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<b>ARBITRATION IN THE MATTER</b>	*	<b>Grievant: Knox Kunkle</b>
	*	
<b>Between</b>	*	<b>Issue: Four-day Suspension</b>
	*	
<b>Hewitt Builders</b>	*	
	*	
<b>and</b>	*	
	*	
<b>The International Brotherhood of Truckers, Local 15</b>	*	<b>Arbitrator: Judy A. Gust,</b>
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**PRELIMINARY STATEMENT**

The hearing in this matter was held on July 27, 2001, at the Law Offices of Ronald D. Primrose, 273 Caminetti Dr., San Diego, California. The parties stipulated that the matter was properly before the arbitrator for a final and binding decision. During the course of the hearing the parties presented evidence through exhibits and the testimony of witnesses who were subject to cross-examination. The record of this case was closed on August 24, 2001, following receipt by the arbitrator of the parties' post-hearing briefs.

**APPEARANCES & WITNESSES**

**For the Company**

Barry Jones . . . . . Counsel and Spokesperson, Hensel & Tate  
Gerald Kingman. . . . . Manager, Labor Relations  
Carol Himel . . . . . Regional Human Resources Manager  
Karl Earnest. . . . . Vice President, Operations  
Louis Moore . . . . . Head Concrete Dispatcher  
Ricky Barnes. . . . . Supervisor  
Denny Brown . . . . . Supervisor  
Mike Nielson . . . . . Supervisor

**For the Union**

Ronald D. Primrose. . . . . Counsel/Spokesperson, Law Offices, Ronald D. Primrose  
Knox Kunkle . . . . . Grievant  
Aaron Conner . . . . . Business Agent  
Casey Roland . . . . . Business Agent  
Gary Zwift . . . . . Driver

## **BACKGROUND AND FACTS**

On September 21, 2000, the Grievant, Knox Kunkle, had made three delivery runs to the Paulson job and was under the batch plant with a ticket for a fourth run to the Paulson job. The rubber boot from the batch plant had lowered into the hopper of Kunkle's truck and the drum containing the material had started to lower from the batch plant. The batch man came out, took the order ticket from Kunkle and told Kunkle to go around to the call box. Kunkle drove the truck to the end of the line and waited to be loaded for a different job. (Un. Br. pp. 2) After Kunkle's truck was loaded, he proceeded to his delivery assignment at the Nicholson jobsite. When he arrived, Kunkle observed pickets on the gate closest to him. He pulled his truck to the side of the road and got out. Kunkle and Supervisor Mike Nielson had a brief discussion about whether Kunkle was going to drive the truck through the gate where one picket was walking and two were seated. Nielson, with a copy of the 1999-2003 Labor Agreement in hand, directed Kunkle to take the load in. Kunkle asked if the Company was going to provide him with protection and Nielson again directed Kunkle to take the load in. (Un. Br. pp. 3) Kunkle again said that the picketers knew him, knew his family and where he lived and asked if the Company was going to provide him a guard. Nielson then relieved him of duty.

Supervisor Ricky Barnes drove Kunkle's truck through the gate. Shortly, a third supervisor, Denny Brown, appeared at the site and collected Kunkle's personal possessions from his truck. Brown placed the possessions in a box in the back of his truck. Brown then drove Kunkle back to the yard where Kunkle cleaned out his locker and left the premises. (Un. Br. pps. 3-4)

On September 19, 2000, two days before the instant situation, another driver, Gary Zwift, pulled away from a pump on a job in the Hillcrest area when a picket appeared at the site. Zwift contacted dispatch to report the picket and dispatch sent a supervisor to the site. Zwift was upset by the situation and refused to drive his truck or any vehicle due to his concern and upset. The Company then transported Zwift back to the plant where he clocked out and was picked up by his wife. (Un. Br. pp. 4)

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Approximately one week after September 19th, the Company issued a two-day suspension to Zwift and a four-day suspension to Kunkle as a result of the respective September 19th and 21st incidents.

## **ISSUE**

The parties agreed upon the following issue: Was the discipline of the Grievant in violation of the contract? If so, what shall be the remedy?

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 3 STEWARD**

*3.3 The steward shall not stop the Company's work for any reason or tell any employee, whether or not covered by this Agreement, that he or she cannot work on the job. Infraction of either of these two rules shall be cause for immediate dismissal of the steward without any prior notice.*

### **ARTICLE 5 WORKING RULES**

*5.7 Disciplinary Action. No employee who has attained seniority under the terms of this agreement shall be discharged, suspended or disciplined without cause. In the event of discharge or suspension without cause, the employee shall be reinstated with or without back pay. The written grievance must be received by the Company within five (5) working days of the discharge or suspension; failure to provide the written grievance to the Company within such five day period shall constitute waiver of the grievance.*

### **ARTICLE 9 NO STRIKE, NO LOCKOUT**

*9.1 During the term of this Agreement, no work stoppages, strikes, slowdowns, or lockouts shall occur for any cause whatsoever. In addition, no sympathy strikes shall be caused or sanctioned by the Teamsters or by any member thereof because of differences between the Company and any other local or national union, or other company, or because of differences between the Teamsters and any other local or national union, or other company; provided, however, that nothing herein shall preclude an employee from honoring a lawful, primary picket other than the Company at any location where reserve gates have not been established. The Teamsters shall give the Company 24 hours written notice of intent to place such a picket line, and the Company shall have 24 hours in which to complete delivery of perishable products in transit without interruption.*

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*9.4 It is agreed that the Company may take whatever action it deems necessary with regard to employees involved in any action in violation of this Article 9, including discharge.*

#### **ARTICLE 10 GRIEVANCES – ARBITRATION**

##### **10.4 Joint Conference Board and Arbitrator Duties, Limitations**

*10.4.2 The chairperson or arbitrator shall deliver to all parties, within seven (7) working days after completion of the hearing, a written decision including a remedy if necessary. Decisions of the Conference Board or arbitrator shall be based solely on and restricted to the terms and conditions contained in the collective bargaining Agreement (sic).*

*10.4.3 The decisions of the Joint Conference Board or arbitrator are final and binding on the parties.*

*10.4.5 All expenses incurred by the Joint Conference Board or arbitrator shall be paid equally by the Union and the Company.*

#### **POSITION OF THE COMPANY**

The Company argued that its position, that it had cause to discipline Kunkle, is supported by the contract language agreed to by the Union. The Company also suggested consideration of other facts it deems pertinent: Local 15, Hewitt and the Hewitt drivers have worked in the construction field for a long time; the people involved in this dispute know the contract, they know what picket lines are and they know what a strike is. (Co. Br. pp. 1)

There was no strike involved in this dispute. The Union did not dispute the fact that the activity at the Nielson site was informational picketing, directed at a supplier other than Hewitt. The Company pointed out that the commitment of Local 15 that its members will work is spelled out in the relevant contract language of Article 3 and Article 9 as follows:

*3.4 The steward shall not stop the Company's work for any reason or tell any employee, whether or not covered by this Agreement, that he or she cannot work on the job. Infraction of either of these two rules shall be cause for immediate dismissal of the steward without any prior notice.*

*9.2 During the term of this Agreement, no work stoppages, strikes, slowdowns, or lockouts shall occur for any cause whatsoever. In addition, no sympathy strikes*

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*shall be caused or sanctioned by the Truckers or by any member thereof because of differences between the Company and any other local or national union, or other company, or because of differences between the Truckers and any other local or national union, or other company; provided, however, that nothing herein shall preclude an employee from honoring a lawful, primary picket other than the Company at any location where reserve gates have not been established. The Truckers shall give the Company 24 hours written notice of intent to place such a picket line, and the Company shall have 24 hours in which to complete delivery of perishable products in transit without interruption.*

*9.5 It is agreed that the Company may take whatever action it deems necessary with regard to employees involved in any action in violation of this Article 9, including discharge. (Co. Br. pp. 1-2)*

The Company also argued that the Grievant admitted that regardless of the nature of the picket line and regardless of whether a reasonable person would feel jeopardized, he would not cross and deliver his load. As an employee, this was wrong. As a shop Steward, this was egregious conduct. The Company quoted from a 1997 Lockheed Martin award by Arbitrator Gentile that quoted Arbitrator Schmertz:

What was established and proved was that W\_\_\_\_\_ as a Senior Steward, failed to meet his responsibilities as a Steward to see that Article I, Section 8, (no strike provision) was observed. As stated by Arbitrator Schmertz in a 1966 decision,

[i]f there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement to actively instruct each Employee to do so as well... .

Arbitrator Gentile reduced the discharge to a prolonged suspension without back pay. (Co. Br. pp. 2)

The Company quoted another award from Arbitrator McDermott that upheld a discharge where the instigation and leading of an illegal work stoppage by Union Officers was found to be sufficient cause for the discharge. (Co. Br. pp. 2)

The Company did not deny that it selected Kunkle to deliver to the Nielson job site specifically because he was a Shop Steward. Rather than an attempt to "set up" Kunkle for

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discharge, the Company argued that management believed he would have a better than average knowledge of the no-strike language in the Agreement, that he was in frequent contact with Local 15 officials and that he would determine whether the picket line was sanctioned. They also believed that Kunkle's crossing would provide an example to other company drivers when confronted with informational pickets. The Company found itself in a difficult position that day and had made a real effort to avoid putting its drivers in the situation Kunkle found at the Nielson site by using contract (non-employee) drivers. Because of the volume of business and the quirks of mid-day dispatching, it needed to use some Hewitt drivers and Kunkle was selected for the reasons noted above. (Co. Br. pp. 3)

Next, the Company challenged the reasonableness of Kunkle's alleged fear and pointed to an award by Arbitrator Daniel Williams that concluded that a driver who had been told something would happen to him if he crossed, was cursed at and was aware of picket line violence in the area, should have crossed the informational picket line. That award reduced the termination to a two-month suspension. In the case before us here, all witnesses, including the Grievant, testified that the picket line was peaceful and that dozens of vehicles entered the job site without problems although the Grievant did mention that he saw someone in a car across from the picket line pounding his fist into his palm. Assuming this to be true, the Company still argued that the presence of company officials and the unhindered ingress and egress Kunkle observed, offered no basis for reasonable fear. (Co. Br. pp. 4)

In summary, the Company again asserted Kunkle's obligation, as a Steward, to promote harmony between the Union and the Company and to refrain from interrupting the progress of the job. Article 3 of the Agreement twice addresses the importance of uninterrupted delivery. In §3.2, the Agreement reads in part: ". . .the Steward may not interrupt the progress of the job. . ." In §3.3, it reads:

"The Steward shall not stop the Company's work for any reason or tell any employee, whether or not covered by this Agreement, that he or she cannot work on the job. Infraction of either of these two rules shall be cause for immediate dismissal of the steward without any prior notice."

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The Grievant flagrantly ignored and violated the admonitions of Sections 3.2 and 3.3 and could have been terminated. Hewitt acted reasonably in suspending Kunkle for a short period of time. The argument that the Zwift incident (resulting in a two-day suspension) set the bar for Kunkle fails for a variety of reasons. First, Zwift was not a shop steward. Secondly, he wasn't confronted with crossing a picket line but rather unloading on a picket line. Finally, there were no management officials present at the Zwift site while there were two or three management officials present for assistance at the Nicholson site involved where Kunkle's refusal to deliver occurred. Article 9 of the Agreement establishes the guidelines for consequences where there is a violation of Article 9. Specifically, §9.4 states

"...that the Company may take whatever action it deems necessary with regard to employees involved in any action in violation of this Article 9, including discharge."

The fact that Hewitt chose not to be as severe as permitted (discharging Kunkle) further undermines the Union's argument regarding "set up" and retaliation. (Co. Br. pp. 5)

The Company asked that the grievance be denied. Failure to deny the grievance will serve to deprive Hewitt of a significant part of its Agreement with Local 15. Denying the grievance will insure not only the Company's ability to serve its customers, it will also enable the parties, Local 15 and Hewitt, to effectively deal with similar situations going forward. (Co. Br. pp. 6)

### **POSITION OF THE UNION**

The Union's theory of the case was that the Company was attempting to "set up" Mr. Kunkle for termination. It points to Article 1.9 of the Collective Bargaining Agreement that reads in pertinent part:

"No Employee of (sic) applicant for employment covered by this agreement shall be discriminated against because of membership in a Union or activities on behalf of the Union... ."

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The Union also challenged the Company's representations that the picket line was informational. No witness recalled seeing the word "informational" on the picket signs. Further, no one recalled the pickets handing out any leaflets of any kind. Finally, it faulted the Company for failing to tell Kunkle that Local 15 had indicated to management that this line was not one which Local 15 members would honor or to advise Kunkle to call Duncan (at the Union) to check it out. (Un. Br. pp. 5) If the Employer knew that there was (a) a picket line on the job and (b) that the Truckers were not suggesting to their members that the line should be honored, the Employer should have communicated this information to Kunkle during the time Kunkle was sitting around the yard waiting to be reloaded for the Nicholson job. (Un. Br. pp. 6) In this context, the Employer's reaction to Knowton should be no harsher than the Employer's initial reaction to Mr. Zwift. (Un. Br. pp. 7)

With regard to the Zwift incident, he was actually at the pump ready to unload when the picket appeared. Zwift pulled away from the pump without unloading and contacted dispatch. There, the Company's reaction was to send a Supervisor out to take the truck in and bring it out. In Kunkle's case, the Supervisor's reaction was to pound his finger on the contract and tell Mr. Kunkle, "just do it", followed immediately by Mr. Kunkle's "discharge". (Un. Br. pp. 7)

The Union argued that the Employer's intent was to discharge Knowton. As support for this argument, the Union pointed to the removal of Kunkle's equipment from his truck and a directive to clean out his locker. Further, the Company knew that there were pickets on the job and thought the line was informational but never advised Kunkle or suggested that he check with the Union. (Un. Br. pp. 8)

Kunkle had a genuine concern about the safety of himself and his family. Kunkle had prior knowledge of the testimony of another employee, Cameron Timmons, before the National Labor Relations Board (NLRB) when Kunkle's discharge case came before the NLRB some time before September 2000. That testimony arose from an Operating Engineers' picket line incident with Hewitt's predecessor. In Timmon's sworn testimony, he alluded to a batch plant that had been burned although there was no proof of who was responsible. Timmons also testified that the Company found it necessary to hire security to protect his (Timmons) family during the strike

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because he, as a member of the bargaining unit, was crossing the picket line. Thus, knowing this information from Timmon's previous NLRB testimony, on September 21, 2000 Kunkle repeatedly asked Supervisor Nielson whether or not he, Kunkle, and his family would receive protection if Kunkle crossed the Operating Engineers' picket line. (Un. Br. pp. 8) At no time did Kunkle ever refuse to cross the picket line. At no time was Kunkle told, "either you take the load in or you are fired." (Un. Br. pp. 9)

Kunkle was concerned and he wanted to know what was going on – who was picketing, why they were picketing, was the line sanctioned, and was it one he could cross. The Company provided no answers and no opportunity for Kunkle to find out what was going on. The Employer simply directed Kunkle to "take it across" when Kunkle expressed concern about his safety and that of his family. (Un. Br. pp. 9)

The Union also cited part of Section 502 of the original National Labor Relations Act, codified into 29 U.S.C. § 143:

... nor shall the quitting of labor by an Employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such Employee or employees be deemed a strike under this chapter.

According to the Union, the courts have held that an Employee who refuses to cross a picket line by reason of physical fear does not act on principle and may not be considered a "striker". In *National Labor Relations Board vs. Knight Morely Corp.*, 251 F.2d 753 (6th Cir. 1958), the court held that a walkout pursuant to this section was not a strike and therefore the no-strike provisions of a Collective Bargaining Agreement were not applicable in determining whether or not the discharge of employees was an unfair labor practice. Following this reasoning, the Union argued that a failure to perform services for fear of one's physical safety does not constitute a strike. Therefore, the Employer had no basis on which to discipline Kunkle. (Un. Br. 10)

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Finally, the Union addressed the Company's evidence at hearing concerning the "big job" and Kunkle's delivery on that job. That job occurred substantially after the incident that is the subject of this discipline. For a number of reasons, the activity on the subsequent job was not sanctioned by Local 15. As a result, the Employer's employees did not honor the picket line. That does not negate their ability to honor a picket line under the proper circumstances, but simply indicates that the proper circumstances were not present on that job. (Un. Br. pp. 11)

In conclusion, the Union restated its position that the Employer was looking for an opportunity to discharge Kunkle and "set him up". This is not the case of an Employer who was trying to resolve a problem. Although the Employer knew about the situation with pickets in advance, knew that the line was not sanctioned or was informational only and knew that Kunkle could check with the Business Agent to verify such information, it failed to provide this information to Kunkle. Further, it is clear from the sequence of events that Mr. Zwift was disciplined after the incident with Mr. Kunkle so that the Employer could claim that it had not singled Mr. Kunkle out for disparate treatment. Because Mr. Kunkle never refused on principle to cross the picket line, he did not violate the no strike clause of the Agreement and, therefore, should not have been disciplined. The Union asked that Kunkle be made whole for the four-day suspension. (Un. Br. pp. 10-12)

## **DISCUSSION**

No grievance was entered in the record of this hearing. However, the parties stipulated that the Union filed a grievance on September 21, 2000, regarding the termination of Knox Kunkle and that on that same day, the Company faxed back a notice that Kunkle had not been terminated. Testimony during the hearing revealed that Kunkle suffered a four-day suspension as a result of the incident at the Nicholson site on September 21, 2000.

As a discipline case, the Company has the burden of proving that cause existed for the four-day suspension imposed on Kunkle. The Company cited as the basis for this discipline Kunkle's violation of Article 3, 3.2, 3.2.2, 3.2.5 and 3.3. (Co. Br. pp. 4) Those portions of the Agreement pertain to Steward activities. The pertinent parts include:

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3.2 ...the Steward may not interrupt the progress of the job. . .;

3.2.2 Work with the Company's designated representative in charge of the job in an attempt to resolve disputes prior to the application of the grievance procedure.,

3.2.5 Report to the Business Agent infractions of the Agreement which have not been resolved between the steward and the Company's designated representative., and

3.3 The steward shall not stop the Company's work for any reason...

(Jt. Ex. 1)

Other relevant language is located in Article 9 of the Agreement addressing No Strike and No Lockout. It permits a Union member to honor a "lawful, primary picket line of the Truckers growing out of a labor dispute between the Truckers and a company other than the Company at any location where reserve gates have not been established." Article 9 also prohibits work stoppages, strikes, slowdowns, and lockouts for any cause.

The Company's witnesses testified that the day of the infraction, September 21, 2000, was one of its busiest days ever. The Company was aware that Operating Engineer (OE) pickets might be at the Nicholson job on September 21st and, as a precaution, the Company had arranged to use contract drivers for that business on September 21st. When the Nicholson job required more loads than expected and there were no more leased vehicles available, the VP of Operations, Karl Earnest, testified that he contacted Business Agent Duncan Stanton at the IBT Local 15 offices, to see if the OE picketing was sanctioned by Local 15. Upon getting confirmation that the picketing was not sanctioned, Earnest advised Duncan that the Company would be sending some of its own drivers to the Nicholson job.

The Union attempted to cast doubt on the Earnest's testimony that he had contacted Business Agent Stanton with testimony from Carl Roland, Local 15 Business Agent. Mr. Roland has since taken over Mr. Stanton's position. Roland testified that he was with Duncan Stanton on the morning of September 21, 2000 attending a meeting at another plant. He further testified that Stanton took no calls from approximately 10:00 to 10:30 a.m. when the meeting started until the

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meeting ended at approximately noon or after. Earnest testified that he arrived at work about 9:30 – 10:00 a.m. and was informed of the need for additional drivers on the Nicholson project. Thus, the time periods testified to by both of these witnesses do not provide *convincing* evidence that Earnest's call to Stanton did not occur. If Earnest arrived at 9:30, he could have placed the call between 9:30 and 10:00 a.m., before the earliest time that Roland testified he was with Stanton. Given the Company's knowledge of the potential for picketing at Nicholson, its original concern about using its drivers on that job evidenced by initially assigning contract drivers, and its admission that it specifically sent Kunkle because of his status as a Steward, it is more likely than not that the Company did get assurance from the Union that the OE picketing at Nicholson was not sanctioned and that Kunkle could be expected to cross the picket line.

The Company also argued that Kunkle's conduct was egregious, particularly in light of Kunkle's admission that he would not cross a picket line regardless of the nature of the picket line or whether a reasonable person would feel jeopardized. This Arbitrator could find no testimony from the Grievant of such an admission. Similar testimony to that credited by the Company to the Grievant was found from Union witness Gary Zwift. Zwift testified that he was concerned by seeing even one picket and that the purpose of the picketing and whether or not he observed any violence or property damage would make no difference to him. However, Zwift's beliefs and reactions cannot be extended to Kunkle.

The Company challenged the reasonableness of Kunkle's fear and his reluctance to cross the picket line without assurance that he and his family would be provided protection. It pointed to Kunkle's testimony and that of the other witnesses that the picketing at the Nicholson site was peaceful, there was no yelling, physical violence, property damage or carloads of people at the site. Further, Company witnesses testified that several vehicles entered and exited the site at the time Kunkle was there and throughout the day without incident. There were also Company officials at the site at the time of the Kunkle's arrival. Although Kunkle testified that he had seen someone in the car across from the picket line pounding his fist in his hand, the Company still argued that Kunkle had no "reasonable" basis for fear that would justify interrupting his delivery.

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The Union attempted to refute the Company's position on the reasonableness of Kunkle's fear. It introduced a transcript from an earlier National Labor Relations Board hearing in which Kunkle was present. That transcript was the testimony of a former Hewitt employee, Cameron Timmons, who was testifying about the behavior of the Grievant, Knox Kunkle, on January 8, 1997. In that transcript, Timmons testified to his experience in a 1982 strike and again, a Trucker's strike in 1985, when Timmons was a member of the Operating Engineers Union. Timmons testified that in 1985 he resigned from the Union after two weeks, crossed the picket lines and experienced personal property damage to his home – "They egged my house, dropped hundreds of pounds -- pounds and pounds of nails in my driveway, threw rocks at my garage door. It got to a point to where the company had to hire security, 24-hour security on my house and my wife. That lasted three or four weeks." The Union argued that because Kunkle was aware of what happened to Timmons, behavior that was attributed to the OE Union, Kunkle had a legitimate fear for his safety and that of his family when he saw the OE picketers at the Nicholson site on September 21, 2000. That knowledge prompted Kunkle's inquiry to Supervisor Nielson about whether Kunkle and his family would receive protection if Kunkle crossed the picket line. The Union continued its argument by stating that Kunkle was concerned and he wanted to know what was going on – who was picketing, why they were picketing, was the line sanctioned, and was it one he could cross. That argument would be more compelling if there were *any* evidence that Kunkle made *any* inquiry into any of those issues. Rather, Kunkle testified that he only repeated the question about whether or not he would be provided protection "like management was". There was no evidence that Kunkle made any attempt to find out what was going on or what his responsibilities were in regard to Articles 3 or 9 of the Agreement.

The Company urged that other factors be considered: that Local 15, Hewitt and the Hewitt drivers have worked in the construction field for a long time; that the people involved in this dispute know the contract, they know what picket lines are and they know what a strike is. While there was no direct evidence on these points, one can reasonably infer that at least Hewitt and its drivers are experienced in the construction field and had, or should have had, knowledge of the contract. More particularly, Kunkle is a Union Steward. He testified that he has been a Steward for approximately 13 years and has taken classes at Mesa College in the Labor Studies program. As a Steward, Kunkle testified that it is his job to file grievances where there is a

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violation of the contract. In order to know whether or not a violation exists, one must be familiar with the contract. In the instant matter, the language of Article 9.1 spells out when a Union member can honor a picket line (refuse to cross) – "...nothing herein shall preclude an employee from honoring a *lawful, primary picket* line of the Truckers growing out of a labor dispute between the Truckers and a company other than the Company at any location where reserve gates have not been established... " (emphasis added). Notwithstanding the fact that Kunkle testified that he did not take the Labor Studies class that addressed picketing until after this incident, it is difficult for this Arbitrator to believe that Kunkle had no understanding of the difference between a primary picket line and informational picketing particularly when he testified that there was no secured gate and that "if there is a second gate, there shouldn't be any picketers". The language in Article 9 is very specific – "lawful, primary picket line of the Truckers". An experienced Steward can be expected to understand the import of such language. At the very least, one can reasonably expect an experienced Steward to inquire about the meaning of that specific language if faced with a situation, as is the case here, of possible termination for stopping work. Further, one would be unlikely to know the impact of a secured gate without knowing something about picketing and the importance of a secured or reserved gate. Further, testimony from Ricky Barnes contradicted Kunkle's assertion that there was no secured gate. Barnes testified that the delivery gate was posted with a sign stating "this gate to be used by Nicholson customers and contractors". Whether or not the gate was secured, Kunkle failed to inquire or investigate into the specific facts of the circumstance that would have guided his conduct in compliance with Articles 3 and 9 of the Agreement.

Continuing with Kunkle's status as a experienced Steward, Kunkle was responsible for being familiar with the terms of the Agreement, for attempting to resolve disputes, and for refraining from stopping the Company's work for any reason. It is a well recognized tenet of labor relations that an employee follow management directives at the time and grieve later unless there is an imminent danger of harm to oneself or others. Although Kunkle's position is that he was in fear of imminent danger based upon Timmons' experience, even the conduct testified to by Timmons did not occur at the time (imminently) but occurred some time later at his home. The September 21, 2000 Nicholson situation, as described by both Kunkle and the other witnesses, offered no basis for a reasonable belief that harm or danger was imminent to Kunkle

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or anyone else. If Kunkle truly believed he needed protection for his family, he should have driven his truck through the gate, unloaded and later requested that he and his family be provided protection from any anticipated harm from OE members.

Kunkle also testified that Nielson told him at the time that he (Kunkle) was in violation of Article 9. Kunkle made no effort to address Nielson's charge or to review Article 9 to check on Nielson's claim. Rather, Kunkle delayed delivery to the customer and stopped work by repeating his demand – "a guarantee of protection for my family" – and arguing with Nielson about why management can get protection and he was not being offered protection. Kunkle did nothing to attempt to resolve the issue – he did not check with the Local Union, he did not review the Agreement, and he even refused Nielson's offer of one last chance to walk through the gate after the load was delivered and Nielson would "forget about it" .

The Union argued that the Company was attempting to "set-up" the Grievant for termination, relying upon Brown's removal of Kunkle's personal property from his truck before returning Kunkle to the plant to support its argument. The Union also argued that Brown directed Kunkle to clean out his locker and return his uniforms, further evidencing the Company's intention to terminate Kunkle. Both Brown and Kunkle testified that Kunkle wanted to return to his truck at the Nicholson site to get the balance of his property before Brown returned him to the plant. Kunkle denied that it was his idea to gather up his personal property. However, when Kunkle was asked if it was true that he "didn't trust management" and "was afraid they were going to steal something", Kunkle replied, "like they did last time". Thus, the Company's inference that it was Kunkle, himself, that chose to clean out his locker and turn in his uniforms, is noted. While not clearly evidencing Kunkle's intention, it casts doubt on the Union's theory that the Company was setting up Kunkle for termination.

Similarly, Kunkle's testimony that his vast experience as a Steward with other suspensions that never removed an employee's personal property or locker contents, failed to support his claim of set-up in that Kunkle also testified that he had only attended to one suspension under Hewitt management. When taken with Carol Himel's testimony that when employees are relieved of duty they hold a status of "suspended pending investigation" and that

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Company policy prohibits "on-the-spot termination", it is found that Himel's testimony is the more convincing. This finding also dilutes the Union's argument that Zwift was only disciplined to avoid a disparate treatment claim against the Company.

Finally, the Union faulted the Company for failing to advise Kunkle in advance of the pickets, failed to advise him that the line was not sanctioned or was informational only and failed to tell Kunkle that he could check with the Business Agent. While such communication may have been helpful, the Company had no obligation to provide such information to Kunkle. There was nothing found in the Agreement that would require the Company to instruct Kunkle about how to perform his job as a Steward. In fact, as the Company pointed out, the Agreement provides " ...reasonable time during regular working hours to conduct such Union duties ... as cannot be performed at other times...". Further, the Company's testimony about the exceptional volume of work on that day was not disputed. The Company's focus was on meeting its business demands. Again, relying on Kunkle's own testimony that he was a "smart Steward" and vastly experienced, it cannot be found that the Company was at fault in not informing Kunkle of his options. As a Steward, Kunkle should have known what options were available to him to confirm or clarify the situation. At the very least, with his cell phone readily available, one could reasonably have expected Kunkle to call the Union if there was any question about the legitimacy of the picket line or the Company's directive to drive through the gate.

In conclusion, this case rests on the reasonableness or legitimacy of the Grievant's fear for himself and his family and whether that fear was sufficient for him to risk termination under the work interruption and stoppage language of Articles 3 and 9 of the Agreement. Kunkle, while premising his failure to proceed with the delivery based upon a safety concern, did, in fact, interrupt and stop work in violation of Article 3, §3.2 and §3.3. Kunkle's demand for protection appears to be little more than a thinly disguised challenge to management rather than, as alleged, a legitimate need to determine "what was going on" with the OE picketers and whether he would be protected if he crossed the picket line.

Many of the cases reviewed that addressed discipline resulting from an improper refusal to work while a collective bargaining agreement was in effect involved discharge. Where there

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was some doubt as to the reasonableness of the alleged fear or some other mitigating circumstance, the findings reduced the discipline from a discharge to some lesser penalty, usually a suspension of some significant amount. In this case, there is a four-day suspension. When that suspension is viewed in light of similar cases and the parties' Agreement that permits immediate discharge for a refusal to work, the suspension appears to be quite reasonable under the circumstances.

Based upon the above facts and reasoning, it is found that the Grievant, Knox Kunkle, did violate Article 3 of the collective bargaining agreement when he failed to drive his truck through the gate and deliver product at the Nicholson site on September 21, 2000. Accordingly, it is found that the Company did not violate the Agreement in that it had sufficient cause for the imposition of a four-day suspension.

### **AWARD**

Based upon the foregoing, the grievance is denied.

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Judy A. Gust, Arbitrator

Ramona, California  
September 5, 2001