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Michael Grinnell v. Board of Review of the Industrial Commission of Utah, Department of Employment Security, and May Trucking Company : Brief of Respondent

Utah Supreme Court

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DOCKET NO. 860256

IN THE SUPREME COURT
OF THE STATE OF UTAH

MICHAEL F. GRINNELL,

Claimant-Petitioner,

vs.

Case No. 860265⁵⁶

BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH, DEPARTMENT OF
EMPLOYMENT SECURITY, and MAY TRUCK-
ING COMPANY,

Category 6

Respondents.

RESPONDENTS' BRIEF

**Petition for Review of a Decision of the
Board of Review of the Industrial Commission,
Unemployment Insurance Division,
State of Utah**

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Claimant-Petitioner

Michael F. Grinnell

Respondents

Board of Review of the
Industrial Commission
of Utah

Department of Employment
Security

Employer-Respondent

May Trucking Company

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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL F. GRINNELL,

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BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH, DEPARTMENT OF
EMPLOYMENT SECURITY, and MAY TRUCK-
ING COMPANY,

Category 6

Respondents.

RESPONDENTS' BRIEF

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issue presented in this case is whether the Claimant-Petitioner Michael F. Grinnell was properly denied unemployment insurance benefits under §35-4-5(b)(1), Utah Code Annotated 1953, as amended (Laws of Utah, First Special Session, Chapter 20, §3), on the grounds he was discharged from his employment with May Trucking Company for just cause or for an act or

omission in connection with employment which was deliberate, willful or wanton and adverse to the employer's rightful interests.

STATEMENT OF THE CASE

This is an action before the Supreme Court of the State of Utah pursuant to §35-4-10(i), Utah Code Annotated 1953, seeking judicial review of the majority decision of the Board of Review, Industrial Commission of Utah, dated April 29, 1986, Case No. 86-BR-106 (See Appendix A), which reversed the decision of the Administrative Law Judge dated February 26, 1986, Case No. 86-A-563 (See Appendix B). The majority decision of the Board of Review denied benefits to the Claimant-Petitioner, Michael F. Grinnell, pursuant to §35-4-5(b)(1), Utah Code Annotated 1953, as amended, on the grounds he was discharged from his employment with May Trucking Company, for "just cause" as that term has been construed and defined in the Unemployment Insurance Rules of the Utah Department of Employment Security of the Industrial Commission of Utah and by the Utah Supreme Court. (Statutes and Rules Applicable to the Case are cited in Appendix C and all "R" prefixed notations refer to pages from the record, and are duplicated in numerical order in Appendix D.)

STATEMENT OF FACTS

The Claimant-Petitioner, hereinafter referred to as "claimant" worked as a tractor-trailer driver for May Trucking Company from September 20, 1984 to December 20, 1985, some one year and three months. R.0037 The claimant was a cross country driver and earned compensation of \$.16 per mile. R.0037,0038 The claimant returned to the terminal of the employer, May Trucking Company, in Layton, Utah on December 20, 1985 (R.0055) after having been away from the terminal with the employer's truck on a road trip of approximately two weeks' duration.

Upon claimant's return from the approximate two week road trip the employer discovered that the road speed governor on the claimant's truck had been altered. Claimant admitted that he had worked on the governor and in the process a valve was cracked and broken. R.0040 Claimant contended that an air line had broken while he was out on the road which necessitated that he make temporary repairs in order to prevent brake failure. R.0040 The employer contended that the claimant altered the speed governor on the truck in order to exceed the maximum speed allowed by the governor.

The employer had in effect a policy providing in case of a mechanical failure or breakdown on the road the driver was to immediately notify the shop in Payette, Idaho to enable the

employer to direct the driver to a shop to have the breakdown repaired. R.0040 It was made clear to the drivers that the driver is not to attempt to make the repair himself while on the road. The claimant was aware of the policy but did not call in to report the mechanical failure and did not offer an explanation as to his failure to report the breakdown. R.0042

There was an on-board computer installed in the claimant's truck during the time period in question which computer disclosed that beginning on the 17th day of December of 1985 there were three extended periods of time when the claimant averaged 66 miles per hour. R.0041 This occurred at the same time the speed governor was broken.

The Rockwell Trip Master Computer installed on claimant's truck disclosed to the employer that on the 21st of November 1985 the claimant began driving at 7:26 a.m. Between 7:26 a.m. November 21 and 6:52 a.m. the next day, November 22, the claimant was actually at the wheel and driving the truck for a total of 21 hours and 28 minutes. This conduct of the claimant was grossly in violation of DOT regulations and the policy of the employer which limits a driver to drive no more than ten hours following eight consecutive hours off duty. R.0044

The claimant submitted to a urinalysis test to determine whether or not there was any trace in his system of a controlled substance. The test was administered on December 24, 1985, four

days after he had returned from his road trip. The results of the test showed the presence of traces of marijuana in the claimant's body. R.0046 Claimant admitted having used marijuana at some time in the past but denied smoking any marijuana while in control of any motor vehicle. R.0050 The employer contended that the testimony of the claimant proved he had used marijuana sometime during the two week period of time that he was on his last road trip. R.0063 The claimant denies having used marijuana during said two week period of time. R.0062

The Board of Review found that the employer's decision to discharge the claimant was based upon a cumulation of factors, including the use of marijuana, and not based just upon the use of marijuana. R.0019,0020,0049

SUMMARY OF ARGUMENT

POINT I

This Court has consistently held that the Commission's findings of fact are conclusive, binding on the Court, and to be sustained if supported by competent and substantial evidence in the record. With respect to mixed questions of law and fact the Court in reviewing agency decisions should afford considerable deference to the technical expertise and experience of the agency so long as these decisions fall within the limits of

reasonableness and rationality. As regards questions of law the Court's review is plenary with no deference accorded to the administrative determination.

POINT II

Claimant-Petitioner in his brief contends that "because of the technical experience of the ALJ and the ALJ's ability to more closely evaluate the testimony proffered, great deference should be afforded to the ALJ's decision." This does not mean that the Court should prefer the decision of the ALJ over the decision of the Board of Review. The decision of the Board of Review takes the place of the decision of the ALJ and becomes the decision of the Commission. The Supreme Court affords great deference to the technical expertise or more extensive experience of the agency, the decision of which in case of an appeal under the Employment Security Act, is rendered by the Board of Review.

POINT III

CLAIMANT ALTERED THE ROAD SPEED GOVERNOR

The Board of Review found that the claimant intentionally altered the truck's road speed governor in order to drive in excess of the 62 mile per hour maximum speed the governor permitted. Testimony on this point is in dispute but it is

submitted that the Board's decision is amply supported by substantial and competent evidence. The claimant admitted that he had worked on the governor. Claimant contended he had done so to repair an air leak which he was concerned would affect the brakes on the truck. The employer had a well-known policy that requires a driver anytime there is a mechanical failure or breakdown on the road to notify the employer's head of maintenance in the shop in Payette, Idaho to be instructed as to which shop the truck should be taken to have the truck repaired. Drivers are clearly informed not to attempt to make repairs themselves on the truck. The claimant made no call to the employer regarding the broken air line or the broken governor and has offered no explanation regarding his failure to do so.

DOT requirements provide for a driver to complete a "vehicle inspection report" every day. There is no indication in such reports prepared by the claimant of an air leak in connection with the road speed governor.

While the road speed governor was out of commission the claimant did in fact for extended periods of time exceed the maximum speed set by the governor. If the claimant had not exceeded the 62 mile per hour governor speed after the governor was broken, it would be probative that the claimant did not intentionally alter the governor, whereas the driving at an average speed of 66 miles per hour for extended periods of time

is probative that the claimant did intentionally alter the road speed governor.

DRIVING AT SPEEDS IN EXCESS OF THE 62 MILE PER HOUR MAXIMUM SET BY THE EMPLOYER.

The finding that the claimant, while the road speed governor was broken, drove at an average speed of 66 miles per hour for extended periods of time is not in dispute. It is conclusive and binding on the Court.

CLAIMANT OPERATED HIS VEHICLE FOR NEARLY 22 HOURS OUT OF A 24 HOUR PERIOD IN VIOLATION OF U. S. DOT REGULATIONS AND COMPANY POLICY.

The claimant drove a total of 21 hours and 28 minutes in a 24 hour period. This action was grossly in violation of U. S. Department of Transportation regulations and the employer's policy. The claimant at the hearing did not specifically deny said conduct.

A URINALYSIS TEST DISCLOSED THAT CLAIMANT DURING THE TIME OF HIS EMPLOYMENT USED A CONTROLLED SUBSTANCE (MARIJUANA).

When the employer discovered the incident of driving some 21 1/2 hours within a 24 hours period, he requested that the claimant submit to a urinalysis for a drug screen. The test showed the presence of traces of marijuana in the claimant's

body. The claimant admitted having used marijuana at some time in the past. The Board of Review concluded that the claimant had used a controlled substance (marijuana) some time prior to the urinalysis test administered on December 24, 1985.

THE DISCHARGE WAS BASED UPON THE CUMULATIVE EFFECT OF ALL OF THE AFOREMENTIONED FACTORS AND NOT JUST ON THE USE OF MARIJUANA.

The Board of Review concluded from the evidence that the claimant was discharged for a cumulation of factors and in the words of the employer's witness "it was a cumulative situation, the marijuana was probably the straw that broke the camel's back."

It is submitted that all the above-mentioned findings of fact in POINT III are supported by substantial competent evidence and are therefore conclusive and binding on the Court. Further, that the conclusion of law of the Board of Review that the claimant was disqualified from receiving benefits under §5(b)(1) of the Act falls within the limits of reasonableness and rationality and should therefore be affirmed.

POINT IV

ANALYSIS OF UTAH SUPREME COURT DECISIONS

In the recent decision of Lane v. Board of Review filed October 16, 1986 the Court reversed the Board of Review and

allowed benefits under §5(b)(1). The facts in the instant case are clearly distinguishable from the Lane case. In the Lane case the Court held that Lane's conduct in selling beer to a minor after having failed to check the age of the individual in question fell into the category of an isolated error in judgment or discretion and did not satisfy the culpability factor. The offenses of the claimant in the instant case do satisfy the culpability factor and do not fall into the category of an isolated error in judgment or discretion.

In the case of Logan Regional Hospital v. Board of Review the Court affirmed the Board of Review decision holding that where the element of fault is lacking a disqualification from benefits is not warranted. The Court agreed with the conclusion of the Board of Review that circumstances which led to the claimant's discharge were the result of inadvertent conditions beyond the control of the claimant. It is submitted that in the instant case the control factor is clearly satisfied.

In the case of Terminal Service Company v. Board of Review the Court affirmed the decision of the Board of Review which allowed benefits. The decision was based mainly upon the knowledge factor. The Court found that the claimant was not clearly warned that future attendance deficiencies would result in termination. The facts of the instant case are clearly

distinguishable. The claimant does not contend that he understood it was okay to alter the road speed governor nor does he contend he understood it was okay to drive at the excessive speed indicated nor that he was unaware of the company policy and DOT regulations prohibiting his action in driving some 21 1/2 hours out of a 24 hour period.

In the case of Spartan AMC/Jeep v. Board of Review, the Supreme Court affirmed the decision of the Board of Review allowing benefits under §5(b)(1). This case mainly involved a dispute as to the facts. The Board believed the claimant's explanation and the Supreme Court affirmed, holding that there was substantial competent evidence to support the findings of fact of the Board. In the instant case the facts are generally not disputed except as regards whether or not the claimant intentionally altered the road speed governor. With respect to this finding of fact, it is submitted there is substantial competent evidence supporting the finding of the Board of Review.

In the case of Wright's Furniture Mill, Inc. v. Industrial Commission, the Court affirmed the decision of the Board of Review allowing benefits under §5(b)(1). The culpability factor was involved in this case. In Wright's a truck driver had incurred two speeding violations in Texas some 18 months prior to his discharge. The instant case is clearly distinguishable

involving infractions incurred immediately prior to the discharge which clearly satisfied the culpability requirement.

In the case of Kehl v. Board of Review the Court considered the "just cause" provisions of the Statute for the first time and affirmed the decision of the Board of Review denying benefits under the just cause provision of §5(b)(1). In Kehl the Court analyzed the facts in accordance with the culpability, knowledge and control tests set forth in Department Proposed Regulations. The Court concluded that all three tests had been satisfied and that the denial of benefits on the basis the claimant was discharged for "just cause" was justified. It is submitted the claimant in the instant case was also properly denied benefits on the basis of a review of the facts under the culpability, knowledge and control factors.

CULPABILITY

The four offenses involved were each serious offenses. The discharge was consistent with reasonable employment practices. The conduct of the claimant in the instant case cannot be characterized as an isolated instance of poor judgment or a single violation of relatively insignificant import.

KNOWLEDGE

There is no indication in the record in this case that the employer's expectations were unclear, ambiguous or inconsistent except possibly with respect to the use of marijuana off of the job. As respects the use of marijuana the claimant concedes that he was aware that use of marijuana while performing his duties as a truck driver was contrary to the employer's policy and contrary to U. S. Department of Transportation rules and regulations. By reason of the very nature of the job involving driving on the road away from the terminal for weeks at a time the employer could not monitor the claimant's physical condition. The claimant reasonably should have known that any discovery of a controlled substance in his system under the circumstances of his particular job would have a serious affect upon his job and a very high degree of likelihood of a discharge.

CONTROL

The employer's policy required a driver to immediately contact the shop of the employer in Payette, Idaho to report any mechanical failure. Drivers were prohibited from doing their own repairs while out on the road. It certainly was within the claimant's control to report the mechanical failure

involving the road speed governor to the employer rather than attempting repairs on it himself. As respects exceeding the speed limit and driving some 21 1/2 hours in a 24 hour period it certainly was within the control of the claimant to drive within the set speed limits and not exceed allowed driving time, and to notify the employer if there was a problem delivery time and request the employer to have it rescheduled. As respects the use of marijuana or other controlled substances it must be assumed it was within the control of the claimant to obey the law and refrain from using such substances.

ARGUMENT

POINT I

IN REVIEWING A DETERMINATION OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT, THE COURT WILL AFFIRM THE COMMISSION'S FINDINGS OF FACT IF SUCH ARE SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AND WILL IMPLEMENT AN INTERMEDIATE STANDARD OF REVIEW WITH REGARD TO MIXED QUESTIONS OF LAW AND FACT.

The standard of review in unemployment insurance cases is well established. §35-4-10(i), Utah Code Annotated 1953, provides in pertinent part:

In any judicial proceeding under this section, the findings of the Commission and the Board of Review as to the facts if supported by evidence, shall be conclusive and the jurisdiction of the Court shall be confined to questions of law.

This Court has consistently held that the Commission's findings of fact are conclusive, binding on this Court, and to be sustained if supported by competent and substantial evidence in the record. Martinez v. Board of Review, 25 U.2d 131, 477 P.2d 587 (1970); Whitney v. Board of Review of Industrial Commission of Utah, Utah, 585 P.2d 780 (1978).

This Court has further observed:

Under §35-4-10(i) the role of this Court is to sustain the determinations of the Board of Review unless the record clearly and persuasively proves the action of the Board of Review was arbitrary, capricious and unreasonable. Specifically, as a matter of law, the determination was wrong; because only the opposite conclusion could be drawn from the facts.

Continental Oil Company v. Board of Review of the Industrial Commission of Utah, Utah, 568 P.2d 727 (1977). Even in the case of conflicting testimony by the parties, this Court has stated:

. . . Substantial evidence need not be uncontroverted evidence. It is for the administrative agency, not this Court, to choose between conflicting facts.

The Court further pointed out that it is beyond the Court's prerogative to determine that the Board's reliance on one party's testimony over another's was inappropriate. Salt Lake City Corporation v. Department of Employment Security, Utah, 657 P.2d 1312 (1982). The Court will affirm commission findings on questions of basic fact if they are supported by evidence of any

substance whatever and will set them aside only if they are without foundation in fact. Utah Department of Administrative Services v. Public Service Commission, Utah, 658 P.2d 601, 609 (1983).

Practical experience with judicial review has unquestionably identified a major category of administrative decisions on which reviewing courts exercise a scope of review more extensive than when reviewing agency findings on questions of basic fact, but less extensive than when reviewing to correct error in agency decisions on questions of general law. Utah Department of Administrative Services v. Public Service Commission, *supra*, p. 610; Salt Lake City Corporation v. Department of Employment Security, *supra*. This intermediate standard of review may be characterized as mixed questions of law and fact or the application of findings of fact to the legal rules governing the case. "In reviewing decisions such as these, a court should afford great deference to the technical expertise or more extensive experience of the responsible agency." Utah Department of Administrative Services v. Public Service Commission, *supra*. "The degree of deference extended to the decisions of the commission on these intermediate types of issues . . . must fall within the limits of reasonableness or rationality." Utah Department of Administrative Services v. Public Service Commission, *supra*. The test of rationality may be no

more than a matter of logic or completeness, such as when the question is whether the commission's findings of fact support its conclusion. Utah Department of Administrative Services v. Public Service Commission, supra; City of Orem v. Christensen, Utah, 682 P.2d 292 (1984).

In reviewing the commission's interpretations of general questions of law, the Court applies a correction-of-error standard with no deference to the expertise of the commission. General questions of law include interpretation of the United States Constitution and the acts of Congress and interpretation of the Utah Constitution and acts of the Utah Legislature. Examples of this correction-of-error type of review include whether the commission has acted beyond its statutory jurisdiction or authority and, questions of general law such as the interpretation of contracts. Utah Department of Administrative Services v. Public Service Commission, supra, p. 608.

POINT II

WHEN A DECISION OF AN ADMINISTRATIVE LAW JUDGE IS APPEALED TO THE BOARD OF REVIEW AND THE BOARD OF REVIEW ISSUES A DECISION AFFIRMING, MODIFYING OR REVERSING THE ALJ, THE DECISION OF THE ALJ IS OF NO FURTHER AFFECT OR VALIDITY EXCEPT TO THE EXTENT THE BOARD OF REVIEW IN ITS DECISION ADOPTS THE FINDINGS OF FACT AND/OR CONCLUSIONS OF LAW OF THE DECISION OF THE ALJ.

On page 7 of his Brief, the claimant asserts that this Court should affirm the decision of the ALJ because it is

supposedly supported by substantial evidence whereas the Board's decision disallowing benefits is supposedly not supported by substantial evidence. It is submitted that once a decision of the ALJ had been appealed to the Board of Review and the Board of Review allows the appeal, either because the ALJ decision did not affirm a prior decision, or the Board in its discretion elects to hear an appeal on the merits in a situation where an ALJ did affirm a prior decision, the decision of the Board of Review then supplants and takes the place of the decision of the ALJ and becomes the decision of the Commission. At that point the decision of the ALJ is void and without any further operative effect except to the extent that the Board of Review adopts the Findings of Fact and/or Conclusions of Law of the decision of the ALJ in its (the Board of Review) decision. The relevant provisions of the Utah Employment Security Act in this regard are as follows:

35-4-10(d)(1) The governor shall appoint a review board composed of three impartial members to hear and decide referrals and appeals from the decision of the appeal referee. . . .

(d)(2) The board of review within the time specified for the filing of appeals may allow an appeal from a decision of an appeals referee on application filed within the designated time by any party entitled to notice of the decision. An appeal filed by the party shall be allowed as of right if the decision did not affirm a prior decision. Upon appeal the board of review may

on the basis of the evidence previously submitted in the case, or upon the basis of any additional evidence it requires, affirm, modify or reverse the findings, conclusions and decision of the appeal referee. The board of review shall promptly notify the parties to any proceedings before it of its decision, including its findings and conclusions, and the decision shall be final unless within ten days after mailing of notice to the parties' last known addresses or in the absence of mailing within ten days after the delivery of the notification further appeal is initiated under the provisions of this section; provided that upon denial by the board of review of an application for appeal from the decision of an appeal referee the decision of the appeal referee shall be deemed to be a decision of the board of review within the meaning of this paragraph for purposes of judicial review and shall be subject to judicial review within the time and in the manner herein provided.

Utah Code Annotated 1953, as amended.

It is clear from the foregoing quoted provisions of the Act that the Board of Review is appointed by the Governor to decide referrals and appeals from decisions of the Administrative Law Judges. When an appeal has been allowed by the Board it is the responsibility of the Board to make a decision on the merits based upon the record before it. It is a de novo review in the sense that the Board makes its own findings of fact based upon all of the evidence in the record. The role of the Board of Review in reviewing appealed ALJ decisions is quite different from the role of the Supreme Court when a decision

of a Board of Review has been appealed to the Court under §35-4-10(i) of the Act. When a decision of the Board of Review is appealed to the Supreme Court "the findings of the Commission and the Board of Review as to the facts if supported by evidence, shall be conclusive and the jurisdiction of the Court shall be confined to questions of law."

Inasmuch as the Board of Review has issued its decision in this case the decision of the ALJ is of no further effect and is void. The Board of Review did not adopt any of the findings of fact and conclusions of law of the decision of the Administrative Law Judge in its decision. The claimant on page 7 of its Brief refers to the holding in Kehl v. Board of Review, Utah, 700 P.2d 1129 (1985) that "because of the technical experience of the ALJ and the ALJ's ability to more closely evaluate the testimony proffered, great deference should be afforded to the ALJ's decision." This does not mean that the Court should prefer the decision of the ALJ over the decision of the Board of Review. The decision of the Board of Review supplants the decision of the ALJ as mentioned above and the Supreme Court affords great deference to the technical expertise or more extensive experience of the final statement or decision of the Agency, which under the statutory scheme of the Employment Security Act is rendered by the Board of Review consisting of a Member of the Industrial Commission and two

Members appointed for two year terms by the governor. §35-4-10(d)(1), Utah Employment Security Act.

POINT III

THE BOARD OF REVIEW'S DECISION THAT APPELLANT CLAIMANT WAS DISQUALIFIED FROM RECEIVING BENEFITS UNDER §35-4-5(b)(1) OF THE ACT FALLS WITHIN THE LIMITS OF REASONABLENESS AND RATIONALITY AND THE COURT SHOULD THEREFORE AFFORD GREAT DEFERENCE TO THE BOARD'S TECHNICAL EXPERTISE AND/OR EXTENSIVE EXPERIENCE IN SUCH MATTERS.

The Board of Review found that the claimant was discharged from his employment for four reasons. First, "That the truck's road speed governor had been altered to allow driving in excess of the 62 mile per hour maximum speed the governor would have allowed." Second, "that the on-board computer showed that the truck had averaged about 66 miles per hour." Third, "that the claimant had operated his vehicle for nearly 22 hours out of a 24 hour period, which is clearly a violation of both the United States Department of Transportation Hours of Service regulations and company policy." Fourth, "On a urinalysis test for drug usage, he was found to have used a controlled substance (marijuana)." R.0019 Each of said findings of fact is amply supported by the evidence in the record.

CLAIMANT ALTERED THE TRUCK'S ROAD SPEED GOVERNOR

The testimony on this point is in dispute but the Board's decision is amply supported by substantial and competent evidence. The employer's Safety Manager, Nixon, testified:

I was notified by the mechanics in the shop that one of the drivers had come in and mentioned something about an air leak that he had tried to fix himself. They told me that the air leak involved a road speed governor, which is within my department to investigate any problems with that area.
R.0039

The employer's witness Nixon testified that the employer checked out the governor and found it was not working. The governor, when it is working, restricts the RPM so as not to allow the truck to go in excess of approximately 61 or 62 miles per hour. Upon examination of the mechanism, the employer's shop found that a valve on top of the transmission had been removed or some way tampered with. The valve itself was cracked and broken. The brass fittings going to the valve had been removed by something other than a proper sized wrench because there were teeth marks in the brass and the corners were rounded off. One of the air lines had an extreme amount of tape on it which is not the type of repair a proper shop would perform. R.0039,0040 Nixon confronted the claimant with the evidence discovered and the claimant responded to Nixon:

He indicated to me that he had broken an air line while he was out on the road and that he felt it was necessary to repair it. And he did indicate that he did remove the valve in order to make that repair, and that in the process of doing so, apparently, that is how it became cracked and broken. He also indicated that he taped it trying to get the air leak to stop. R.0040

The employer has a clear cut, well known policy that explains what drivers are to do when they have a breakdown or a mechanic is needed on the road. The policy is:

At any time there's a mechanical failure or break down on the road, they are to notify the head of maintenance in the shop in Payette, Idaho. At that point, he will direct them to a shop to have that--the problem repaired. We are pretty specific about drivers not doing their own repairs on the road. R.0040

The driver has alternate phone numbers for a driver to call before and after shop hours so that anytime of day or night they can reach supervisory personnel. R.0040 The employer testified that the claimant made no call regarding the broken air line or with regard to a broken governor. R.0040 The employer testified that the claimant did not offer any reasonable explanation as to why he did not call in to report the mechanical failure.

. . . He was aware of the fact that that's something that he should of done. He expressed the idea, that he was out, as he said, '50 miles from the nearest town.' My comment was, you know, 'why didn't you stop and report it then, and we could have had a

proper repair made at that time,' and we had that discussion about it, Mr. Grinnell really couldn't offer an explanation as to why he didn't do it. R.0042

The employer asked the claimant when he had first observed the leak. The claimant responded that he had been writing it up for quite some time. DOT requirements provide that every day a driver complete what is called a "vehicle inspection report." The employer maintains a file of these reports. Nixon testified: "I went back through all of his vehicle inspection reports and the only thing that I can find that indicates an air leak, was written up on September 20th of 1985." R.0043 This was some three months before the incident which gave rise to the termination on or about December 20, 1985. The air leak referred to in the September 20th report was around the battery box, something different from the air leak in question regarding the speed governor. R.0043

The on-board computer installed in claimant's truck disclosed that beginning on the 17th day of December of 1985 there were three extended periods of time when the claimant averaged 66 miles per hour for extended periods of time. R.0041 This was at the same time that the speed governor was broken. Otherwise the governor would have prevented his driving at such excessive speeds. The employer's Safety Manager, Nixon, concluded that the claimant had tampered with the speed governor

because of the combination of the mechanical defect that was present (the broken governor) and also the increased speed at that same time. The fact that the governor was broken did not cause the claimant to drive above the 62 mile per hour speed which the claimant certainly knew was required by the employer simply by the fact of the installation of governors on the trucks limiting the top speed to 62 miles per hour.

Nixon: Well in looking at the evidence, my conclusion was that, that there was some possible tampering involved there, because of the combination of the mechanical defect that was present and also the increased speed at that particular time.
R.0041

The fact that the claimant did drive at excessive speed at that time it is submitted does tend to prove that the claimant intentionally tampered with the speed governor and that it was not just a matter of the claimant taping an air line which broke in order to avoid loss of air pressure resulting in his brakes jamming up on him while driving. R.0071

Upon discovering the air leak and upon discovering that the speed governor was not operating, the claimant in accordance with clearly stated company policy should have called in at the first opportunity to report the mechanical failure and receive instructions as to how to handle the problem and how to effect repairs through a proper repair shop. The employer

had clearly informed all drivers, including the claimant, that they were not to do their own repairs on the truck while out on the road. R.0040 The claimant does not admit altering the speed governor, but rather vigorously contends that he performed necessary repairs to a broken air line to enable him to get back to the terminal. However, it is submitted that there is ample evidence in the record to sustain the Board's finding that the claimant altered the truck's road speed governor in order to allow the claimant to exceed the 62 mile per hour maximum speed and that thereafter the claimant did in fact exceed the maximum speed and averaged 66 miles per hour for extended periods of time.

DRIVING AT SPEEDS IN EXCESS OF THE 62 MILE PER
HOUR MAXIMUM SET BY THE EMPLOYER.

The employer testified that it has a Rockwell Trip Master Computer installed on each of its trucks. There was one installed on the claimant's truck during the time period in question and it was functioning properly at the time. The employer's Safety Manager, Nixon, examined the data from the on-board computer to see if the claimant had been exceeding the maximum speed during the time when the speed governor was broken. Nixon testified:

. . . Beginning on the - let me find the date here. Beginning on the 17th of December, I found that for a period of time, beginning about 6 o'clock in the evening and going until almost 2 o'clock in the morning of the next day, there were three different periods of time where Mr. Grinnell averaged 66 miles per hour for extended periods of time. R.0041

This writer has been unable to find any evidence in the record disputing the testimony of the employer regarding the claimant's driving at an average speed of 66 miles per hour for extended periods of time. This finding of the Board of Review is not in dispute, is conclusive and binding on the Court. Martinez v. Board of Review, supra.

CLAIMANT OPERATED HIS VEHICLE FOR NEARLY 22 HOURS OUT OF A 24 HOUR PERIOD IN VIOLATION OF U. S. DOT REGULATIONS AND COMPANY POLICY.

U. S. Department of Transportation regulations allow a driver to drive up to 10 hours and then they require an 8 hour break, to wit:

49 CFR, Chapter 3, §395.3. Maximum Driving and on Duty Time.

(a) Except as provided in paragraph (c) and (d) of this section and in §395.10, no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:

(1) More than 10 hours following 8 consecutive hours off duty; or

(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

(3) (Not pertinent in this instance.)

The employer's Safety Manager, Nixon, testified:

. . . In reviewing Mr. Grinnell's daily trip reports, I found that earlier in his trip, in November, he had an extended period of driving time. DOT regulations will allow a driver to have up to ten hours' driving time, then they require an eight hour break. Mr. Grinnell drove continuously, well let me read to you what the results, or what the printout says, "On the 21st of November, he began driving at 7:26 a.m., he drove for a total of 7 hours and 56 minutes, he stopped the truck at 3:22 p.m., he covered a distance of 414 miles, the truck was stopped for 57 minutes. At 4:19 p.m., he started up again, drove for another 3 hours and 40 minutes. The truck was shut off at 7:59 after he had driven 176 miles, and then he stopped for an hour and one minute, and then at 9:00 in the evening, he started again and drove for 9 hours and 52 minutes, shutting the truck off the next morning at 6 hours - or, excuse me, 6:00, 6:00 a.m. and 52 minutes, after driving 496 miles. His total road hours or driving time was 21 hours and 28 minutes. . . . R.0044

The claimant had driven for 21 hours and 28 minutes and during that time had only had one hour and 58 minutes break. It is clear that the claimant was grossly in violation of the above-quoted DOT regulations.

Claimant was also in violation of the employer's policy and rules in this regard. In response to the question as to

whether the employer has a policy in this regard, Nixon testified:

Nixon: Yes, in fact it is very clear that, the DOT regulations will be complied with and that if necessary, we will reschedule the load.

Wilson: Suppose a driver was assigned a load with a delivery time that cannot be legally complied with. What is a driver expected to do?

Nixon: At that point the driver should talk to the dispatcher and see if he will reschedule it. If the dispatcher refuses to reschedule it, then we expect the drivers to get in touch with the Safety Department, at which time we will get the load rescheduled, rather than have the driver violate the regulations.

Wilson: How are the drivers advised of that policy?

Nixon: They're advised of it basically I guess you could say three ways: one way they're told in orientation, another way, it's, it's in our written policies, and the third way, if the driver has a log book violation, he is mailed a warning letter which indicates very specifically on there, what our policies are. R.0045

The claimant does not dispute this allegation of the employer. The claimant generally states in his appeal to the ALJ:

Also I am accused of violations of exceeding maximum driving and on duty time. I have in my possession all the log books from the time I started working at May Trucking and there are no violations.

The claimant at the hearing did not specifically deny that he drove 21 hours and 28 minutes in a 24 hour period.

It is submitted that this finding of the Board of Review is supported by substantial competent evidence, is conclusive and binding on the Court.

A URINALYSIS TEST DISCLOSED THAT CLAIMANT DURING THE TIME OF HIS EMPLOYMENT USED A CONTROLLED SUBSTANCE (MARIJUANA).

The Board of Review in its decision acknowledged that:

There may well be insufficient evidence respecting the claimant's use of marijuana to demonstrate when the claimant had actually used the drug or what effect, if any, the use of the drug had upon his driving ability. R.0019

The claimant returned from an approximately two week road trip with his truck on December 20, 1986. When the employer discovered the incident of driving 21 hours plus within 24 hours, it was concerned that the claimant may have used a controlled drug of some sort to enable him to accomplish such a feat. At that point the employer requested that the claimant submit to a urinalysis for a drug screen. The claimant agreed and submitted to the test. The result of the test showed the presence of traces of marijuana in the claimant's body. R.0046 When the results came back positive the employer asked the laboratory to recheck the same specimen and the laboratory came up with the

same results. The claimant admitted having used marijuana at some time in the past but denied being a habitual user or an addict. The claimant denied smoking any marijuana while in control of any motor vehicle. R.0050 The employer contends that the urinalysis test and the testimony of the claimant prove that the claimant used marijuana sometime during the two week period of time that he was on the road with his truck on his last trip from which he returned on December 20, 1985. The claimant denies this, but does not specifically state when he used marijuana which gave rise to the positive result in the test administered on December 24. It is submitted that the finding of fact of the Board of Review that the claimant had used a controlled substance (marijuana) sometime prior to the urinalysis test administered on December 24, 1985 is supported by substantial competent evidence and is, therefore, binding on the Court.

THE DISCHARGE WAS BASED UPON THE CUMULATIVE
EFFECT OF ALL OF THE AFOREMENTIONED FACTORS AND
NOT JUST UPON THE USE OF MARIJUANA.

The Board of Review found that the employer's decision to discharge the claimant was based upon a cumulation of factors, i.e., tampering with the road speed governor, exceeding the maximum speed set by the employer, grossly exceeding the allowed driving time in a 24 hour period, and use of marijuana. This

finding is amply supported by the evidence. The ALJ carefully questioned the employer's witness, Nixon, on this issue:

Judge: Just, just one point Mr. Nixon, are you saying then that all these other problems, the problem with the governor, the log--driving too long and so forth, brought up a suspension, but the actual termination--decision to make the termination, came when you determined that Mr. Grinnell had marijuana in his system, following the drug test?
R.0048

Nixon: Well, what I'm saying is the combination of all of those things. Had it not been for the, the positive results on the drug test, Mr. Grinnell probably would have had a two-week suspension and then it would have been over with. (Emphasis added.)

Judge: Would any of these others had made any difference if you'd determined he had marijuana in his system?

Nixon: The tampering situation is an offence for which drivers are terminated.

Judge: Okay, but you say that would have probably only resulted in a suspension. My question is, if you would of determined that he had marijuana in his system, without any of these other problems, would he have been terminated for having the marijuana in his system?

Nixon: Yes sir.

Judge: That--so none of the rest of them really make a damn bit of difference, it's the marijuana in the

system that matters? Excuse my language, excuse my language, but I want to get to the point. I've heard an awful lot of talking here and about two minutes of the reason for the discharge.

Nixon: All those things, all those things enter in. We make it very clear to our employees that, that any tampering with the equipment or any drug usage is not tolerated, and that they will be terminated. (Emphasis added.)

Judge: They--but the reason for the discharge was when you determined that Mr. Grinnell had been using marijuana, or that he had consumed marijuana. I'm not even going to go to the dictionary definition of use because I think that's merely a semantics question. But, but my concern here is that you determined that he had consumed marijuana, it was a positive test, he was fired as a result. The rest of those things are incidental?

Nixon: I...

Judge: I mean they may have been accumulative, but when the marijuana was determined, that was the reason for termination?

Nixon: I, I agree with what you just said. It was a accumulative situation, the marijuana was probably the last straw that broke the camel's back.

Judge: But without any of the others, if he would have taken a drug test, determined that he had marijuana in his system, he would have been discharged, correct?

Nixon: That is correct? R.0049

The employer's Terminal Manager, Berrett, testified:

Mike the reason you were not terminated because of the tampering which we found, immediately at that point, was because you have been a good driver, and we wanted to give you, give you every, every chance we possibly could. And that's the reason you weren't immediately, immediately terminated at that point. Had that happened to someone who had an accident too, they would have been out the door at that point, Mike. And so it really, how you were able to do that, I, I don't know, I don't have the slightest idea how, how that was. It's possible maybe you aren't a frequent user, I don't know, but the chance that you would be, is not something we want--we are going to take. R.0058

It is submitted that the Board of Review correctly concluded from the evidence that the claimant was discharged for a cumulation of factors and in the words of the employer's witness, Nixon, "It was a accumulative situation, the marijuana was probably the straw that broke the camel's back". R.0049

POINT IV

THE DECISION OF THE BOARD OF REVIEW IS IN ACCORD WITH THE DECISIONS OF THIS COURT INTERPRETING THE "JUST CAUSE" FOR DISCHARGE PROVISION OF §35-4-5(b)(1) OF THE ACT AND DEPARTMENT RULES INTERPRETING SAID SECTION.

ANALYSIS OF UTAH SUPREME COURT DECISIONS.

The most recent decision of this Court regarding "just cause" and §5(b)(1) of the Act is the case of Lane v. Board

of Review, Case No. 20888, filed October 16, 1986. The Lane case notes the fact that the Proposed Rule of the Department upon which the Court relied in Kehl v. Board of Review of Industrial Commission, supra, was finally adopted as of January 15, 1986. The Court further noted that said adopted Department of Employment Security Unemployment Insurance Rules pertaining to §5(b)(1) of the Act can properly serve as the basis of decision of any matter decided after January 15, 1986. Inasmuch as the decision of the Board of Review in the instant case was dated April 29, 1986 and mailed May 1, 1986, Unemployment Insurance Rule B. pertaining to §35-4-5(b)(1) of the Act defining "just cause" was properly taken into consideration and served as the basis of the decision of the Board of Review.

The Court in its decision in the Lane case considered the culpability factor set forth in Clearfield City v. Department of Employment Security, Utah, 663 P.2d 440, 441 (1983) in reversing the Board of Review and holding that Lane's discharge was not for "just cause." The Court held that the claimant Lane's conduct fell into the category of an isolated error in judgment or discretion. The claimant was discharged for selling beer to a minor after having failed to check the age of the individual in question. The Court held that claimant's failure to check the age of the person to whom he sold the beer was a mistake in judgement and not an intentional or knowing disregard of the employer's policy. The Court found that the

employer had not established any clear procedure for employees to follow to assure that beer would not be sold to minors other than to instruct their employees to "check identification when age was in doubt." The Court held that when the employer in Lane left certain matters to the employee's discretion with only vague guidelines that the employer cannot expect its employee to be denied unemployment compensation if it discharges such an employee.

The facts in the instant case are clearly distinguishable from the Lane case. Claimant's offenses in the instant case do not fall into the category of an isolated error in judgment or discretion. (See discussion of the CULPABILITY factor hereafter on page 43.) The offenses of the claimant in the instant case of altering the road speed governor and driving at speeds averaging 66 miles per hour and grossly exceeding DOT regulations and employer policy limiting the hours a driver may operate a vehicle following eight consecutive hours off duty, were clearly distinguishable from Lane's mistake in judgment in failing to ask for I.D. to determine the age of the individual to whom he sold beer, who turned out to be a minor. The Court in the Lane case stressed the fact that the employer had not established any clear procedures for employees to follow to assure that beer would not be sold to minors. The Court went so far as to cite an example of a procedure that could have

been established by the employer to require the checking of identification of all people who looked younger than forty. The Court then noted that if the employee Lane had violated such a specific procedure with respect to which he had been trained, a finding of just cause might be sustainable.

In the instant case we have no such similar inadvertent mistake of judgement on the part of an employee due to a failure of the employer to establish clear procedures and policy. As previously mentioned in POINT III the expectations and policy of the employer with regard to altering the speed governor and the driver making repairs on the truck on the road without first calling in to enable the employer to arrange to have the repairs performed by a qualified mechanic in a proper shop had been made known to the claimant and he was well aware of the policy. As respects driving at an average speed of 66 miles per hour for extended periods of time and driving some 21 and one-half hours in a 24 hours period, the policy of the employer and the requirements of DOT regulations were well known, clear and unambiguous and the claimant has not contended otherwise.

As respects the use of marijuana there is some uncertainty as regards whether off-duty use of the marijuana was prohibited under the employer's policy. However, it is submitted the claimant reasonably should have known that a discovery of a controlled substance in his system under the circumstances of

his particular job would have a very serious affect on his job and place his job in serious jeopardy. (See discussion of KNOWLEDGE hereinafter on page 45.)

Claimant refers to the case of Logan Regional Hospital v. Board of Review, 39 Utah Adv. Rep. 34 (1986), on page 11 of its brief. In the Logan Hospital case the claimant, Dailami, was allowed benefits under §35-4-5(b)(1) of the Act. The Logan Hospital case is clearly distinguishable from the instant case. The Board of Review in Logan Hospital held that the claimant's failure to control the water pressure in the building with a bypass valve while trying to repair the regular valve, was beyond the claimant's control. The Board further concluded that the employer failed to show that claimant's performance was the result of anything other than inability, incapacity, or isolated instances of inadvertencies or ordinary negligence in isolated instances. The Supreme Court affirmed the Board of Review's decision holding that "where the element of fault is lacking, the employee's conduct may be sufficient for discharge, but is not necessarily sufficient for a disqualification from benefits under the Employment Security Act."

The Court went on to state: "The administrative law judge expressly found that the circumstances leading to Dailami's discharge were the result of inadvertent conditions beyond his power of control, precluding a discharge for just cause." It

is clear that the decision in Logan Hospital to allow benefits is based upon a fault concept as set forth in Department rules and a finding by the Court in agreement with the finding of the Board of Review and the Administrative Law Judge that the claimant's failure of performance in the incident which gave rise to his discharge was beyond his control and therefore a denial of benefits under §35-4-5(b)(1) was not justified. In the instant case the control factor is clearly satisfied. The Board of Review found that the claimant had altered the truck's road speed governor to allow driving in excess of the 62 mile per hour maximum speed the governor would have allowed. The Board also found that the truck had in fact averaged 66 miles per hour during certain substantial periods of time. Third, the Board found that the claimant had operated his vehicle for nearly 22 hours out of a 24 hours period in violation of U. S. Department of Transportation regulations and company policy. And fourth, the claimant had used a controlled substance (marijuana) as disclosed by a urinalysis test. R.0019 All four of the objectionable actions referred to above were clearly within the control of the claimant Grinnell.

In the case of Terminal Service Company v. Board of Review, 26 Utah Adv. Rep. 24 (1986), the Court affirmed the decision of the Board of Review which allowed benefits under §35-4-5(b)(1). The decision to allow benefits in the Terminal Service

Company case was mainly based upon the knowledge factor. The Court found that the claimant was not clearly warned that future attendance deficiencies would result in termination. The employer did not present documented evidence regarding the claimant's absences or tardiness. The employer had no written attendance policy and no written warning or reprimand was given to the claimant. These facts are clearly distinguishable from the instant case. There is no contention on the part of the claimant Grinnell that he understood it was all right to alter the truck's road speed governor. As mentioned in POINT III claimant denies that he altered the speed governor. Grinnell does not contend that he did not know he was in violation of the employer's rules to drive at an average speed of 66 miles per hour. Claimant also does not contend that he was unaware of the company policy and Department of Transportation regulations prohibiting his action in driving nearly 22 hours out of a 24 hour period.

In the case of Spartan AMC/Jeep v. Board of Review of the Industrial Commission, Utah, 709 P.2d 395 (1985), the Supreme Court affirmed the decision of the Board of Review allowing benefits under §35-4-5(b)(1) of the Act. This case mainly involved a dispute as to the facts. The employer contended that the claimant had taken various property from the employer without authorization. Claimant denied having done so. The

Board believed the claimant's explanation with regard to the various items in question. The Supreme Court affirmed the Board of Review stating:

We view the evidence in the light most favorable to the findings and, if there is evidence of any substance whatever which can be reasonably regarded as supporting the determination of the Board of Review, we will affirm that determination on appeal.

In the instant case the claimant does dispute that he altered the truck road speed governor but it is submitted there is ample evidence in the record to support the finding of the Board of Review that the claimant did intentionally alter the road speed governor. Claimant does not dispute that he drove the truck at an average speed of 66 miles per hour nor that he operated the vehicle for 21 plus hours out of a 24 hour period, nor that he used marijuana.

In the case of Wright's Furniture Mill, Inc. v. Industrial Commission, Utah, 707 P.2d 113 (1985), the Court affirmed the Board of Review decision allowing benefits under §35-4-5(b)(1). In the Wright's case, the claimant Molyneux was discharged because the employer's insurance carrier would not insure the claimant as a truck driver. The claimant had been cited in Texas 18 months prior to his discharge for speeding violations. The Administrative Law Judge concluded that although the employer had no reasonable alternative but to either discharge the

claimant or offer him other work, that the speeding violations which had occurred 18 months previously did not satisfy the culpability factor required for disqualification under §5(b)(1). The instant case is clearly distinguishable. The actions of Grinnell occurred immediately prior to the discharge and the nature of the infractions clearly satisfy the culpability requirement as compared to the long forgotten 18 month old speeding citation in the Wright's case.

In the case of Rahimi v. Board of Review of Industrial Commission, Utah, 706 P.2d 1063 (1985), the Court affirmed the decision of the Board denying benefits. In the Rahimi case the culpability, knowledge and control factor were each clearly satisfied. It is submitted that each of the three factors is satisfied in the instant case as will be examined in detail hereafter.

The first case in which this Court construed the "just cause" provision of §35-4-5(b)(1) of the Act is the case of Kehl v. Board of Review of Industrial Commission, supra. In the Kehl case the Court affirmed the decision of the Board of Review denying benefits under the "just cause" provision of §5(b)(1). The Court held that the Proposed Department Rules and Regulations specifying the culpability, knowledge and control factors were within the limits of reasonableness and rationality and the Court then analyzed the facts in Kehl in

accordance with Department proposed regulations and the culpability, knowledge and control tests. The Court affirmed the conclusion of the Board of Review that all three tests had been satisfied and affirmed the denial of benefits on the basis that the claimant was discharged for just cause per §35-4-5(b)(1). Again it is submitted that all three factors are satisfied in the instant case. The Petitioner was discharged for just cause and was properly denied benefits.

ANALYSIS OF THE FACTS AS RESPECTS THE CULPABILITY, KNOWLEDGE AND CONTROL FACTORS.

The Unemployment Insurance Rules pertaining to §35-4-5(b)(1) of the Act are set out in Appendix C attached hereto. These rules set forth the three basic factors which establish just cause and are essential for a determination of ineligibility. These three factors are culpability, knowledge and control.

CULPABILITY

This factor has to do with the "seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests." The Board of Review in its decision held:

The employer clearly testified that it was the cumulative affect of all the above-listed factors which resulted in a decision to terminate the claimant. The employer has noted in its appeal that the number of hours which the claimant drove in a 24 hour period exceeded double the Federal permissible limit and at speeds substantially in excess of the maximim speed limit. Moreover, these violations of company policy, as well as state and federal laws, were not just isolated incidents that had accumulated over the period of the claimant's employment, but rather were an accumulation of evidence respecting the claimant's conduct on the last trip he drove for the employer. R.0020

It is submitted that the decision of the Board of Review meets the test of reasonableness and rationality. The discharge it is submitted was consistent with reasonable employment practices. The four offenses involved were each serious offenses. The alteration of the truck's road speed governor to allow driving in excess of the speed limit set by the governor, then actually driving at speeds substantially in excess of the speed limit established by the employer, constitute very serious offenses. The offense of driving 21 hours and 28 minutes in a 24 hour period was a gross violation of government regulations and the employer's policy. The final offense of use of marijuana was as stated by the employer representative the "last straw that broke the camel's back." The employer's representative stated that they did not know whether the claimant was a frequent user of marijuana or other controlled substances but

the evidence of the use of marijuana along with all the other offenses caused the employer to make the decision to discharge the claimant. The employer didn't want to take the chance that the claimant's use of illegal drugs would have a future adverse effect upon the employer. R.0058 The conduct of the claimant in the instant case cannot be characterized as an isolated incident of poor judgment or a single violation of relatively insignificant import. The decision of the Board of Review that the culpability factor has been satisfied is well within the limits of reasonableness and rationality and it should be affirmed.

KNOWLEDGE

The Rule provides:

. . . It is not necessary that the claimant intended to cause harm to the employer, but he should reasonably have been able to anticipate the effect his conduct would have. . . .

There is no indication in the record in this case that the employer's expectations were unclear, ambiguous or inconsistent. The employer testified that drivers were warned not to tamper with the speed governor. R.0049 There is no indication in the record that the claimant was not well aware of the Department of Transportation rules regarding permissible hours of driving following eight consecutive hours off duty.

The claimant takes the position that he had no warning or knowledge that off the job use of marijuana would have any affect upon his ability to do his job for the employer. The record is not clear that the claimant was warned that he would be discharged if it were found that he had used a controlled substance while off duty. However, it is the position of the Respondents that the marijuna use was not a primary factor giving rise to the discharge. Rather the other offenses were matters of a nature that they clearly satisfied the knowledge factor. They were in the nature of a flagrant violation of a universal standard of behavior expected of a truck driver and did not require a specific warning although the evidence is to the effect that the claimant was given specific warnings regarding said offenses.

As respects the use of marijuana claimant concedes that he was aware that use of marijuana while performing his duties as a truck driver was contrary to the employer's policy and contrary to U. S. Department of Transportation rules and regulations. Claimant had been out driving on the road for some two weeks away from the employer's terminal in Layton, Utah. Claimant reasonably should have known that any positive test for use of drugs upon return from his two-week road trip would place his job in jeopardy. By reason of the very nature of his job the employer could not monitor his physical condition

while he was out on the road driving for two weeks at a stretch. The claimant reasonably should have known that any discovery of a controlled substance in his system under the circumstances of his particular job would have a very serious effect upon his job and a very high degree of likelihood of a discharge. This is so because of the inability of the employer to closely supervise and observe the claimant's performance of his duties and the need for the employer under the circumstances to be able to rely upon its drivers to maintain themselves in a physical and mental condition so as to be safe on the road. The employer had a vital interest to avoid liability by reason of negligent or intentional behavior of its drivers resulting in damages to third parties.

CONTROL

There does not appear to be much dispute that the actions complained of were within the control of the claimant. The claimant admitted that he tampered with the governor and contends that he did so because it was necessary in order to repair an air leak. The tampering with the speed governor, whether to repair an air leak or for the purpose of allowing claimant to exceed the governor limited speed was clearly a violation of the employer's rules and policy. The employer's policy required a driver to immediately contact the shop of the employer in

Payette, Idaho in case of any mechanical failure. The policy prohibited the drivers from doing their own repairs while out on the road. It certainly was within the driver's control to follow the employer's policy and report the mechanical failure to the employer rather than going ahead and working on the governor himself without authorization from the employer.

As respects exceeding the speed limit and driving at an average speed of 66 miles an hour, there is no contention by the claimant that this did not occur nor that it was in any way beyond his control. As respects the violation of DOT regulations and driving 21 plus hours in a 24 hour period, there is no indication in the record that claimant was not in fact guilty of the infraction. Claimant testified that he was required to drive the excessive hours because some dispatcher had set a delivery time that caused his actions in order to meet the time of delivery. The employer testified that the employer's policy in this regard required that drivers comply with the DOT regulations and policy required that a driver contact the employer's safety department to have a delivery time rescheduled if a delivery time could not be met without violating DOT regulations. It certainly was within the control of the claimant to notify the employer of the problem delivery time and request the employer to have it rescheduled. Claimant made no such attempt to comply with the employer's policy in this regard so

as to avoid the gross violation of DOT regulations and the employer's policy regarding permissible hours of driving after an eight hour rest period. As respects the use of marijuana and or other controlled substances, it must be assumed that it is within the control of a law abiding citizen to obey the law and refrain from using such substances which use is prohibited and constitutes a crime.

CONCLUSION

The findings of fact of the majority of the Board of Review are supported by substantial competent evidence. The conclusion of law of the Board of Review falls within the limits of reasonableness or rationality as measured by the statutory language, purpose and policy. The Respondent, Department of Employment Security, has promulgated Unemployment Insurance Rules defining the "just cause" standard as applied in determining whether a denial of benefits is appropriate in connection with a discharge from employment. This Court held in the Kehl case that said proposed rules are within the limits of reasonableness and rationality. Said rules were adopted in accordance with the Utah Rule Making Act as of January 15, 1986. Said rules properly serve as the basis of the decision of the Board of Review in this case.

The three factors essential for a determination of ineligibility per said Unemployment Insurance Rules: culpability, knowledge and control, have all been satisfied in the instant case. The decision of the majority of the Board of Review denying benefits to the claimant and relieving the employer of charges to its benefit ratio account for tax purposes should be affirmed.

Respectfully submitted this 24th day of October, 1986.

DAVID L. WILKINSON
Attorney General

WINSTON M. FAUX
Special Assistant
Attorney General

By _____
Winston M. Faux
Special Assistant
Attorney General

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed four copies of the foregoing Respondents' Brief, postage prepaid, to the following:
Ted K. Godfrey, UTAH LEGAL SERVICES, INC., Attorney for Claimant-Petitioner, Michael F. Grinnell, 385 - 24th Street, Suite 522, Ogden, Utah 84401, this 24th day of October, 1986.

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

SMH/TK/LRB/mgn

APPENDIX A (Page 1)

MICHAEL F. GRINNELL
S.S.A. No. 384 62 5299

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

:
:
Case No. 86-A-563
:
DECISION
:
Case No. 86-BR-106
:

After careful consideration of the record and testimony in the above-entitled matter, the Board of Review hereby reverses the decision of the Administrative Law Judge which allowed benefits to the claimant effective December 29, 1985, pursuant to §35-4-5(b)(1) of the Utah Employment Security Act, on the grounds the claimant was discharged from his employment but not for conduct which is disqualifying under the provisions of §35-4-5(b)(1) of the Utah Employment Security Act; and held the employer, May Trucking Company, liable for benefit charges in connection with this claim. Benefits are denied to the claimant effective December 29, 1985 and continuing until he has worked in bona fide covered employment and earned wages equal to at least six times his weekly benefit amount and is otherwise eligible, on the grounds the claimant was discharged from his employment for conduct which is disqualifying under the provisions of §35-4-5(b)(1) of the Act. This disqualification establishes an overpayment in the amount of \$1,351, pursuant to §35-4-6(e) of the Act, which must be offset by future benefits to which the claimant may become eligible during his current benefit year. The employer, May Trucking Company, is relieved of benefit charges in connection with this claim.

In reversing the decision of the Administrative Law Judge, the Board of Review notes that the claimant was discharged from his employment after returning from a trip when the employer learned: (1) that the truck's road speed governor had been altered to allow driving in excess of the 62-mile per hour maximum speed the governor would have allowed, (2) noted that the on-board computer showed the truck had averaged about 66 miles per hour, (3) that the claimant had operated his vehicle for nearly 22 hours out of a 24-hour period, which is clearly a violation of both the United States Department of Transportation Hours of Service Regulations and company policy; and (4) on a urinalysis test for drug usage he was found to have used a controlled substance (marijuana).

The Board of Review acknowledges that there may well be insufficient evidence respecting the claimant's use of marijuana to demonstrate when the claimant had actually used the drug or what effect, if any, the use of the drug had upon his driving ability. Nevertheless, the Board of Review does not accept the ALJ's conclusion that the claimant's discharge

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MICHAEL F. GRINNELL
S.S.A. No. 384 62 5299

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

:

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Case No. 86-A-563

:

DECISION

:

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should be adjudicated solely on the basis of the evidence respecting the claimant's use of marijuana. The employer clearly testified that it was the cumulative effect of all of the above-listed factors which resulted in a decision to terminate the claimant. The employer has noted in its appeal that the number of hours which the claimant drove in a 24-hour period exceeded double the federal permissible limit and at speeds substantially in excess of the maximum speed limit. Moreover, these violations of company policy, as well as state and federal laws, were not just isolated incidents that had accumulated over the period of the claimant's employment, but rather were an accumulation of evidence respecting the claimant's conduct on the last trip he drove for the employer. The fact that it took the employer several days to accumulate and evaluate the evidence cannot be used as a basis for looking only at the strength or weakness of the last evidence obtained in making the determination of whether the claimant should be disqualified under the provisions of §35-4-5(b)(1) of the Act and entirely disregarding the more substantial evidence respecting other acts that were part of the same incident.

This decision will become final ten days after the date of mailing hereof, and any further appeal must be made directly with the Utah Supreme Court at the State Capitol Building, Salt Lake City, Utah, within ten days after this decision becomes final. To file an appeal with the Supreme Court, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35-4-10(i) of the Utah Employment Security Act, followed by a Docketing Statement and a Legal Brief.

/S/ Stephen M. Hadley
/S/ James F. Hannan

I dissent.

I don't feel that the urinalysis test for drug usage results were that conclusive, particularly where they were taken nearly a week after the

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APPENDIX A (Page 3)

MICHAEL F. GRINNELL
S.S.A. No. 384 62 5299

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

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Case No. 86-BR-106
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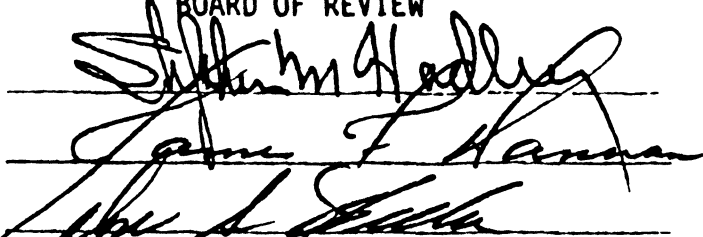
Page 3

claimant's return from the trip. Moreover, I do not find that the claimant's driving 66 miles per hour, which admittedly is in violation of the law, is that appreciably higher than 62 miles an hour, also in violation of the law, which the employer basically authorized as evidenced by the fact that that's the speed at which the governor was set.

/S/ Don S. Belka

Dated this 29th day of April, 1986.

Date Mailed: May 1, 1986.

BOARD OF REVIEW


INDUSTRIAL COMMISSION OF UTAH
DEPARTMENT OF EMPLOYMENT SECURITY

APPENDIX B (Page 1)

Appeals Tribunal

Decision of Administrative Law Judge

Michael F. Grinnell
2575 Hwy 89
Brigham City, Utah 84302

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:

S.S.A. No. 384 62 5299

Case No. 86-A-563

APPEAL FILED: January 29, 1986

DATE OF HEARING: February 19, 1986

APPEARANCES: Claimant/Employer

PLACE OF HEARING: Brigham City, Utah

The Department's decision dated January 24, 1986 denied unemployment insurance benefits effective December 29, 1986 on the grounds the claimant was discharged for just cause. Section 35-4-5(b)(1) and 35-4-7(c)(3)(F) of the Utah Employment Security Act are quoted on the attached sheet.

FINDINGS OF FACT:

Prior to filing a claim for unemployment insurance benefits effective December 29, 1985, the claimant worked as a tractor trailer driver for May Trucking Company from September 20, 1984 to December 19, 1985. His weekly benefit amount is \$193.00 for 26 weeks.

The claimant was discharged when he was determined to have traces of the drug marijuana in his system. After returning from a trip, a mechanic reported to the employer the dashboard on the claimant's truck had been removed and an air control valve on the governor had been altered. The governor controlled the truck's speed to below 62 miles per hour. An on board computer showed the truck had averaged about 66 miles per hour. When confronted about the problem, the claimant told the safety director he had air brake problems and he had tried to correct the difficulties. While the investigation into the air valve was being conducted, the safety director discovered the claimant had recorded an excessive driving time on his log. He had shown nearly 22 hours of driving time in a 24 hour period. The claimant had violated ICC standards by driving without taking proper break time. He was put on suspension as a result of the two incidents and the safety director ordered him to take a physical examination and a urine analysis because there was a serious question as to his ability to drive the extended time period without using amphetamines or other such drugs. The urine analysis established he had the trace of marijuana in his system. The claimant was discharged at that time.

The employer's policy prohibited the use of drugs or alcohol while employed by the company, but there was no written rules available to explain the details of the policy. The safety director felt the rule applied to a driver regardless of when the drugs were used. The claimant understood the rule was violated if the driver

consumed the substances while in or around a truck or under the influence of the substances while operating the vehicle. He had consumed the drug about two to three weeks before the test was administered and he had not used the substance regularly. The urine analysis test had been conducted by a local laboratory, but there was no information available to explain what influence the amount of drug in the claimant's system might have had on the claimant.

The claimant had a good performance record with the employer and he had not had any prior disciplinary problems. Due to his record, the employer had chosen to give him a suspension following the incidents involving the governor and the ICC violation of excessive driving time rather than discharge him.

REASONING AND CONCLUSION OF LAW:

A denial of unemployment insurance benefits following a discharge is based on a fault concept, as explained in the following decision:

When an employee is discharged by his employer, such discharge may have been the result of incompetence, lack of skill, or other reasons which are clearly beyond the claimant's control. The fact of willful or wanton conduct is not established merely by the claimant's knowledge that he is violating a reasonable rule of the employer; rather, it must be shown from the evidence that the claimant knew or had reason to know that his conduct may result in loss of employment. (Utah Board of Review, 80-BR-322.)

In the present case, the evidence clearly established the claimant's discharge was the result of the discovery of a drug in his system and the other incidents were not the primary reason for the termination. The employer was justified in having a policy designed to control and eliminate the problems of drug or alcohol used among its truck drivers, but in this instance there is substantial confusion as to the understanding of that rule and the application of the rule in the claimant's case. The claimant testified credibly that he had not consumed the drug for a considerable amount of time and he was not a regular user of the drug. He understood he was not in violation of the rule unless the drug had an influence on his driving performance or he had consumed the drug in or around a company vehicle. There was insufficient evidence provided to support the employer's contention the claimant knew he would be terminated for any use of drugs and the employer did not meet its burden of proof in this case to show the claimant had knowledge he would lose his job under the circumstances. It is therefore concluded the claimant was not discharged for just cause in accordance with the Utah Employment Security Act.

It is noted this decision does not attempt to determine the reasonableness of the employer's rule.

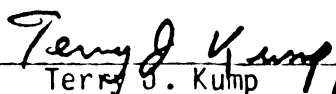
The Utah Employment Security Act relieves an employer of charges for unemployment insurance benefits when the claimant was discharged for reasons which are disqualifying under Section 35-4-5(b) of the Act. The Act does not grant relief when the reason for the discharge would not have resulted in a disqualification, even if the discharge resulted from circumstances over which the employer had no control. In

this case, the claimant was not discharged for disqualifying reasons and the employer is, therefore, ineligible for relief of charges.

DECISION:

The decision of the Department Representative is reversed and benefits are allowed effective December 29, 1985 pursuant to Section 35-4-5(b)(1) of the Utah Employment Security Act provided the claimant was otherwise eligible.

The employer, May Trucking Company, is not relieved of charges as provided by Section 35-4-7(c)(3)(F) of the Utah Employment Security Act and is liable for its pro-rated share of benefit costs paid to this claimant.


Terry J. Kump
Administrative Law Judge
DEPARTMENT OF EMPLOYMENT SECURITY

This decision will become final unless within ten days from February 26, 1986, further written appeal is made to the Board of Review (P. O. Box 11600, Salt Lake City, Utah 84147) setting forth the grounds upon which the appeal is made.

ch

Attachment

cc: May Trucking Company

STATUTES AND RULES APPLICABLE TO THE CASE

§35-4-5(b)(1), Utah Code Annotated 1953, as amended (1985 Pocket Supplement), provides as follows:

5. An individual is ineligible for benefits or for purposes of establishing a waiting period:

(b)(1) For the week in which the claimant was discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton and adverse to the employer's rightful interest, if so found by the commission, and thereafter until the claimant has earned an amount equal to at least six times the claimant's weekly benefit amount in bona fide covered employment.

Rules A., B.1., 2., and 3., Department of Employment Security Unemployment Insurance Rules, pertaining to §35-4-5(b)(1) of the Utah Employment Security Act, provides as follows:

A. GENERAL DEFINITION

Ordinarily accepted concepts of justice are used in determining if a discharge is disqualifying under the "just cause" provisions of the Act. Just cause is defined as a job separation that is necessary due to the seriousness of actual or potential harm to the employer provided the claimant had knowledge of the employer's expectations and had control over the circumstances which led to the discharge. Just cause is not established if the reason for the discharge is baseless, arbitrary or capricious or the employer has failed to uniformly apply reasonable standards to all employees when instituting disciplinary action. The purpose of this section is to deny benefits to individuals who bring about their own

unemployment by conducting themselves, with respect to their employment with callousness misbehavior, or lack of consideration to such a degree that the employer was justified in discharging the employee. However, when an employee is discharged by his employer, such discharge may have been the result of incompetence, lack of skill, or other reasons which are beyond the claimant's control. The question which must be established by the evidence is whether the claimant is at fault in his resulting unemployment. Unemployment insurance benefits will be denied if the employer had just cause for discharging the employee. However, not every cause for discharge provides a basis to deny benefits. In order to have just cause for discharge pursuant to Section 35-4-5(b)(1) there must be some fault on the part of the employee involved.

B. JUST CAUSE

1. The basic factors which establish just cause, and are essential for a determination of ineligibility are:

a. Culpability

There is the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests. A discharge would not be considered "necessary" if it is not consistent with reasonable employment practices. The wrongness of the conduct must be considered in the context of the particular employment and how it affects the employer's rights. If the conduct was an isolated incident of poor judgment and there is no expectation that the conduct will be continued or repeated, potential harm may not be shown and therefore it is not necessary to discharge the employee.

(1) Longevity and prior work record are important in determining if the act or omission is an isolated incident or a good faith error in judgement. An employee who has historically complied with work rules does not demonstrate by a single violation, even though harmful, that such violations will be repeated and therefore require discharge to avoid future harm to the employer. For example: A long term employee who does not have a history of tardiness or absenteeism is absent without leave for a number of days due to a death in his immediate family. Although this is a violation of the employer's rules and may establish just cause for discharging a new employee, the fact that the employee has established over a long period of time that he complies with attendance rules shows that the circumstance is more of an isolated incident rather than a violation of the rules that is or could be expected to be habitual. In this case, because the potential for harm to the employer is not shown, it is not necessary for the employer to discharge the employee, and therefore just cause is not established.

b. Knowledge

The employee must have had a knowledge of the conduct which the employer expected. It is not necessary that the claimant intended to cause harm to the employer, but he should reasonably have been able to anticipate the effect his conduct would have. Knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a pertinent written policy, except in the case of a flagrant violation of a universal standard of behavior. If the employer's expectations are unclear, ambiguous or inconsistent, the existence of knowledge is not shown. A specific warning is one way of showing that the employee had knowledge of the expected

conduct. After the employee is given a warning he should be given an opportunity to correct objectionable conduct. Additional violations occurring after the warning would be necessary to establish just cause for a discharge.

(1) For Example: When the employer has an established procedure of progressive discipline, such procedures generally must have been followed in order to establish that the employee had knowledge of the expected behavior or the seriousness of the act. The exception is that very severe conduct, such as criminal actions, may justify immediate discharge without following a progressive disciplinary program.

c. Control

The conduct must have been within the power and capacity of the claimant to control or prevent.

2. Just cause may not be established when the reason for discharge is based on such things as mere mistakes, inefficiency, failure of performance as the result of inability or incapacity, inadvertence in isolated instances, good faith errors in judgment or in the exercise of discretion, minor but casual or unintentional carelessness or negligence, etc. These examples of conduct are not disqualifying because of the lack of knowledge or control. However, continued inefficiency, repeated carelessness, or lack of care exercised by ordinary, reasonable workers in similar circumstances, may be disqualifying depending on the reason and degree of the carelessness, the knowledge and control of the employee.

3. The term "just cause" as used in Section 5(b)(1) does not lessen the requirement that there be some fault on the part of the employee involved. Prior to the

1983 addition of the term "just cause" the Commission interpreted Section 5(b)(1) to require an intentional infliction of harm or intentional disregard of the employer's interests. The intent of the Legislature in adding the words "just cause" to Section 5(b)(1) was apparently to correct this restrictive interpretation. While some fault must be present, it is sufficient that the acts were intended, the consequences were reasonably foreseeable, and that such acts have serious effect on the employee's job or the employer's interests.

§35-4-10(d), Utah Code Annotated 1953, as amended, provides as follows:

(d)(1) The governor shall appoint a review board composed of three impartial members to hear and decide referrals and appeals from the decision of the appeal referee.

(d)(2) The board of review within the time specified for the filing of appeals may allow an appeal from a decision of an appeals referee on application filed within the designated time by any party entitled to notice of the decision. An appeal filed by the party shall be allowed as of right if the decision did not affirm a prior decision. Upon appeal the board of review may on the basis of the evidence previously submitted in the case, or upon the basis of any additional evidence it requires, affirm, modify or reverse the findings, conclusions and decision of the appeal referee. The board of review shall promptly notify the parties to any proceedings before it of its decision, including its findings and conclusions, and the decision shall be final unless within ten days after mailing of notice to the parties' last known addresses or in the absence of mailing within ten days after the delivery of

the notification further appeal is initiated under the provisions of this section; provided that upon denial by the board of review of an application for appeal from the decision of an appeal referee the decision of the appeal referee shall be deemed to be a decision of the board of review within the meaning of this paragraph for purposes of judicial review and shall be subject to judicial review within the time and in the manner herein provided.

§35-4-10(i), Utah Code Annotated, 1953, as amended, provides as follows:

(i) Within ten days after the decision of the board of review has become final, any aggrieved party may secure judicial review by commencing an action in the supreme court against the board of review for the review of its decision in which action any other party to the proceeding before the board of review shall be made a defendant. In that action a petition which need not be verified but must state the grounds upon which a review is sought shall be served upon a member of the board of review or upon that person the board of review designates and service is deemed completed service on all parties but there shall be left with the party served as many copies of the petition as there are defendants and the board of review shall mail one copy to each defendant. With its answer, the board of review shall certify and file with the court all documents and papers and a transcript of all testimony taken in the matter together with its findings of fact and decision.

MPH. I did not tamper with this control, but merely taped an airline which broke while I was on the road. I fixed it with tape so that I could get back to the terminal. I offered to take a lie detector test to verify that I didn't tamper with the governor, but the employer wasn't interested. I have since heard that this employer is checking back on my military records and is also trying to get something that would indicate that I was also involved with drug use at the time this happened. The airline was from the brakes and this could have caused some real problems, thus it is against FICC regulations. Had I not have taped the line, I would have had my brakes jam up on me and it could have caused some very dangerous problems. Mr. Nixon tried to get me reinstated, but the head office in Payette, Idaho said 'no.' Since that time, the rumors of the drug charges have come up. I was not using drugs while driving the company trucks." Mr. Grinnell, that is signed by you, correct?

ant Yes sir.

Attached to that, "Air controles (sic) the brakes on a truck and I was out about 50 miles from the nearest town when I taped the air lines witch (sic) was causing the truck's brakes to lock up."

Exhibit #4, is Mr.--is your notice Mr. Grinnell, of the denial of the benefits and Exhibit #5, is the request for an appeals hearing, Mr. Wilson, you should have a copy of this, I believe you stated that you did have a copy of this one, the claimant's appeal. Signature...

n (Unintelligible)

Okay. The signature on Exhibit 5, Mr. Grinnell is that--that is your signature sir?

ant Yes sir.

These exhibits are part of the permanent record, any comments or exceptions to them should be brought out during the course of our hearing this afternoon. Now general information, first of all Mr. Grinnell, your application for benefits shows that you were employed by the May Truck Company from September 20th, 1984 to December 19th, 1985, is that correct?

ant Yes.

What did you do there?

ant I was their cross-country driver.

Okay, what was your wage?

Claimant \$.16 a mile.

Judge Now according to this you were fired, is that right?

Claimant Yes sir.

Judge Okay, it is the policy of the Commission in matters of discharge to ask that the employer representatives explain the reasons for the discharge, Mr. Grinnell, you'll have a chance to ask any questions that you might have of those witnesses and then make your statement and bring in your witnesses. I do a lot of cross-examination of the claimant and witnesses in this regard, and both parties will have an opportunity of rebuttal statements and closing statements. So at this time, I'm going to ask the employer to explain the reasons for Mr. Grinnell's discharge. However you choose to do that, Mr. Wilson, Mr. Berrett, Mr. Nixon, go ahead with that please.

Wilson (Unintelligible)

Berrett Okay, I'm here Tim.

Judge We're having real troubles hearing you Mr. Wilson.

Wilson I'll try to speak up, is this audible?

Judge Just barely.

Wilson Well I'll do my very best to keep speaking loudly.

Judge Okay.

Wilson Mr. Nixon, what is your title with May Trucking Company?

Nixon I'm a Safety Manager.

Wilson Where are you a Safety Manager at?

Nixon The Layton Terminal.

Wilson What do your duties include?

Nixon Basically overseeing the operation of the trucks, the maintaining of the equipment in a safe working order, and the way that the drivers drive the trucks, also the background on the drivers as to their employment, driver's license information and so on.

Wilson Are you familiar with the events leading to the discharge of Mr. Grinnell?

Nixon Yes sir.

n When did this situation first involve you?

I believe it was the 20th of December.

n What happened?

I was notified by the mechanics in the shop that one of the drivers had come in and mentioned something about an air leak that he had tried to fix himself. They told me that the air leak involved a road speed governor, which is within my department to investigate any problems with that area.

n Did you have--did you physically investigate the air leak?

Yes sir, after they had the truck in the yard, we checked to make sure the governor was not functioning properly. The way the governor operates in, in high gear in the truck, it restricts the RPM so the engine will not allow the truck to go in excess of approximately 61 or 62 miles an hour.

n When you investigated the governor, did you find that it was not working?

Yes I found that it would--it was not working, that the, the engine would allow the RPM to go beyond that RPM range and allow excessive speed.

n Did you find any physical problems that caused the road speed governor not to work?

Well I directed the shop to look at it and see if they could find the problem.

n What problem did they find?

There's a small valve on top of the transmission, this valve is designed to conduct the air supply through the road speed governor. When the truck is placed in eighth gear, it restricts that air supply so that the governor works properly. This valve, apparently, had been removed or some way tampered with. The valve itself was cracked and broken. The brass fittings going to the valve, had been removed by something other than a proper size wrench. It would appear to be a pliers or a vise grip, because there are teeth marks in the brass and the corners are all rounded off.

n Teeth marks, must mean a pair of pliers.

Well, whatever was used, right.

ilson Right. What (Unintelligible) physical evidence was discovered.

ixon Well in looking at that, it was pretty obvious that a shop hadn't, hadn't done the repair where the, the--whatever had been done to that governor-- or to that valve, I should say, because they would have used the proper wrench. Also one of the air lines had an extreme amount of tape on it, which is an uncommon repair for a, a proper shop.

ilson Did you confront the claimant with the evidence discovered?

ixon Yes I did.

ilson What was his response?

ixon He indicated to me that he had broken an air line while he was out on the road, and that he felt it was necessary to repair it. And he did indicate that he did remove the valve in order to make that repair, and that in the process of doing so, apparently, that is how it became cracked and broken. He also indicated that he taped it tryin' to get the air leak to stop.

ilson Does the May Trucking Company have a policy that explains what drivers are to do when they have a breakdown or a mechanic is needed on the road?

ixon Yes sir the policy is that anytime there's a mechanical failure or breakdown on the road, they're to notify the head of maintenance in the shop in Payette, Idaho. At that point, he will direct them to a shop to have that--the problem repaired. We are pretty specific about drivers not doing their own repairs on the road.

ilson Do they have alternate phone numbers in case the driver can't contact the shop itself for some reason?

ixon Yes there's, of course the main business line going into the office in Payette. The driver can reach someone there from about 7:00 to 2:00 a.m. in the morning. The drivers are also provided with numbers to call after hours so they can reach someone at home.

ilson Before hours, are they covered?

ixon Yes sir.

ilson Is there any evidence, or has there been any claim that a call was made from the claimant. Any stock number to obtain instructions on this here?

ixon There was no call made.

n Is there any device on the tractor involved in this situation that reports speed, a standard method to determine at what speed it was operating?

Yes sir, we have a Rockwell Trip Master Computer installed on each of our trucks. This particular truck did have one that was installed and it was functioning at the time.

n Did you examine the data from that on-board computer to see what the data looks like?

Yes, that's standard procedure after a, especially after a situation where a possible tampering is involved. I will extract the information from the computer and take a look at it.

n Did you personally examine the data from Mr. Grinnell's computer?

Yes I did. Beginning on the--let me find the date here. Beginning on the 17th of December, I found that for a period of time, beginning about 6:00 in the evening and going until almost 2:00 in the morning of the next day, there were three different periods of time where Mr. Grinnell averaged 66 MPH for extended periods of time.

n Now if the first governor had not been tampered with, now what is limited by the operation of that device.

If it's functioning properly, it should be limited to no more than 62 miles an hour.

n This thing that makes this information (unintelligible) at extended periods of operation, average 4 or 5 miles an hour over the road governor limit.

That's correct.

n What was the physical evidence found on the truck, the data, the speed data from the Rockwell Trip Master on-board computer?

Well in looking at the evidence, my conclusion was that, that there was some possible tampering involved there, because of the combination of the mechanical defect that was present and also the increased speed at that particular time.

n How long has Mr. Grinnell been employed by either May Trucking Company or May Trucking Company, Inc.?

My records show he began employment on September 22nd, of 1984.

ilson During his period of employment has Mr. Grinnell participated in the program concerning speed control?

ixon We have a new incentive bonus program, where if a driver keeps his speed and RPH idle time at certain levels, specifically talking about speed, it would be under 60, then he is eligible for, up to \$.3 a mile, as an additional bonus. Mr. Grinnell did participate in that program, he got his field bonus quite often. I don't think I could say he got it every time, I think he missed it once or twice. But it was somewhat unusual to me when I noticed on his trip reports that he had this excessive speed.

ilson From the data provided by the Rockwell Trip Master computer... Let me back up a minute, let me ask a different question first. Did Mr. Grinnell have any comment concerning the air leak beyond those that you have already mentioned?

ixon We had some discussion about it, specifically what we've already entered into evidence by testimony, and that is the fact that he didn't bother to call the shop and report it. He was aware of the fact that that's something that he should of done. He expressed the idea, that he was out, as he said, "50 miles from the nearest town." My comment was, you know, "why didn't you stop and report it then, and we could have had a proper repair made at that time," and we had that discussion about it, Mr. Grinnell really couldn't offer an explanation as to why he didn't do it.

ilson Could Mr. Grinnell have made it the 50 miles into town?

ixon The air line that was leaking is a very small air line. To give you a visual idea, you could probably place a standard size paper clip in the end of that air line, it would fill--the hole or the gap in that air line. And that size of an air leak probably would not have affected the brakes as Mr. Grinnell says they would, because the compressor puts out a much larger volume of air than that, so it wouldn't have created an out of balance situation.

ilson Now when you said you could fill the line with a paper clip, you mean you could fill the line with the wire from a paper clip is that correct?

ixon Yes, uh huh.

ilson If it was approximately the size of a paper clip, it would maybe be a quarter of an inch.

ixon No, just...

ilson Like a one-thirty-second because the wire would fill the plug.

Even, even smaller than that.

1 Okay. Did Mr. Grinnell make it plain about reporting the air leak to the staff?

He indicated that he'd been writing it up for quite sometime. DOT requirements require that every day a driver complete what's called a vehicle inspection report. We maintain a file of all of those. I went back through all of his vehicle inspection reports and the only thing that I can find that indicates an air leak, was written up on September 20th of 1985. Then...

n What sort of air leak did that report log?

I can read from the report right over into the record, it says under the remarks column, it says "that the truck had an exhaust leak, and an air leak around the battery box." That is the only comment that I've been able to find in his vehicle inspection reports concerning an air leak.

n An air leak of any type?

That's correct.

n How long has Mr. Grinnell operated this particular...

I started working for May Trucking Company in March last year, and I recall Mr. Grinnell being on that truck at that time, so to my knowledge he's been on it, or had been on it, at least since March or April of 1985.

n So at the time of this incident it was his truck for eight or nine months.

Yes sir.

n So the time marked on the daily tickets was such that would result in a sign of carelessness, but the tampering was not concerning that air leak next to the battery.

1 That's the only one I could find.

n Okay. Does May Trucking Company have a policy about writing up daily problems?

1 Yes.

n What is that policy?

- xon Well the policy is, that's explained in our Employee Handbook, that the drivers are expected to maintain a vehicle inspection report on a daily basis and that those reports are to be turned in along with their paperwork from their trip and their daily log books, so that the shop can have them and be aware of any mechanical problems.
- lson Is it the same report that fulfills the U. S. Department of Transportation Requirements?
- xon Yes sir, I can read the exact wording from the rule book, if you'd like me to.
- lson I don't think that's necessary.
- ixon Okay.
- ilson Is there other information on the Rockwell Trip Master that was out of the ordinary and what was that information?
- ixon Yes there was something that concerned me very much in fact. In reviewing Mr. Grinnell's daily trip reports, I found that earlier in his trip, in November, he had an extended period of driving time. DOT regulations will allow a driver to have up to ten hours of driving time, then they require an eight hour break. Mr. Grinnell drove continuously, well let me read to you what the results, or what the printout says, "On the 21st of November, he began driving at 7:26 a.m., he drove for a total of 7 hours and 56 minutes, he stopped the truck at 3:22 p.m., he covered a distance of 414 miles, the truck was stopped for 57 minutes. At 4:19 p.m., he started up again, drove for another 3 hours and 40 minutes. The truck was shut off at 7:59 after he'd driven 176 miles, and then he stopped for an hour and one minute, and then at 9:00 in the evening, he started again and drove for 9 hours and 52 minutes, shutting the truck off the next morning at 6 hours--or, excuse me, 6:00, 6:00 a.m. and 52 minutes, after driving 496 miles. His total road hours or driving time was 21 hours and 28 minutes. The time that he spent not driving does not accumulate his eight hour break. In fact, he only had about two hours, really, in between there. We had a little discussion about that when Mr. Grinnell came in, I know he thinks that, that he was justified in doing that because of a dispatch situation, but the discussion that we had was, that he, if he wasn't aware, he should have been aware of the fact that he is not required or obligated by this company to break the DOT regulations. If...
- ilson Let me, let me ask this question. Evidently this hours and service problem was with Mr. Grinnell?
- ixon That's correct.

n What was his response to that?

Okay, his response to that was, the dispatcher had given him a load and that it had to be in Stockton, California for delivery on the 22nd of November and he received the load on the 21st, which is unreasonable to expect anybody to make that delivery.

n And he claimed that he was driving excessive hours in order to make that delivery?

That's correct.

n Okay, Does May Trucking Company have a policy about what drivers are expected--whether drivers are expected to comply with the hours in the service log?

Yes, in fact it's very clear that, the DOT regulations will be complied with and that if necessary, we will reschedule the load.

n Suppose a driver was assigned a load with a delivery time that cannot be legally complied with. What is a driver expected to do?

At that point the driver should talk to the dispatcher and see if he will reschedule it. If the dispatcher refuses to reschedule it, then we expect the drivers to get in touch with the Safety Department, at which time we will get the load rescheduled, rather than have the driver violate the regulations.

n How are the drivers advised of that policy?

They're advised of it basically I guess you could say three ways: one way they're told in orientation, another way, it's, it's in our written policies, and the third way, if the driver has a log book violation, he is mailed a warning letter which indicates very specifically on there, what our policies are.

n At what time does a driver receive his oral orientation and his written rule book.

He receives that before he actually becomes employed by the company. That is the, the very first thing we do with a new driver.

n So its basically at the time of hire?

That's correct.

n Okay, and this was the method of hiring drivers, entering them into the work force at the time Mr. Grinnell was hired?

xon Right.

lson Now, prior to this particular episode did you have a lot of problems with Mr. Grinnell running fast, or running extra hours?

xon I don't recall any specific instances of running extra hours. We did have a couple of times where he came in with excessive speed, but that was pretty much limited, most of the time he, he kept it under 60.

lson How would you describe the nature revealed by this data in terms of his normal behavior?

ixon Out of the ordinary.

lson What was your concern, or concerns with specific problems observed from the data, like the extra hours, or from the concerns of erratic behavior compared to his normal situation?

ixon One of my normal concerns, not just with Mr. Grinnell but with any driver that can drive for sustained time, such as 21 hours and 28 minutes, with only a two hour break, is that it would be difficult for anyone to do that without some kind of chemical assistance. Because of that I requested that Mr. Grinnell submit to a urinalysis for a drug screen.

lson Did he agree to do that?

ixon Yes he did.

lson Did he complete it though?

ixon Yes he did?

lson What was the results?

ixon Urinalysis was, the urine specimen, I should say, was examined by Northwest Toxicology, a private laboratory in Salt Lake, and their results showed the presence in his urine of acetaminophen which is a tylenol type substance, phenopropalamine, which is a decongestant, both of those ingredients are commonly present in cold medi--remedies which can be purchased over the counter. Also the presence of cannabinoids, which is the active ingredient in marijuana.

lson Did that (unintelligible) bother you?

ixon Oh yeah.

lson What part of those results bothered you? Did they all bother you or was it the marijuana derivative?

- n Well Mike you would had to have used it to get it into your system. I, I, I'm sure you might have some, you know, different definition of that, but there's no way you can get it into your system without using it.
- mant Well I have a dictionary and I looked up the definition of "use, used, and using - as to consume or to take regularly, on a regular basis". And the Safety Code 392.4 states, I'll look it up, "No person shall operate or be in physi--physical control of a motor vehicle if he possesses, is under the influence of, or is using any of the following substances." I feel I was never found in the possession of, I was never found under the influence of, and I have never used marijuana. And have you got anything to say, have you ever observed me under the influence of, have you ever found me in possession of, or have you got witnesses that can testify that I was using the substance?
- n I can testify that you told me that you did. We had a conversation about the result of the drug test and you said, I said, "does that surprise you," and you said, "me--well no, but would it do me any good to explain that it was only a one-time situation."
- mant But see it states, "no person shall operate or be in physical control of a motor vehicle." That had never been brought out, I was never driving, never operating, or never around a motor vehicle while any of that had ever happened.
- n Well Mike I can't explain why Greg put that in the letter, because I didn't type the letter, Greg typed the letter. From my point of view, I would just simply say that it is Company policy that anyone who has used the drug or is using it, is not permitted to be an employee for this company. It really doesn't have anything to do with that regulation. Greg may have put that in the letter, and there again, Greg isn't here, I can't explain why he wrote that in the letter. You were aware that the company policy was that we do not have people that use narcotics or marijuana controlled substances.
- 2 Just, just one point Mr. Nixon, are you saying then that all these other problems, the problem with the governor, the log--driving too long and so forth, brought up a suspension, but the actual termination--decision to make the termination, came when you determined that Mr. Grinnell had marijuana in his system, following the drug test?
- 1 Well, what I'm saying is the combination of all of those things. Had it not been for the, the positive results on the drug test, Mr. Grinnell probably would have had a two-week suspension and then it would have been over with.

udge Would any of these others had made any difference if you'd determined he had marijuana in his system?

ixon The tampering situation is an offense for which drivers are terminated.

udge Okay, but you say that would have probably only resulted in a suspension. My question is, if you would of determined that he had marijuana in his system, without any of these other problems, would he have been terminated for having the marijuana in his system?

ixon Yes sir.

udge That--so none of the rest of them really make a damn bit of difference, it's the marijuana in the system that matters? Excuse my language, excuse my language, but I want to get to the point. I've heard an awful lot of talking here and about two minutes of the reason for the discharge.

ixon All those things, all those things enter in. We make it very clear to our employees that, that any tampering with the equipment or any drug usage is not tolerated, and that they will be terminated.

udge They--but the reason for the discharge was when you determined that Mr. Grinnell had been using marijuana, or that he had consumed marijuana. I'm not even going to go to the dictionary definition of use because I think that's merely a semantics question. But, but my concern here is that you determined that he had consumed marijuana, it was a positive test, he was fired as a result. The rest of those things are incidental?

Nixon I...

Judge I mean they may have been accumulative, but when the marijuana was determined, that was the reason for termination?

Nixon I, I agree with what you just said. It was a accumulative situation, the marijuana was probably the straw that broke the camel's back.

Judge But without any of the others, if he would have taken a drug test, determined that he had marijuana in his system, he would have been discharged, correct?

Nixon That is correct?

Judge Okay. Any other questions Mr. Grinnell?

Claimant Okay, all I can say is I have a witness that I've known since November 1984, which I have lived with him, I've run team with him from the dates-- I've run team with him from March 4th, 1985, till July 21st, 1985, and I've

known him approximately two--a year and a half now. And at any time, if he, he can state the knowledge of me and drug usage, as far as he can see.

Okay, we'll get to his...

ant Okay.

Testimony. Let's stick with the cross-examination of Mr. Nixon at this point.

ant Okay, so we determined the rest of that was not...

Well, we haven't determined that it isn't. I--what I think we've determined is that you were fired for having marijuana in your system.

ant Okay. Well concerning that, I called the Federal Motor Carrier Safety Regulations in Salt Lake City and I've talked to them and they said for an acc--accurate test for the substance of marijuana in your system, a blood sample would have been required also. Why wasn't I requested for a blood sample also?

Are you asking me that?

ant Yes.

Okay, Northwest Toxicology Consultant, Inc. is the laboratory that does our testing, they tell us that this is a very definitive test and that further testing is not necessary. When the results came back positive, I asked them to recheck the same specimen, they came up with the same results. If necessary they are prepared to come in and testify and stand on their reputation as a credible, independent testing laboratory.

ant Well my main concern is the urinalysis did not prove I was operating or under control of any vehicle while any of that occurred. And I did not smoke any marijuana while in any control of any motor vehicle, is my concern on this termination. And it's makin' it difficult for me to obtain employment under the statements that have been mailed out by May Truck Company.

Let me ask this question Mr. Grinnell. It's a little irregular but, were you aware of a rule by May Truck Company, stating that if you--that it was against their rules to consume drugs?

ant Well, when I was hired Steve Nixon was not the Safety Personnel. And the main way that the man that put that out at the time, he said, "while operating," he said mainly the Safety Regulation Book, he said, "while operating, or on the road, or any kind of control of the vehicle. In the vehicle, around the vehicle, or anything concerning the truck, there

idge: Okay, just following up on that particular point, Mr. Berrett, and make sure it's clear in my mind. You say that when the test was administered to Mr. Grinnell it was approximately two weeks after the claimant had last driven a vehicle?

errett: No, no. That he had been out on the road for approximately two weeks. I'm just quessing, but normally it's about two weeks that they're out on the road.

idge: Uh huh.

errett: And he'd come back in, and then the tests and everything had happened at that point.

idge: Okay, now when in, when in, in approximal time to the actual administering of the test, had Mr. Grinnell actu--last driven a May Trucking Company vehicle?

errett: Well, hold on a second, let me see if I can find that information here. Hold on just a second, I'll have to check...

idge: All right.

errett: He had driven--come in on the 20th of December...

idge: In...

errett: Drug, drug test was on--conducted on the 24th of December.

idge: So there were--there was four days between the time that he had actually last driven and the administering of the test?

errett: That would be correct, uh huh.

idge: Are, are you familiar with the test?

errett: Because it came in on the 20th--the administration of the test was on the 24th.

idge: Okay, are you familiar with the test administered to Mr. Grinnell in this case?

errett: In what respect?

idge: Well, I guess the question that I have...

errett: Let me, let me say--see if I can answer that for you. The test is administered by Clearfield Medical Clinic.

tt I, I think you did, yes. I don't have that information at my finger tips, but I think you did.

ant Well if I was using drugs and such as I'm claimed to have been, how would I have been able to maintain no accidents within a year's time of drivin'?

tt Mike the reason you were not terminated because of the tampering which we found, immediately at that point, was because you had been a good driver, and we wanted to give you, give you every, every chance we possibly could. And that's the reason you weren't immediately, immediately terminated at that point. Had that happened to someone who had an accident too, they would have been out the door at that point, Mike. And so it really, how you were able to do that, I, I, don't know, I don't have the slightest idea how, how that was. It's possible maybe you aren't a frequent user, I don't know, but the chance that you would be, is not something we want--we are going to take.

ant Okay.

Okay. Mr. Grinnell, do you have any comments?

ant You mean like a closing statement?

No, just any comments. You haven't really made a statement yet, although you've...

ant Okay.

In your questions there have been some statements. At this point I'm going to give you a chance to respond to the things that have been said here and so on. You've heard the reason for the discharge.

ant For the usage of...

Right.

ant Drugs.

That's what I want you to stick with. That's...

ant Okay. I've read through the Safety Regulation Book which is an issued item to all drivers who are hired on at May.

Okay, let me stop you just a minute. Mr. Wilson, can you hear Mr. Grinnell?

n No I cannot.

Judge Okay.

Wilson Mr. Grinnell, during the trip when you were out on the road in the company truck, including anything associated with it, did you consume marijuana?

Claimant No.

Wilson You say you didn't consume marijuana. Did this include all the times in which you left the terminal to the time when you got back in and had the problem with the road speed governor? In other words, I'm not just asking you when you were physically on the truck, but when you were out in association with your duties, operating the vehicle, and being next to the vehicle and all the things you do when you're on the road, did you consume marijuana?

Claimant No, I did not.

Wilson Between the time that you returned to the terminal and when you were told you would need a urinalysis, at the time that you actually reported at your own convenience and took the test, did you consume marijuana during that interval?

Claimant What was that question?

Judge I, I, I understood the question, I believe Mr. Wilson. From the time that you returned, that would have been the 20th of December, until the time that you took the test on the 24th of December, did you consume marijuana?

Claimant No, I did not.

Judge Did you hear the answer Mr. Wilson?

Wilson No I didn't.

Judge He said, "no, he did not."

Wilson Okay. I don't have any other questions of Mr. Grinnell.

Judge Okay. Mr. Wilson, do you have anything that you would care to state in closing?

Wilson Yes.

Judge Okay, go ahead with that please?

- on Let's see, Mr. Grinnell was terminated in connection with other activities that occurred. Now I'm aware of the letter where Mr. Weigel indicated that he was suspended and then he was terminated later. But quite frankly I regret the inarticulate statement of how things occurred. At the time Mr. Grinnell left the terminal, he was aware that the minimum penalty that he would receive would be a two-weeks' suspension and that the company was concerned that drug use had occurred in connection with the operation of the vehicle. The test that Mr. Grinnell, that in fact the tests concluded what amounts to a grace period where the (unintelligible) of the test, such substances resulting from marijuana use, but it, the laboratory regards that the small amount would not detect recent use so it gives him a grace period. And with the grace period the test proved to be positive. Mr. Grinnell was aware of what policies he had violated. He was aware that the hours and service call had been violated. His contradictory testimony was that he violated the drugs policy, but it appears that if there was drugs present in Mr. Grinnell and that it wasn't after he left May Trucking Company, that it occurred on the last trip. And so a combination of those things indicated that Mr. Grinnell was performing his job in a manner that was a hazard and not beneficial to operate cars or trucks 29 hours in a row, at speeds of 66 miles an hour. As long as it is a company rule that it is against the rules to violate Federal and State law, and so we find that Mr. Grinnell was operating this vehicle in a manner that is contrary to the law, the laws of the State. There was an hours and service problem, and that he appeared to be playing with drugs and that he not have, that the core of this eradic operation would seem to have occurred extemporaneously and, therefore, he was terminated.
- idge Okay sir, thank you. Mr. Grinnell, anything in closing?
- Claimant Okay, concerning the letters I received as reasons of termination, are different than the verbal ones, and the main issue was a drug usage, and I don't think May Trucking has sufficient evidence to prove my drug usage or any habit forming or addiction to the drugs. So I feel under the grounds that I was unjust--unjustly discharged.
- Judge I'm going to consider the evidence and testimony presented before this hearing and a determination, Mr. Grinnell, will be made to establish whether you're entitled to unemployment insurance benefits. I'm going to advise that you continue to actively seek employment and if you are not currently employed, I'm also going to advise that you continue to file your weekly claim forms, at least until such time as a decision is made to determine your entitlement to those benefits. It will be a week to ten days before that decision is published. A copy will go to both parties. We'll determine also, whether or not the employer is subject to charges in regards to their account. Both parties will be advised of any further appeal rights that they have. There's nothing further then, I am going to close this hearing.

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PA 3

Michael Francis Grimell

221 27 5700

Social Security Number

Social Security Number

Information: I was discharged for allegedly tampering with the governor on the truck
Information: that I was driving. This is a device that keeps the truck speed at 60 MPH. I
did not tamper with this control, but merely taped an airline which broke while
I was on the road. I fixed it with tape so that I could get back to the terminal.
I offered to take a lie detector test to verify that I didn't tamper with the
governor, but the employer wasn't interested. I have since heard that this
employer is checking back on my military records and is also trying to get
something that would indicate that I was also involved with drug use at the
time this happened. The airline was from the brakes and could have caused
some real problems, plus it is against FICC regulations. Had I not have taped
the line, I would have had my brakes jam up on me and it could have caused some
very dangerous problems. Mr. Nixon tried to get me reinstated, but the head office
in Payette, Idaho said "no." Since that time, the rumors of the drug charges
have come on. I was not using drugs while driving the company trucks.

Mike Grimell

Air controles the Brakes on a Truck
and T. was out about 50 miles from
The nearest town when I taped the
air line witch was causing the trucks
Brakes to lock up.