanation for the movement of the plow to the point where it was located at the time of the last collision is that Grievant, either intentionally or with an absent mind operated the joystick, breaking the chain system and lowering the plow to that position. Indeed, Witness Karl Blakely testified that in his experience the most common cause for chain breakage is the driver operating the joystick overriding the chain with the hydraulic system. *Testimony of Karl Blakely*.

⁴⁶At the hearing there was testimony regarding some leaking of the hydraulic bleed valve on this system. The defect was noticed when the truck was not running and there was no pressure on the hydraulic system. *Testimony of Spah and Blakely*. Both Blakely and Spah noted some drift in the wing plow when the vehicle and its systems were turned off. Following the February 4th collisions but prior to the valve being repaired, the truck was driven two times by professional drivers without report of this defect. *Testimony of Blakely*. When it was brought to the garage's attention the valve was repaired. *Testimony of Blakely, Employer Exhibit 9h*. There has been no evidence presented that this leaking caused the plow to drop to the point it was at the time of the collisions.

drivers should be doing 360 degree checks at least every 90 seconds. *Testimony of Spah.*

The Employer argues that the truck is equipped with several mirrors from which the driver can conduct these 360 degree checks and observe the space between the truck and other objects. *Employer Exhibits 7a- 7k.* Mirrors are located on the driver's door, passenger door and front right corner of the truck. *Id.* The wing plow in its stowed position is visible through the passenger window and the right side mirrors. *Employer Exhibits 7h-7k.* Responsible drivers use these mirrors to maintain appropriate space management between the truck and other vehicles.

Employer argues when the wing plow drifted to the position it was at the time of the collisions, there was a noticeable change in the position of the plow through the passenger window and from the mirrors. *Compare Employer Exhibit 7h with 8u, 7k with 8x, 8bb, 8cc.* If the Grievant was performing his duties responsibly, he would have seen this change. The from the scene of the first collision just east of the intersection of Selby and Western, to the scene of the last collision at Selby and Kent, the Grievant traveled four City blocks and crossed three intersections. *Employer Exhibit 8a.* A responsible driver would have looked out both left and right when crossing these intersections. Grievant claims he noticed nothing "unusual" about the wing plow. The Employer asserts either he was not paying attention to the location of the plow or he didn't look to the right at all as he traveled through these intersections. Put another way, either he didn't notice something that was obvious, or he didn't look. A responsible driver would have observed the location of the wing plow and its proximity to vehicles on the right. It was not until he stopped after hitting the Jeep Grand Cherokee and a citizen told him that Grievant became aware he had hit three vehicles damaging the side mirrors prior to the final collision. Clearly the Grievant was not performing his responsibilities in a competent manner.

Employer argues that following the investigation the Department's collision review board met and reviewed driver responsibility for these collisions. The board is comprised of ten members including the Grievant's peers, most of whom also drive snow plows. *Testimony of Tom Bosman, Employer Exhibit 12c.* Mr. Blakely, a board member, testified that the discussion at the meeting centered on the fact that due to the distance between the collisions the board felt that the responsibility fell to the driver. *Testimony of Blakely.* The discussion included comments that at each intersection the driver should have slowed down and looked out the window and observed the position of the plow. *Testimony of Bosman.* Mr. Bosman testified he felt that the board would have likely found the collisions non-preventable if there was only one vehicle involved, but because of the number of vehicles and the distance between them, the board voted the collisions were "preventable." The board's vote was nearly unanimous. *Testimony of Bosman.*

3. Employer argues that that Grievant had a fair opportunity for appeal of the Collision Review

Board's Decision. During the hearing in this matter, the Union raised the argument that there were serious due process irregularities regarding Grievant's right to appeal this case to the Collision Review Board following their decision that the collisions were preventable. Grievant was not denied a right to appeal the board's decision; rather he had the opportunity to appeal to the final decision maker, the Interim Department Director.

When examining procedural irregularities:

Employer states that the essential question for an arbitrator is not whether the disciplinary action was totally free from procedural error, but rather whether the process was fundamentally fair. [The arbitrator] must find in order to overturn the employer's action on procedural grounds, that there was at least a possibility, however remote, that the procedural error may have deprived the Grievant of a fair consideration of his case.

DISCIPLINE AND DISCHARGE IN ARBITRATION, 3d ed. ABA Section of Labor and Employment Law, Bureau of National Affairs, Washington D.C., 2015, Chap. 2, "Just Cause" page 2-37.

Employer notes that when Interim Director Nancy Homans reviewed the circumstances of Grievant's collisions and the salting incident for possible disciplinary action, she offered Grievant the opportunity to present his input regarding these events prior to making her decision. *Testimony of Nancy Homans, Employer Exhibit 4b.* Grievant along with representation from the Union attended a meeting with Ms. Homans. Grievant presented his information in the form of a written statement. *Employer Exhibit 4d.* With regard to the collisions, in the statement Grievant admitted that after chaining the wing plow up when he began his shift that morning he was no longer concerned about the position of the wing plow but checked the truck at his morning break. *Testimony of Walters.* He had no idea when the clip holding the chain had broken away. *Id.* He admitted he wasn't watching the clearance of the wing plow as he conducted his sanding operation down Selby Avenue, rather he was watching the corner of the front plow that he had moved away from the parked vehicles as he proceeded. He had no idea he had struck a series of vehicles causing damage to the side view mirrors. *Id.* He admitted that it was only after the final collision when he noticed that the wing plow had drifted away and was no longer in the stowed position. *Employer Exhibit 4d.* He pointed to the lack of "flags" on the plows, stating that if they were present he would have been able to observe the location of the wing plow. Grievant however did not address the fact that the wing plow has two orange pylons (sticks) secured on the plow and placed to enable the driver to judge the plow's location.

Employer, also, notes that here the Grievant had ample and fair opportunity to present his case

to the final decision maker. Arguably, this was the best avenue for his appeal. The director had not made her decision and he was provided with a fair opportunity to present his best case to her. However, the information he presented to Ms. Homans admitted his failure to exercise due care in the operation of the wind plow. There is no viable argument that a similar appeal directly to the collision review board would result in a reversal of their decision.

4. Employer, also, notes that Grievant salted the parking lot of the Sewer Maintenance building at an excessive application rate and without due care causing employees' vehicles to be coated with salt. No one at Sewer Maintenance requested that the parking lot be sanded. Undisputed facts establish that on January 7, 2015 upon Grievant's request to sand the lot, Grievant received permission to apply road salt to the Sewer Maintenance building parking lot. Following that operation, a sewer employee complained that Grievant had spread salt at such a heavy application rate that his vehicle was coated with road salt. The Automatic Vehicle Locator records from the truck indicated that at the location of the incident the Grievant was spreading salt at an application rate of 1,000 pounds per lane mile. *Employer Exhibit 8dd*. When responding to this complaint Grievant stated he was almost out of salt so he had to raise the box often. He claimed that he was aware of certain spots in the lot that were often slippery he would turn the application auger "way up." He admitted he may have covered the employee's vehicle with salt. Mr. Spah testified at the hearing that it is never okay to coat vehicles in salt.

Clearly, Employer finally argues that this represents another occasion where Grievant failed to operate the truck in a responsible manner. If his box was so empty to the point where he had to put the box way up and turn up the auger to spread the material at a heavy rate, a small parking lot was not the place to conduct the operation. Grievant showed no remorse for the actions.

VIII. UNION'S ARGUMENTS

The Union argues that the Employer has not proved that Grievant violated the Last Chance Agreement:

A. The Employer Violated Grievant's Due Process Rights. The United States Constitution forbids a state actor to "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. Grievant, a public employee covered by a collective bargaining agreement, has a constitutionally protected property interest in his continued employment at the Employer. See generally *Phillips v. State*, 725 N.W.2d 778, 783 (Minn. Ct. App. 2007). Given this, the Employer must respect Grievant's due process rights. In investigating and terminating Walters, however, the Employer did not oppose: it literally changed the rules to deprive him – and only him – of procedural rights that he was entitled to under Employer policy.

The Union argues that its undisputed that in this case, on February 26, 2015 , the Employer received and denied Grievant's request to exercise his appeal right as described in the Policy.

The Union argues that the Board was tainted because two Board members shared their “insights” into the accident, answering other Board members questions and giving their opinions about the cause of the accident. That “If” Employer allowed the Grievant to appeal to the Board as provided by Policy he would convince the Board that he had done nothing wrong. And that the effect of the Employer's decision to deprive Walters of his due process rights cannot be understated.⁴⁷ Union argues that the Employer's one-sided, unfair investigation, violated the Grievant's due process rights owed to him under the United States Constitution and for this reason alone, the Grievance must be sustained.

B. The Union argues that the Employer has not proved that Grievant violated the Last Chance Agreement:

The Union argues that as stated above, the Employer bears the burden of proving that Walters violated the Last Chance Agreement. It has not, and cannot, meet this burden. The facts surrounding the accident are relatively undisputed. Before the accident occurred, Grievant completed two walk-arounds of his truck that revealed no issues. As Walters drove westbound on Selby at Kent, he felt a rocking motion and saw a mirror on the ground behind his truck. Walters immediately stopped his truck, and saw that the wing plow had struck a Jeep Grand Cherokee parked on the street. As he investigated, he found that the welded bracket for the chain securing the plow to the truck had snapped off of the truck. Walters testified that as he was driving, he was doing mirror checks and observed the wing plow in its proper position and did not observe it sag away from the truck at any point.

The Union argues that the overwhelming evidence adduced by the Employer, including the testimony of its own witnesses, shows that the cause of the wing plow’s droop is unknown. The only witness that testified otherwise, Joe Spah, claimed that because he couldn’t replicate the accident, it meant that the Grievant deliberately lowered the wing plow. This is nonsensical. Walters testified that the wing plow was secured up against the side of the truck, that he had lifted up the front plow, and that he was only salting, and not plowing, the Employer streets. Grievant had no need to lower the wing plow, or otherwise touch the plow controls shown in Employer Exhibit 7o. Had the Grievant lowered the wing plow and driven down Selby Avenue, it would have been a deliberate act that would

⁴⁷ See the Eight Circuit Court of Appeals has held that when an employee’s due process rights are violated, an arbitrator may required the grievant’s reinstatement, even where the employer had otherwise proved dischargeable misconduct. *Teamsters Local 878 v. Coca-Cola Bottling Co.*, 613 F.2d 716, 721 (8th Cir.), cert. denied, 557 U.S. 988 (1980). Accord, Hill & Sinicropi, *REMEDIES IN ARBITRATION*, p. 262-3 (BNA Books 1991):

have knowingly endangered the property of others, and a far different case would present itself here. While the cause of the wing plow droop could not be replicated, we know for a certainty that the plow was not deliberately lowered as Walters drove down Selby Avenue. As Troy Eisenhuth testified without rebuttal, had Walters deliberately lowered the wing plow as he drove down Selby Avenue, he would have caused serious body damage to every single vehicle he passed on Selby Avenue.

The Union argues that Moreover, when investigating the incident, Spah insisted on taking measurements from only one point on the wing plow and in only one position: the top of the plow while it was fully lowered and extended. However, as Spah initially testified, over the course of 30 minutes, the wing plow sagged approximately one-quarter of the way toward the ground. Grievant testified that the wing plow was visible and in its proper position as best as he could determine while he was driving down Selby Avenue. No witness, other than Grievant, testified as to the location of the wing plow when they arrived at the accident scene on February 4. Union Exhibit 1 was taken by the Employer at 1:23 pm., nearly three hours after the accident. Given the Employer's own test, it is entirely possible that over the course of a three-hour time span, that the wing plow drooped to its lowest position. Simply put, there is no evidence that the plow was fully lowered and fully extended at the time the accident occurred.

The Union argues that indeed, there are multiple points that could have collided with the Jeep and the two other vehicles on the road: either of the front corners and the bottom back corner of the plow. In the Employer's photographs, black marks can be easily seen on those three corners. When asked why those hadn't been measured, Spah replied that he didn't have to measure those points. That answer demonstrates the issue with the Employer's investigation as a whole: it was incomplete. Had the Employer taken the time to obtain alternative measurements, it might have found that the impact point was elsewhere on the plow, thus explaining what the Employer seems to assert is unexplainable (yet somehow explainable enough to show that the Grievant should have and could have prevented it).

The Union argues that attempting to bolster its case with the January 7 incident also fails. The Employer failed to call any witness with independent, first-hand knowledge of the incident, including the alleged victim, notwithstanding that he is a Employer employee, under the Employer's direction and control. Yet, the Employer neither produced that witness nor explained his conspicuous absence. If the alleged victim's testimony at the hearing would have contradicted Grievant's version of the events (of which the Employer was fully aware), the Employer had the ability, responsibility, and duty to produce their evidence before the Arbitrator. Having failed to do so, the Arbitrator must draw the conclusion that this individual would have agreed with Grievant's version of the facts. As summarized in a leading treatise:

The failure of a party to call as a witness a person who is available to it and who should be in a position to contribute informed testimony may permit the arbitrator to infer that had the witness been called, the testimony adduced would have been adverse to the position of that party.

See generally ELKOURI *supra*, at 8-51 (citations and footnotes omitted). For these reasons, the Arbitrator should conclude that no evidence contradicting Grievant's testimony about the January 7 incident.

Finally, the Union argues that in this case, the evidence does not support the Employer's conclusion that the Grievant violated the Last Chance Agreement. Having failed to meet its burden of proof that the Grievant violated some rule or policy, the Grievance must be sustained.

IX. ANALYSIS AND DISCUSSION

In September 2014, the Union and the Employer entered into a "Last Chance Agreement" (LCA) as part of a settlement of a prior disciplinary grievance. That agreement stated:

"The Employer will return Mr. Walters to work with the understanding that he is in a Last Chance Agreement. Specifically, for one year from the date of this letter, if Mr. Walters violates any union contract provisions, civil service rules, Employer or Department policies, which rise to the level of discipline, including discipline resulting from the collision review process, his employment with the Employer of Saint Paul will be terminated."

The Union made three separate challenges to the LCA.

First, The Employer did not meet its burden of proof because the Employer failed to show the cause of the wing plow's droop and the only witness to the droop was the Grievant who, also, testified that the wing plow was visible and in its proper position as best as he could determine while he was driving down Selby Avenue. The arbitrator opines that the Grievant could not recall how far down the wing plow was positioned when It struck the jeep. The Grievant stated that he had no reason to check the wing plow any further for the day after he asked his supervisor help chain the the wing plow up more tightly. The Grievant was unaware that the truck he was driving the wing plow struck a total of four vehicles that were parked on the north side of Selby between Western and Kent. Its undisputed that the Grievant was the person responsible for the safe operation of the snow plow at the time of the collisions. The Employer has established while the Grievant was exercising due care in the operation of the

truck, when the plow became unchained causing it to fall away from the vehicle he could not have avoided the collisions.

Second, The Union contends that Grievant's due process rights was violated due to procedural irregularities in the collision review process following their decision that the collisions were preventable. Grievant claimed the Accident Review Policy allows an appeal to the collision review board after the Board decision that the accident was preventable. The Arbitrator opines that the Grievant was not denied a right to appeal the board's decision; rather he had the opportunity to appeal to the final decision maker, the Interim Department Director.

When examining procedural irregularities: the essential question for an arbitrator is not whether the disciplinary action was totally free from procedural error, but rather whether the process was fundamentally fair. [The arbitrator] must find in order to overturn the employer's action on procedural grounds, that there was at least a possibility, however remote, that the procedural error may have deprived the Grievant of a fair consideration of his case.

When Interim Director Nancy Homans reviewed the circumstances of Grievant's collisions and the salting incident for possible disciplinary action, she offered Grievant the opportunity to present his input regarding these events prior to making her decision. Grievant along with representation from the Union attended a meeting with Ms. Homans. Grievant presented his information in the form of a written statement. With regard to the collisions, in the statement Grievant admitted that after chaining the wing plow up when he began his shift that morning he was no longer concerned about the position of the wing plow but checked the truck at his morning break. He had no idea when the clip holding the chain had broken away. He admitted he wasn't watching the clearance of the wing plow. The Grievant had ample and fair opportunity to present his case to the final decision maker. This was the best avenue for his appeal. The director had not made her decision and he was provided with a fair opportunity to present his best case to her. However, the information he presented to Ms. Homans admitted his failure to exercise due care in the operation of the wind plow. There is no viable argument that a similar appeal directly to the collision review board would result in a reversal of their decision.

Finally, The Union maintains that the Grievant was exercising due care and any over salting, or the coating of another employee's vehicle with salt was due to the fact that the box was nearly empty. The Arbitrator finds that the Grievant salted the parking lot of the Sewer Maintenance building at an excessive application rate and without due care causing employees' vehicles to be coated with salt. No one at Sewer Maintenance requested that the parking lot be sanded. Undisputed facts establish that on January 7, 2015 upon Grievant's request to sand the lot, Grievant received permission to apply road salt

to the Sewer Maintenance building parking lot. Following that operation, a sewer employee complained that Grievant had spread salt at such a heavy application rate that his vehicle was coated with road salt. The Automatic Vehicle Locator records from the truck indicated that at the location of the incident the Grievant was spreading salt at an application rate of 1,000 pounds per lane mile. When responding to this complaint Grievant stated he was almost out of salt so he had to raise the box often. He claimed that he was aware of certain spots in the lot that were often slippery he would turn the application auger "way up." He admitted he may have covered the employee's vehicle with salt. Mr. Spah testified at the hearing that it is never okay to coat vehicles in salt.

Clearly, the Arbitrator finds that this represents another occasion where Grievant failed to operate the truck in a responsible manner. If his box was so empty to the point where he had to put the box way up and turn up the auger to spread the material at a heavy rate, a small parking lot was not the place to conduct the operation.

X. CONCLUSION

1. The Employer has established upon a Preponderance of the Evidence that the Grievant violated the the terms of the Last Chance Agreement.
2. The Employer has established upon a Preponderance of the Evidence that the Employer had Just Cause to terminate the Grievant.

XI. AWARD

After study of the testimony and other evidence produced at the hearing, on the arguments of the parties (in the post hearing written briefs), on that evidence in support of their respective positions, and on the basis of the above discussion, summary of the testimony, analysis and conclusions. I make the following award:

1. The Employer had Just Cause to terminate the Grievant;
2. The Employer established that the Grievant violated the Last Chance Agreement;
3. The Union Grievance is Denied in full as set forth herein.

Dated: September 05, 2015

Harry S. Crump, Labor Arbitrator

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