IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNITED RENTALS,
(SARNIA BRANCH)
- The Employer

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 793
- The Union

AND IN THE MATTER OF the grievance of Gerry Butler

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Gregory F. McGinnis	- Counsel
Mike Fogarty	- Branch Manager

On behalf of the Union:

Sean McFarling	- Counsel
Gerry Butler	- Grievor
Bruce Knight	- Area Supervisor
Vince Prout	- Business Representative

Hearing held May 12, 2003, in Sarnia, Ontario.

AWARD

I. INTRODUCTION

The grievor, Gerry Butler, was discharged for threatening fellow employees.

The grievor denied making any threats. In the alternative, assuming the grievor did threaten others, the Union submitted that discharge was an excessive penalty.

II. THE EVIDENCE

The Employer, United Rentals, operates an equipment rental business in Sarnia.

The grievor worked for that business for eight years before being discharged in February 2003. He worked primarily as a driver delivering rental equipment to customers and ensuring that the customers understood how to operate the equipment.

Mike Barons was a driver for the Employer. He testified that on or about January 28, 2003, he and the grievor were sitting in a truck cab waiting for equipment. Mr. Barons said they were “just talking” and that the grievor indicated that the dispatcher had been "riding him" and that he (i.e. the grievor) would not mind "tuning up" the dispatcher, or beating him up. Mr. Barons testified that he did not think the threat was a serious one in that he did not think the grievor would actually harm the dispatcher, and he did not report it to the Employer.

Mr. Barons also testified about an incident in early February, 2003. Mr. Barons understood the grievor had made a mistake in a delivery and had been told to read his paperwork more carefully. Mr. Barons said that immediately thereafter, in the presence of Mike Beauchamp, he heard the grievor say that he would beat up the next person who “ratted on” him. He testified that the grievor appeared aggravated, upset and angry. Mr. Barons again said that he did not

think the threat was serious and he did not report the matter to management.

Mike Beauchamp also testified. He worked as a counter person and rental coordinator. He said the grievor had been required to make a late-afternoon delivery in May 2002 and that in doing so he ranted and raved and squealed the tires of his truck in front of customers who commented on it. I note that the written discipline states, in part, “Gerry openly displayed his temper in front of staff and customers. His actions included rough treatment of United Rentals equipment.”

In addition, Mr. Beauchamp testified about the February incident described by Mr. Barons, above. Mr. Beauchamp said that he understood the grievor was "in trouble" for a load he had delivered and that the grievor then said, in the presence of Mr. Barons, that he was “sick and tired of being ratted on” and that he would punch out the next person who "ratted on" him. Mr. Beauchamp testified that a short time later the grievor said that if he got “ratted on” and lost his job he would punch the person out, that it would be worth the satisfaction of it even if he went to jail. The grievor further indicated that it would not matter if he did it at work or outside of work and that the grievor had then drawn a comparison between the 30 days he might get in jail versus the loss of an eight year job.

Mr. Beauchamp did not report these comments to management. He, too, said he felt the grievor was venting and that he did not think the grievor was going to harm him. Mr. Beauchamp did talk to a co-worker, John McCormack, about the comments and Mr. McCormack informed the Employer and the Employer then spoke to the grievor.

Mr. Beauchamp testified that immediately after the meeting between the Employer and the grievor which arose from Mr. McCormack's report, the grievor came out to the counter, pointed a finger at Mr. Beauchamp, and told Mr. Beauchamp that Mr. Beauchamp had almost got him in trouble, or "in shit" - Mr. Beauchamp was unsure as to which word the grievor had

used. Mr. Beauchamp testified the grievor then left the premises, slamming the door.

Mike Fogarty is the manager of the Employer's Sarnia facility. He testified that in January 2003 the grievor had made a delivery to the wrong part of a customer's site. He felt the matter needed to be addressed and he left it to Glenn Ruble, the grievor's supervisor, to investigate and determine if the matter required a written warning. Mr. Ruble later advised Mr. Fogarty that a verbal discussion was adequate.

Soon thereafter Mr. Ruble reported to Mr. Fogarty about threats the grievor had made. Mr. Fogarty felt the matter needed to be investigated and he spoke to both Mr. Beauchamp and Mr. Barons who told him of the threats. In his testimony Mr. Fogarty described what he had been told by Mr. Beauchamp and Mr. Barons; it was essentially as each testified before me. Mr. Fogarty then spoke to the grievor and asked the grievor if he had threatened anyone, either generally or specifically, that he would beat them up if they got him in trouble. Mr. Fogarty said the grievor denied it. Mr. Fogarty said that he then repeated the question at which time he recalled the grievor saying that "if anyone gets me in trouble I would be pissed off".

Two minutes after he had sent the grievor home, Mr. Fogarty said that Mr. Beauchamp came into his office and reported that the grievor had approached him as he was leaving and pointed a finger at him and said that Mr. Beauchamp almost got the grievor "in shit".

Mr. Fogarty spoke to the corporate human resource staff and they agreed that Mr. Fogarty would offer the grievor two options - discharge or permanent layoff with two weeks severance pay. That offer was made and the grievor ultimately chose the discharge and then brought this grievance.

The grievor testified that he liked his job and was friends with his fellow workers. He too recounted the May 2002 discipline. He said he had loaded a 100+ lb. piece of equipment on

the back of his truck and that it had taken a bit of "grunt" work to do so. He agreed that he may have squealed the tires on leaving. He said he was disciplined for rough handling of the equipment and he acknowledged that he had not grieved that discipline.

The grievor also testified about the comments made at the counter in February, 2003. He said he had made a mistake on a delivery and had left a piece of equipment in the wrong part of a customer's facility because he had not read his paperwork carefully. He said he was called into the office and was told he might be written up for the mistake. He said he was concerned about another written discipline. After the meeting he was near the counter getting his coveralls and had said to Mike Beauchamp that "I would be very upset if I was written up and fired". The grievor said he did not intend that as a threat.

The grievor said that soon after the meeting about the mistake in the delivery he was again called into the manager's office and was asked if he had threatened anyone. The grievor said that he had not done so. As he was leaving he spoke to Mike Beauchamp at the counter and told him "thanks Mike, you almost got me in the shit". He said he had not pointed his finger but agreed that he left by the back door and may have slammed it.

The grievor said he came to work the next morning thinking all was fine and was again called into the office. He was offered the option of discharge or of layoff with two weeks severance pay. The grievor said he left the meeting without making a decision and later opted for the discharge and filed this grievance.

As a result of the discharge the grievor testified that he could not understand what had happened to him as his job was his life, that he became depressed, but that he had seen a doctor who had prescribed anti-depressant drugs. He said that his common law spouse had had a kidney transplant due to kidney failure and was on anti-rejection drugs. He said those drugs were very expensive and that, with the loss of his job, he would lose his drug plan and was

unsure as to how they could pay for her drugs.

In cross-examination the grievor testified that the evidence given by Mr. Barons and Mr. Beauchamp was incorrect. He said that Mr. Barons' evidence was a fabrication. He acknowledged making a comment to Mr. Beauchamp that if someone ratted on him and he got fired he would be upset, but said Mr. Barons had not been there at that time. He agreed that it would be reasonable to fire an employee who did as he was alleged to have done.

This Employer has a clear position that threats, intimidation, coercion and similar conduct by employees will not be tolerated. It has repeatedly informed its employees of this position.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The relevant provision of the parties' collective agreement is as follows:

> ARTICLE 3 - MANAGEMENT RIGHTS
>
> 3.01 The management of the business, including . . . the right to . . . discharge for proper cause . . . are vested in the Company . . .

IV. EMPLOYER SUBMISSIONS

The Employer submitted that I had two choices. If I believed the grievor's evidence there could be no discipline, but if I believed the Employer witnesses I should uphold the discharge.

The Employer noted that it had disciplined the grievor in May 2002 for losing his temper in front of customers and this discipline had not been grieved.

Although the grievor took the position that he had done nothing wrong, that position was not credible. Instead the Employer said I should find that the grievor had indicated to Mr. Barons in January 2003 that he would like to "tune up", or beat up, his dispatcher. In addition the

Employer said I should find that in February 2003 the grievor had said to Mr. Barons and Mr. Beauchamp that he was sick of people "ratting on" him and if he was "ratted on" again he would beat that person up. The Employer said that I should further find the grievor carried on the conversation with Mr. Beauchamp and told him that if someone "ratted on" him and it cost him his job he would beat them up and that he would not care if he went to jail. Finally, the Employer said I should find that the grievor said to Mr. Beauchamp, after a meeting with management about the earlier comments, that Mr. Beauchamp almost got him "in shit". The Employer noted that the grievor had an opportunity in the two meetings with management to tell his side of the story but had not done so. The Employer said that the grievor's version of events was not credible and that I should accept the evidence of Mr. Barons and Mr. Beauchamp.

The Employer submitted that there were three incidents. The first two were clear threats. The third was more ambiguous but should still be taken into account. The Employer had clear policies on this matter which should be considered in assessing penalty. The grievor acknowledged that termination was warranted for threats of the type he was alleged to have made. In that context there was no chance for rehabilitation as there was no acknowledgement, no remorse, no promise to change his ways, nothing to indicate the grievor might learn from a lesser form of discipline.

The Employer asked that I dismiss the grievance.

The Employer referred to the following authorities: *Re Pope and Talbot Ltd. and Industrial Wood & Allied Workers of Canada, Local 1-423* (2002), 106 L.A.C. (4th) 19 (Chertkow); *Re Falcon Tool & Die (1979) Ltd. and Canadian Automobile Workers, Local 195* (1993), 36 L.A.C. (4th) 201 (Watters); *Re Government of Province of Alberta and Alberta Union of Provincial Employees* (1992), 29 L.A.C. (4th) 353 (McFetridge); *Re Foyer Valade Inc. and Manitoba Government Employees' Association* (1991), 24 L.A.C. (4th) 32 (Chapman); and

Re ITT Cannon Canada, Division of ITT Industries of Canada Ltd. and Canadian Automobile Workers, Local 1090 (1990), 15 L.A.C. (4th) 369 (H.D. Brown).

V. UNION SUBMISSIONS

The Union noted that this was a discharge case and the onus was on the Employer to prove proper cause. The Union suggested that as the allegations were serious they should be assessed using a standard of clear and cogent evidence. The Employer had not met that standard as the grievor said he had never threatened anyone and his evidence was given in a forthright manner.

As for the alleged threats, the Union said neither Mr. Barons nor Mr. Beauchamp took the first two seriously, and that I should consider that fact in evaluating the issue of cause. As for the final comment of "thanks, you nearly got me in shit", it was unclear as to what was intended but it was not a threat. Moreover, there was no evidence of threats or violence being a problem at United Rentals.

In addition to the fact that neither Mr. Barons nor Mr. Beauchamp thought the alleged threats were serious and did not report them, the Employer did not think they were serious as it offered a layoff with severance pay, something an employer would not ordinarily do if faced with serious misconduct.

The Union asked that I find there had been no basis for discipline and allow the grievance. In the alternative, if I found the grievor did threaten his fellow workers, the Union asked that I find the penalty of discharge excessive and substitute the lesser penalty of a written reprimand.

The Union referred to the following cases: *Re Indusmin Ltd. and United Cement, Lime and Gypsum Workers International Union, Local 488* (1978), 20 L.A.C. (2d) 87 (M. G. Picher);

Re Windsor-Essex County Real Estate Board and Service Employees' International Union, Local 210 [1999] O.L.A.A. No. 10 (Snow); *Re United Steelworkers of America, Local 3257 and The Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356 (Reville); *Re SRI Homes Inc. and International Woodworkers of America - Canada, Local 1-184* (1996), 58 L.A.C. (4th) 385 (Hood); *Re Toronto Western Hospital and Canadian Union of Public Employees, Local 1744* (1989), 6 L.A.C. (4th) 150 (Mitchnick); *Re Commemorative Services of Ontario and Service Employees International Union, Local 204* (1997), 68 L.A.C. (4th) 405 (Saltman); and *Re OSF Inc. and United Steelworkers, Local 5338* (2000), 89 L.A.C. (4th) 52 (Kirkwood).

VI. Conclusions

In discipline cases I prefer to follow a three step analysis:

1. Did the conduct of the grievor justify a disciplinary response?
2. If so, was the discipline imposed an excessive form of discipline?
3. If the discipline was excessive, what penalty should be substituted in all the circumstances of the case?

1. Did the conduct of the grievor justify a disciplinary response?

It is first necessary to resolve the conflicts in the evidence. The evidence of the grievor as compared with that of Mr. Barons and Mr. Beauchamp differed markedly. The grievor denied he made threats in the truck in front of Mr. Barons. He denied that Mr. Barons was present at the counter when he made a comment about being "ratted on". Similarly he said he made no comments about going to jail.

While the grievor agreed that he made a comment about getting "in shit", the differing versions on the other points cannot both be true. The difference in witnesses' testimony is sometimes

simply the result of the passage of time or the witnesses' varying perspectives on the event however, here, the grievor's version of events and the versions from Mr. Barons and Mr. Beauchamp are too dissimilar to be explained as differing, but consistent, recollections of the same events.

Although both Mr. Barons and Mr. Beauchamp testified under subpoena, they did so openly. Their testimony was given in a forthright manner. Neither had anything to gain from either exaggerating or minimizing what was said. Each of their recollections of the comments heard by the other was consistent with the other's testimony. Mr. Fogarty's evidence as to what they told him in January was similar to the testimony Mr. Barons and Mr. Beauchamp gave at the hearing.

On the other hand, in view of his discharge, the grievor had reason to minimize his misconduct. The grievor acknowledged that he had suffered depression after the discharge, that he was shocked and could not understand what had happened, that he did not like the situation and did not understand it, and that he had recently begun taking anti-depressant drugs. Given his response to his discharge, it would not be surprising if he did not now have a clear recollection of the events leading to the discharge. Persons in a situation such as the grievor found himself sometimes rationalize their own conduct and minimize their own mistakes and it is possible that the grievor has done so here. Whatever the reason for his testimony being as it was, I cannot accept the grievor's version of events. Instead I prefer the testimony of Mr. Barons and Mr. Beauchamp.

Thus I conclude that:

1. While they were talking in the truck the grievor made a comment to Mr. Barons about wanting to "tune up", or beat up, his dispatcher.
2. The grievor then made a comment at the counter that he would beat up the next person who "ratted on" him. Later in that same conversation he made a comment about beating

up anyone who might "rat on" him and he made a comparison between going to jail and the loss of his employment, suggesting that going to jail for beating up someone who cost him his job would be worth it.

3. Finally, the grievor told Mr. Beauchamp that Mr. Beauchamp almost got him "in shit".

The Employer described the grievor's comments as threats. A threat occurs when one person indicates an intention to hurt or harm another. I conclude that the first two above were threats. But threats take differing forms and some threats are more serious than others.

The grievor's first threat made to Mr. Barons about beating up the dispatcher was made about a third person who did not hear the threat. As Mr. Barons testified, the two were “just talking” and the comments were not directed to, nor heard by, anyone who might be the subject of a beating. While the comments were about a physical beating and fit within the normal definition of a threat, they were not directed at an intended victim and the threat was not perceived by Mr. Barons as being anything the grievor was actually going to do.

I also regard the second comments made at the counter to Mr Beauchamp, in front of Mr. Barons, and later to Mr. Beauchamp alone, to have been a threat. Moreover this threat was directed in part at one of the people who heard it - Mr. Beauchamp did some dispatching of drivers and in the future Mr. Beauchamp might have to decide whether to report a problem with one of the grievor’s deliveries to management. The grievor’s comments can only be seen as intending to discourage Mr. Beauchamp from reporting to management any matters relating to the grievor. While I note that these comments were not perceived by Mr. Beauchamp as a threat and that Mr. Beauchamp was not intimidated, nevertheless, I find that to tell another employee that "I will beat you up if you report to management any problems with my work" is improper and is conduct which is deserving of discipline.

Moving to the third comment, I do not find the reporting to Mr. Beauchamp that Mr.

Beauchamp almost got the grievor "in shit" to have been a threat. It was a report on what the grievor thought had just happened to him in the meeting. If anything, given how matters transpired, it was an understatement.

I find that some measure of discipline was warranted for the two threats, and in particular for the second threat.

2. If so, was the discipline imposed an excessive form of discipline?

Any threat is a serious matter. The grievor made two threats. The more serious of the threats was heard by two witnesses. However, the two witnesses to the threats have known and worked with the grievor for many years. Neither witness had any concern that the grievor would carry out his threats. Both believed the grievor was venting. I note that they seem to have been correct in that assessment as the grievor did nothing in furtherance of any threat.
I accept the witnesses' assessment of the grievor's two threats and I find that both threats were, as threats go, not serious ones.

I have reviewed the many cases referred to by the parties. However, as was acknowledged at the hearing, each case turns on its own facts. In considering a case such as this I find it more helpful to return to the collective agreement and to the basic principles rather than to reason by analogy from other cases. In assessing the measure of discipline I begin with the basic principles behind the "proper cause" for discipline provision in this agreement, a provision of the type which is common in collective agreements.

The purpose of a "proper cause", or more commonly "just cause", for discipline regime is to correct behaviour, not simply to punish an employee. If discipline is to be for proper cause the discipline should be intended to prompt the employee to change his or her behaviour.

In order for discipline to be proper, the form of discipline must bear a reasonable relationship to the seriousness of the employee's wrong. A mild wrong ordinarily merits a mild response whereas a serious wrong merits a serious disciplinary response.

I, like most arbitrators and many employers, interpret just cause provisions as requiring the use of progressive discipline under which the first instance of improper behaviour merits a moderate form of discipline. More serious forms of discipline are used if the improper behaviour is repeated. The forms of discipline commonly used are verbal warnings, written warnings, then short suspensions, and finally longer suspensions. Very serious forms of misconduct may prompt a more serious form of discipline as a first step. If the behaviour is not subject to modification by these progressively more serious forms of discipline, then discharge may be used.

Some serious forms of misconduct may not be subject to correction by lesser forms of discipline. If that is the case, the Employer may move directly to discharge without attempting to correct the behaviour through progressive discipline.

Whatever the form of discipline used, in order to be for proper cause under this collective agreement, the discipline must not simply relate to the wrong committed. Discipline must also be appropriate to the particular employee, given his or her length of service, previous employment record, etc. Because of this, employees with more seniority or better disciplinary records are entitled to better treatment in the sense that what is proper discipline for those employees may be a milder form of discipline than that given to a more junior employee with a poor record.

I turn now to an assessment of whether the Employer's choice of discharge as the form of discipline in this case was proper.

A threat made by one employee to another employee in a workplace is a serious matter. The Employer has taken the view that such threats are not acceptable and will not be tolerated. I agree with the Employer's general position on threats. However, while I accept that threats are unacceptable in a workplace, and I accept that some threats made by some employees will be deserving of discharge, I do not accept that every threat merits discharge.

Turning to the second and more serious threat made in front of Mr. Beauchamp and Mr. Barons that the grievor would beat up the next person who "ratted on" him and later suggesting to Mr. Beauchamp that jail for the beating would be worth it if he lost his job, I note it was not directed toward anyone in particular, but was instead of a general nature. It appears to have been prompted in part by the grievor's upset, having just left a meeting where he was corrected for the faulty delivery, and was, in that sense, not premeditated.

Mr. Barons and Mr. Beauchamp, the only two employees who heard the threats, did not think the grievor would carry out the threats and they took no action. The threats were perceived by both Mr. Barons and Mr. Beauchamp as the grievor venting. While the grievor made threats, of the range of possible threats, the threats were not particularly serious ones and those who heard the threats recognized them as such.

As for threats generally, there was nothing in the evidence to suggest that there was any need for discharge as a means to deter other employees from engaging in this conduct - the evidence suggested there was no problem with threats or violence at United Rentals.

Various other factors weigh in the grievor's favour. As an eight year employee, the grievor has relatively long service with the Employer, and has never been disciplined for threats. In terms of returning the grievor to the workplace, neither of the two employees who heard the alleged threats felt threatened. Nothing in their evidence suggested that they would be fearful of working with the grievor in the future. Similarly, the Employer expressed a willingness to lay

off the grievor and provide severance, suggesting the Employer may not have thought that the employment relationship had been irreparably harmed.

The grievor desired to have his job back and while he did not assist in the Employer's investigation in the way one would like an employee to do, he did nothing to impede it other than to deny making any threats. In the Employer's investigation I note that the evidence from Mr. Barons and Mr. Beauchamp about the grievor's threats was not put to the grievor at either meeting. The only question put to the grievor was whether he had issued threats. When asked if he had made threats, the grievor denied it, a position he continued to assert at the hearing. While I have concluded he was wrong in that view, and while as arbitrator I would prefer that a grievor understood how others perceived his statements, acknowledged his misconduct and showed a desire to change, such behaviour is not essential to a grievor successfully disputing a discharge. I must still assess whether discharge was a just penalty for the grievor's misconduct.

The grievor had worked at this job for some eight years. While he had a disciplinary record, his discipline was a written warning, a mild form of discipline. Although the discipline was for the grievor's angry response, it was in part for the rough handling of rental equipment, and that specific behaviour had not recurred.

There was nothing about this workplace, about these threats, or about this grievor, that indicated that the Employer's only reasonable solution was to remove the grievor from the workplace. The issue is whether the grievor could have been influenced by other discipline to stop making statements to fellow employees of the sort described above. I believe that a lesser form of discipline would have served to influence the grievor to modify his behaviour and stop making threats. I conclude that the discharge of the grievor was an excessive form of discipline and was, therefore, not just.

3. If the discipline was excessive, what penalty should be substituted in all the circumstances of the case?

The Employer has treated threats as serious and has advised employees they will not be tolerated. The grievor acknowledged that threats were serious matters. The grievor made two threats and that conduct was serious and deserving of a serious form of discipline. Because the misconduct was serious, and because the grievor knew that threats were inappropriate, and because the grievor had a written warning for loss of temper and rough handling of a rental item, I conclude that a one month suspension without pay should be substituted for the discharge.

The parties did not address the issue of damages, or of mitigation of damages, during the hearing. Instead they agreed that I remain seised to deal with any monetary issues that might arise if I were to direct that the grievor be reinstated. I will do as requested.

In summary, I direct that the grievor be reinstated in his employment and that his record show a one month suspension without pay, in place of the discharge. As agreed, I remain seised to deal with any matters which may arise in the implementation of this award, including any issues of compensation.

Dated at London, Ontario this 6th day of June, 2003.

Howard Snow, Arbitrator