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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SIEMENS VDO AUTOMOTIVE INC., Tilbury Plant
- The Employer

-and-

THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW - CANADA) AND ITS LOCAL UNION 1941
- The Union

AND IN THE MATTER OF the discipline and dismissal grievances of Ryan Laporte

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

John Hodgkinson	- Industrial Relations Advisor
Konrad J. Boehler	- Industrial Relations Advisor
Gail Davies-Eastman	- Director, Human Resources

On behalf of the Union:

Robert Jenner	- National Representative
Mark Pastorius	- CAW Chairperson, Siemens Unit
Ryan Laporte	- Grievor

Hearing held February 22, March 1, March 16, March 21, March 27, April 3, April 4, and April 18, 2006, in Chatham, Ontario.

AWARD

I. INTRODUCTION

The Employer disciplined, then later dismissed, the grievor for unsafe work practices. The Union alleged that the Employer had treated the grievor in a discriminatory manner and grieved both the discipline and the dismissal.

II. EVIDENCE

Siemens VDO Automotive Inc, the Employer, makes parts for the auto industry in its plant in Tilbury, Ontario. The plant has some 330 hourly workers represented by CAW-Canada, Local 1941, the Union. Ryan Laporte, the grievor, was employed by the Employer for some two and one half years.

The grievor was a production employee, working as a general labourer and production helper. However, many production employees have another job in this plant. That is, although they normally work in production, some are trained in a second, or "supplemental," job classification. They supplement the normal complement of employees in that classification when the regular employees are absent or when the Employer needs additional employees. At the relevant time the grievor held a supplemental position as a lift truck operator.

The safety incident reports

The Employer records safety incidents. Employees are encouraged to report any safety concerns using an Employer form. The Employer, normally through the Health and Safety Coordinator, reviews the reported safety concerns and takes action to correct the concerns

where appropriate. Often the Coordinator speaks to the individual who filed the report and on occasion representatives of both the Employer and Union will meet jointly with the person involved. The individuals filing the reports are frequently reminded of proper safety practices and, on occasion, a change is made in a plant procedure.

The grievor did as requested and filed safety concerns. Over the two and one half years of his employment, the grievor was mentioned in some 18 safety incident reports, most of which were his own reports. As much of the Employer's case rested upon these reports, it is necessary to list the following incidents.

1. April 24, 2003 - the grievor reported that he had cut his arm on a part while reaching for another part. The Employer followed up on this incident April 30, 2003 and the grievor was re-instructed.
2. July 7, 2003 - the grievor reported discomfort after pushing a bin.
3. August 19, 2003 - the grievor reported that he cut his finger on a part while trying to free parts on a conveyor.
4. November 1, 2003 - the grievor reported pain in his right arm. This report followed a period during which the grievor routinely had to twist a part which had been improperly installed.
5. December 19, 2003 - the grievor reported pain in his right hand from repetitive trimming of a part.
6. January 7, 2004 - the grievor reported hitting his head on a conveyor when he stood up after picking up debris from the floor.

The Employer followed up January 26, 2004, on reports 2 through 6, above. A note was added to the safety incident reports indicating the steps that were to be taken by the grievor or the Employer to address the problems identified - e.g. wear gloves (#3), or modify the equipment (#4).

7. February 13, 2004 - the grievor reported that while "deburring" a part with a knife,

the knife slipped off the part and his finger struck the sharp edge of the part scraping the skin.

8. February 16, 2004 - the grievor reported discomfort in his right wrist due to trimming.

The Employer followed up March 11, 2004, on incidents 7 and 8.

9. July 6, 2004 - the grievor reported a pain in his right forearm after pulling a "lift assist" away from a leak tester.

10. October 12, 2004 - the grievor reported that, while walking in an aisle, he hit a pallet sticking into the aisle and cut his shoulder.

11. March 7, 2005 - the grievor reported a strain in his lower right back when packing parts by hand, at a time when the lift assist was broken.

12. April 8, 2005 - the grievor reported a strain in his left arm after pulling a full bin of parts.

The Employer followed up May 10, 2005, on incidents #10 through #12. Incident report #9 does not record any follow up.

13. April 14, 2005 - the grievor reported that, while moving a conveyor, the air line had come unfastened and that the air line hose had thrashed back and forth and caused damage to the nozzle. The Employer followed up May 11, 2005, and instructed the grievor to call a technician to move the conveyor. May 13, 2005, about a month after the incident, the Employer issued a verbal warning for this incident. This verbal warning was the grievor's first discipline and it was not grieved.

14. April 28, 2005 - a supervisor reported that while walking west in an aisle he saw the grievor driving his lift truck at normal speed in the same direction (west) in the same aisle. Another lift truck operator was driving south and approaching the same corner. As the other driver approached the corner, that driver stopped and blew his horn. The supervisor reported that he "hollered" at the grievor to stop as the other driver sounded his horn and that the grievor "stopped just in time." The Employer followed

up May 10, 2005, and re-instructed the grievor to pay attention. May 13, 2005, the same day as the Employer imposed the verbal warning for the grievor's failure to have a technician move the conveyor, the Employer disciplined the grievor for the lift truck incident by removing him from his lift truck position. The Employer noted in this second discipline letter that "of particular concern" was this April 28 incident, which the Employer described as a "near miss," as well as the grievor's other 14 safety related incidents. The grievor grieved this second discipline - the loss of the supplemental lift truck position - and this is the first of two grievances before me.

15. May 6, 2005 - the grievor reported that after using the telephone he was returning to his work location when his foot caught between two rollers and he tore his boot, exposing the steel toe.

The Employer followed up May 10, 2005, and discussed not walking on the roller system.

16. June 22, 2005 - the grievor was given a written warning for a June 17 incident in which the grievor was talking "on his cell phone (in his work area) when he should have been working on the line." The written warning was the third instance of discipline and it was not grieved.

17. July 31, 2005 - the grievor reported a pain in his right forearm. The Employer followed up September 23, 2005, noting that the grievor was not following proper procedure and that he was re-instructed.

18. September 1, 2005 - the grievor reported a pain in his right arm from repetitive grasping and trimming of a part. The Employer attempted to follow up November 1, 2005, but noted that the grievor had been terminated.

19. September 24, 2005 - the grievor engaged in misconduct by throwing grommets during his shift. October 6, 2005, the Employer dismissed the grievor. The dismissal was grieved and that grievance is the second grievance before me.

I now summarize the evidence about the near miss (#14) and the grommet throwing (#19)

which led to the two grievances before me for resolution.

The near miss

The incident report (#14) about the "near miss" on the lift truck noted that three employees were present - the supervisor who completed the incident report, the driver of the other lift truck, and the grievor. The Union made it clear in its opening statement that the facts of that incident were disputed. Although other witnesses expressed their opinion about the seriousness of a near miss on a lift truck, only the grievor testified as to the actual facts of this incident.

The grievor testified that he was returning on his lift truck from a break, heading down an aisle toward a blind corner. He checked the forks on his lift truck. Another lift truck driver arrived at the corner ahead of the grievor and sounded his horn. The grievor said that he stopped at the same time as the other driver sounded his horn. The grievor said he came to a gradual stop, a normal stop. He said the two lift trucks were then 3 or 4 feet apart.

Bob Lee is the plant manager. The Union put to Mr. Lee extensive evidence regarding other lift truck operators. The Union noted that one person had 5 incidents of property damage and a sixth incident in which there was personal injury and that he continued to drive the lift truck. Mr. Lee said the matter would have been investigated and a decision made.

The Union questioned Mr. Lee about many other safety incident reports regarding lift truck operators. Mr. Lee agreed that he had not compared the grievor's record with anyone else. He agreed that no other driver had been removed for a near miss. However, he did not accept that the Employer had treated the grievor differently. Although he accepted that, on paper, it appeared the Employer had treated the grievor differently, he reiterated that each

case must be dealt with on its own facts.

The grommet throwing

Several witnesses testified about this event and, while the basic facts were not in dispute, the witnesses differed on some of the details.

The grommets thrown were small round flexible rubber washers, about 1 and 1/4 inches in diameter and about 3/4 of an inch thick.

The grievor worked the night shift September 24, 2005. He testified that when there was down time during the shift he tried to "liven up" the night by throwing grommets. Two of his co-workers, Frank Haykus and Jason Benninger were also involved in throwing grommets. The grievor acknowledged that he had started the grommet throwing. He said that he made sure that none of the grommets got into the bins of completed parts. The grievor said that he and Frank Haykus cleaned up the grommets at the end of the shift. He denied "whipping" the grommets, and said they only "lobbed" or "tossed" them.

Jennifer LeBoeuf is a quality process monitor in the plant. She testified that on the night of September 24, 2005, the grievor was working on a production line making large plastic housings for air filters. She said she witnessed two employees - the grievor and Mr. Haykus - tossing or lobbing grommets for about five minutes around midnight. Later in the shift, about 6:00 am, she heard from another employee that the grievor and Mr. Haykus had continued tossing grommets during the shift and she decided to put the parts they had made during the shift on hold. Parts which have been placed on hold are then inspected before being shipped to a customer. She said she was motivated to put the parts on hold both because of her concern about part quality (there was a risk that a grommet may have gotten

into a part) and also because of her concern about her own responsibility if the parts were later found to be defective after being shipped to the customer. She said she had not heard about any problems with these parts when they were inspected.

Alfred Boulley is a production worker in the plant. On September 24 he was working on a nearby production line and he was hit by a grommet. He did not see who threw the grommet. He said he was a nervous person, that he was startled when hit, but he was not hurt and did not report the incident.

Frank Haykus is another operator in the plant. On September 24 he said he was working on a line with the grievor and a student. He said that he, the grievor and Jason Benninger, another production employee, had been throwing grommets. He said the line had been down at the beginning of the shift and that was when the grommet throwing started. He said they had thrown grommets for perhaps 15 minutes during the shift - 5 minutes here and 5 minutes there. He agreed that after the shift he had been interviewed and that he was then suspended during the Employer's investigation. During that investigation he said he had called Mr. Hodgkinson, who was conducting the Employer's investigation, and said he was sorry for what he had done and asked that the Employer consider not firing him. He said he had worked in the plant for 2 years and had a verbal warning for not wearing safety glasses. He was suspended 5 days for the grommet throwing incident. He agreed, however, that of the 5 day suspension he had been paid for 4 days so that he lost only one day's pay. He said they had thrown a couple dozen grommets, that they were tossed or lobbed, that there was no intent to injure, and that he and the grievor had picked the grommets up at the end of the shift. He also said that he observed the grievor checking a bin to make certain that none of the grommets accidentally landed in the bin with the parts, and that the grievor told him he was checking them all.

Linda Rehner is another production operator in the plant. She said that September 24 Mr. Haykus worked across from the grievor. She said she saw Mr. Haykus tossing grommets "up and behind him" and that she saw many grommets on the floor. She said she assumed that the grievor was returning the grommets but that she did not see him throwing them. She said the throwing continued off and on during the entire shift. Ms Rehner said that in the morning she reported the matter to Ms LeBoeuf, the quality process monitor, who expressed concern. Ms Rehner also testified that several years earlier an employee had thrown a grommet at her and hit her; she had reported it; the employee had not been fired; and she did not think that employee had been suspended.

Taras Kohut was a production supervisor on the night shift September 24. He said the grievor, Mr. Haykus and Chris McGowan had been working on a production line. He said he was informed about 5:15 am by Ms Leboeuf that there was a possibility of contamination of the parts from that line and the parts were then put on hold. He said he had four concerns - safety, quality, productivity and cleanliness. Mr. Kohut said he went to the line and spoke to Mr. Haykus about the grommets and that Mr. Haykus said "what do you mean," to which Mr. Kohut said he had replied there was a chance of contamination and to return to work. Mr. Kohut said that when he went to the line at 5:15 there were more than the usual number of grommets on the floor. The next day Mr. Kohut spoke to Mr. Hodgkinson about the issue, and he spoke to Mr. McGowan, the third employee working on the same line. He did not speak to the grievor.

Mr. Kohut agreed that he had disciplined the grievor for his use of the cell phone (#16) and that when using his cell phone the grievor had not been at his work station.

Chris McGowan was a member of the student labour pool and was the third person working on the line with the grievor and Mr. Haykus September 24. He said he observed the grievor

and Mr. Haykus throwing grommets throughout the night. He said the grommets were being "whipped" baseball style, that all were thrown quite hard. He said he also saw Mr. Benninger throwing grommets. Finally, he said the grommets were not cleaned up at the end of the shift.

As noted, Bob Lee is the plant manager. He said that part of his job was to take all reasonable precautions to ensure that workers were not injured. As the senior manager in the Tilbury plant he said he was responsible for health and safety matters, and that he could be personally responsible for health and safety violations.

Another of Mr. Lee's concerns was the quality of the products. There were provisions in the Employer's contracts with its customers under which the Employer could be responsible for additional costs if the customers were dissatisfied with the quality of the product produced. Mr. Lee said he had spoken to all the employees about quality issues around the end of September, 2005, just prior to the grommet throwing incident.

Mr. Lee said he was aware of the grommet throwing matter and that the parts had been put on hold. He said that, in fact, no grommets had been found in the parts or in the bins holding the parts. He said that throwing grommets was against a number of Employer rules - such as the no horseplay rule and the safety rule.

Mr. Lee said he made the dismissal decision and that his role in the grievor's dismissal was to look at the data and decide whether it warranted dismissal. He noted that the grievor had two warnings and a third discipline in the removal from the lift truck position and that in each case the grievor had been warned that further discipline was possible if the misconduct continued. Mr. Lee said he was aware the grievor had about two and a half years of service. He said he saw some of the notes Mr. Hodgkinson made of his interviews and Mr. Lee said

he felt the grievor had started the throwing and that the grievor kept it up through the shift. Mr. Lee said that he had been advised by Mr. Hodgkinson that the grievor had not been candid and was not remorseful. Mr. Lee said he did not think that progressive discipline was working. As plant manager, he said he had to be able to show due diligence regarding safety and that, while he had considered a suspension for the grievor, he felt a suspension would not show due diligence.

Mr. Lee explained the differing discipline given to the three employees. Mr. Haykus was given a five day suspension because he had only one incident of prior discipline, had a better safety record, did not instigate the grommet throwing, and had shown remorse. On the issue of remorse, I note that the notes made by Mr. Hodgkinson of the interviews were in evidence and that those notes do not indicate any remorse on the part of Mr. Haykus during that interview. On the other hand, Mr. Hodgkinson's notes of his interview with the grievor show some grudging remorse - "Sorry if it caused you guys grief." The remorse Mr. Haykus had shown had been during his telephone call to Mr. Hodgkinson while Mr. Haykus was suspended during the investigation.

Mr. Lee said that Mr. Benninger had a clean record and long service, but when interviewed he had said he was not throwing the grommets, so he got a one day suspension for throwing grommets and for his dishonesty in not owning up to his actions. He said a one day suspension was not normal for throwing grommets, that each incident was looked at on an individual basis.

Mr. Lee agreed that, for an employee with no record of discipline, the discipline for grommet throwing would probably be either counselling or a verbal warning.

Mr. Lee also indicated that some employees had been terminated without having had any

prior discipline. He provided the names of three employees whom he said had been fired for harassment and he recalled that one other employee had also been fired without prior discipline.

Evidence of safety practices

I note that the grievor received no stitches for his cuts or scrapes and that he had never missed a shift due to any of the pains, strains, accidents or injuries at work.

Kim Gould is the Employer's Environmental Health and Safety Coordinator and co-chair of the joint health and safety committee. She said she had worked at the plant for about 5 years.

Ms Gould said she was involved in the grievor's orientation in March 2003 and said the orientation dealt with, among other things, the Employer's health and safety rules, the Ontario *Health and Safety Act*, personal protective equipment, types of specialized training, and ergonomics. She reviewed the record of the grievor's training during his two and one half years with the Employer and said the grievor had received more training than many other employees.

Ms Gould said she had received the incident report (#14) regarding the near miss. At that time she said that there appeared to be an escalation in the number of the grievor's incidents and that there was no indication that the grievor was learning from the incidents. She said that after receiving the near miss report she went back and reviewed the grievor's earlier incident reports. Ms Gould then brought the near miss report to the attention of the employees in the Employer's human resources department.

Ms Gould testified that the grievor had more incident reports during his two and one half years of employment than did any other employee during that time. Moreover she said that the grievor reported more injuries than did anyone else during that same period. She agreed that one of the reports used in concluding that the grievor had the most incident reports was one in which the grievor had put out a fire and she agreed that it should not have been included.

At the hearing Ms Gould reviewed the incident reports and she said that in many of the incidents the grievor had been at fault. She said that if the grievor had been more careful the incidents would not have happened.

John Labonte is a production operator and has worked in the plant for 11 years. He is the Union health and safety representative and is the other co-chair of the joint health and safety committee. Both Mr. Lee and Ms Gould agreed that Mr. Labonte was a credible witness on health and safety issues.

Mr. Labonte reviewed the various incident reports and he expressed an opinion on many of them which differed from Ms Gould's opinion. In general terms, in comparison with Ms Gould, Mr. Labonte was much less inclined to find fault with the grievor's actions which had led to the various incident reports.

Both Ms Gould and Mr. Labonte commented on incident #13 which led to the verbal warning. Ms Gould said the grievor was at fault as he had not received training to move conveyors. Ms Gould expressed the view that lock out training was the appropriate training for moving a conveyor. I note that the grievor had that training. Mr Labonte said he had never heard of any training offered regarding adjusting the location of a conveyor. Mr. Labonte said it was common for production operators to adjust the location by moving a

conveyor an inch or two. Moreover, he expressed the view that the Employer had used an improper connection on the air line and should have used a check valve which would shut off the air flow whenever the air line was disconnected.

Both Ms Gould and Mr. Labonte commented on incident #16 which led to the written warning. Ms Gould testified that the use of cell phones was dangerous and a violation of the safety rules. In large part Mr. Labonte agreed although Mr. Labonte said that many other employees (supervisors, etc.) have phones provided by the Employer for use in the plant and he said that those phones were similar to cell phones. Mr. Labonte said that, in his view, the Employer phones were as unsafe as personal cell phones. He said that, in his opinion, all phones should be banned as unsafe, not simply personal cell phones.

Mr. Labonte also expressed his view that the records of the lift truck operators in the comparison group were worse than the grievor's record - that is the other operators had more serious safety violations. As for the near miss, Mr. Labonte said drivers were told to check the forks and ensure that they were in the proper position, and he did not think three or four feet was a near miss.

Mr. Labonte said he had seen other employees throw grommets, that throwing grommets was a common incident in the plant. He said he did not think the incident involving the grievor was a serious one.

III. THE AGREEMENT

The relevant provision of the parties' 2004-2007 collective agreement is as follows:

ARTICLE 3 - Rights of Management - Union Cooperation

3.01 . . . it is the exclusive function of the Company . . . to . . . discipline, suspend or discharge (subject to the right of the employee concerned to lodge a grievance in this matter) employees for just cause . . .

IV. EMPLOYER POSITION

The Employer submitted that the grievor did not treat safety issues seriously. The grievor's record of safety incidents was extensive and the Employer submitted the grievor was not suited to a job in a busy manufacturing plant.

As for the discipline involving removal from the lift truck position, the near miss had been a trigger; the near miss had raised a flag with the Employer which had prompted a full review of the grievor's safety record. Based on its review of all the events, the Employer had found it appropriate to remove the grievor from the lift truck supplement position.

The employees whom the Union had used to compare the grievor all had more time driving the lift truck. Comparing the grievor's record with their records was thus like comparing apples with oranges.

It was the Employer's position that Mr. Labonte was evasive and not a reliable witness. Although Mr. Labonte testified that, in general, all five lift truck operators from the comparison group had more serious infractions than did the grievor, Mr. Labonte had also refused to admit that the grievor was at fault in any incident. Mr. Labonte had refused to admit that if the grievor had been more careful the incidents would not have occurred.

On the other hand, Ms Gould testified about the overall safety record in the plant and noted that the plant had a good record in comparison with other Siemens plants. She reviewed the

grievor's training, including his training on personal protective equipment, on ergonomics, on the Employer rules and on the Ontario statute regarding horseplay.

After the near miss, Ms Gould had become concerned about the escalation in the number of incidents involving the grievor. She said she was concerned that the grievor was not learning from his mistakes. She had testified that the grievor had the worst safety record in the plant.

Mr. Lee had testified about the Employer's business more generally and about the impact of defects in products and the contamination of products, and about sorting products. He testified that quality and safety were major concerns. Mr. Lee testified about the grievor's dismissal and said that each case must be looked at on its own merits.

The Employer reviewed the grommet throwing incident in detail. The Employer submitted the throwing had gone on all night, that at least one employee had been hit by a grommet, that I should conclude they were "whipped," not simply lobbed, and that this was deliberate misconduct with a real potential for injury.

The Employer then asked, "What is the Employer to do with the grievor?" The grievor had injured himself when trimming parts because he failed to wear protective gloves. The grievor injured himself while assigned to a job with a lift assist device because he failed to do that work properly. The grievor had simply walked into a pallet sticking into the aisle. The grievor had hit his head while cleaning up at the end of a shift. Although the grievor was given orientation, was given training and re-training, and was provided with the Employer's rules, nothing seemed to help.

The grievor had been disciplined on two occasions in addition to the near miss. In both

instances he had been informed that further violations would lead to further discipline. Neither discipline was grieved. The verbal warning was for moving a conveyor and the Employer viewed that as an unsafe action. The written warning was for use of the cell phone, another clear violation of the Employer's rules.

The removal from the lift truck was a different matter. The near miss on the lift truck had triggered a review of the grievor's record. With the escalation of the incidents, the Employer concluded it was too great a safety risk to allow the grievor to continue to drive a lift truck.

As for the grommet throwing, the Employer viewed this as a serious matter. The Employer did an investigation and looked at each of the three employees on their own merits - their work record, their seniority and their role in the incident. Mr. Benninger did not instigate the grommet throwing, had greater seniority and a better discipline record, and he was given a one day suspension, in part for being dishonest about the incident. Mr. Haykus had little seniority, had a discipline record, and admitted his role in throwing grommets, but the Employer felt his role was less than that of the grievor and he expressed remorse, so he received a five day suspension.

As for the grievor, he had the worst discipline record of the three, had received several re-instructions and had given no indication that he learned from his mistakes, and his role in the incident was worse as he had instigated the throwing. During the investigation the grievor had not been candid and he had not shown any remorse. He testified at the hearing that he was trying to "liven up" the night, indicative of his irresponsible attitude. The grievor's comments show that his actions were deliberate.

There was a real chance of the grommets getting into the bin with the products, thereby creating problems with the customer, and a real chance of other employees slipping on one

of the grommets and injuring themselves.

In his testimony the grievor gave no indication that even at the time of the hearing he had any real understanding of the seriousness of his actions. The Employer's jobs are structured and boring with specific tasks and specific breaks, and with rules that are to be followed. The Employer had the right to expect its employees to work in a safe and attentive manner as is required by the Ontario *Occupational Health and Safety Act* and the grievor had not done so. Some of the grievor's safety incidents had been a result of deliberate actions and the grievor was clearly culpable. The situation boiled down to the fact the grievor did not take the job seriously - he was simply not suited to this work. There was no reason to think that his behaviour would change if he were reinstated.

Rather than this being a situation in which the Employer had failed to treat the grievor fairly, this was a case in which the grievor had failed to treat the Employer fairly. The Employer hired the grievor in good faith and gave him training and a chance to earn a good income. But the grievor had not held up his end of the bargain. The grievor had failed to follow the rules, had failed to take his work seriously, and had failed to be safe and attentive.

This employment relationship had been irreparably broken. The grievor had only two and one half years of employment, had a poor record and was not entitled to a further chance. There were no factors which would suggest that the dismissal be replaced with a lesser penalty.

The Employer had dismissed other employees without going through the normal steps of progressive discipline.

In response to the Union submissions, the Employer reiterated that it had treated the three

employees involved in the grommet throwing incident differently based on their roles in that incident, their records of employment, and their reactions during the investigations.

The Employer asked that the two grievances be dismissed.

The Employer relied upon the following authorities: *Re Culinar Foods Inc. and American Federation of Grain Millers International Union, Local 242* (1997), 63 L.A.C. (4th) 300 (Snow); *Re United Steelworkers of America, Local 3257 and the Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356 (Reville); *Re Greyhound Lines of Canada Ltd. and Amalgamated Transit Union, Local 1374* (1991), 22 L.A.C. (4th) 291 (McFetridge); *Re Gerdau Ameristeel Corporation and International Union of Operating Engineers, Local 793* (2004), 133 L.A.C. (4th) 149 (R. Levinson); *Re St. Vital School Division No. 6 and Canadian Union of Public Employees, Local 3470* (2002), 109 L.A.C. (4th) 34 (Teskey); *Wilmar Windows, a Division of Jeld-Wen of Canada Ltd., and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 144* [2001] M.G.A.D. No. 69 (Freedman); and *The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW) and its Local Union 1941 and Siemens VDO Automotive Inc. (Tilbury Plant)* (October 20, 2005), unreported (Watters).

V. UNION POSITION

The Union submitted that the Employer had attempted to embellish the facts in order to support its decision to remove the grievor from the lift truck position and to justify the dismissal.

The grievor had many safety incident reports over some 31 months. One of those reports was for putting out a fire - a fire he had no role in starting but which was nevertheless

counted by the Employer as one of the safety incidents. Similarly, there was an incident in which the grievor adjusted the location of a conveyor. Ms Gould testified that the grievor should not have done that as he was not trained but when asked what the training was for moving a conveyor she said it was "lock out." But the evidence indicated the grievor had previously received lock out training. Mr. Labonte, whom both Ms Gould and Mr. Lee testified was a credible witness on safety issues, said there was no special training for moving a conveyor. This was not persuasive evidence of an unsafe or dangerous action on the part of the grievor.

Similarly the Employer had attempted to describe the use of a cell phone as very dangerous and a safety concern, notwithstanding that supervisors and other employees are provided with similar phones for use within the plant, as part of their job.

As for throwing grommets, there was an attempt to paint this as a serious safety risk, but Mr. Lee, the plant manager testified that the offence normally merited counselling or a warning for a first offence.

The night the grievor threw grommets, there were two other employees involved. One, Mr. Benninger, received a one day suspension and the other, Mr. Haykus, received a five day suspension. However, Mr. Haykus was paid for four of those five days. The Employer suggested the difference was justified as the grievor failed to show remorse but the interview notes indicate that only the grievor apologised.

Moreover, the Employer said it believed Mr. Haykus when he said that the grievor had instigated the throwing of the grommets, but that was the only thing Mr. Haykus said which the Employer believed as they rejected the many other parts of Mr. Haykus' statement which were in the grievor's favour - e.g. that only a few dozen grommets were thrown, that they

were just “tossing” or “lobbing” the grommets, that they picked them up at the end of the shift, or that the grievor was checking to ensure that none of the grommets got mixed in with the product being shipped. In any event, although all three employees were doing the same grommet throwing, the only real difference among them was in relation to the discipline which the Employer had imposed.

In order to justify the dismissal the Employer had asserted that this was a culminating incident and had then reviewed a large number of prior incidents many of which were not serious and most of which the Employer did nothing about at the time they occurred.

In fact, the grievor’s discipline record consisted of only two minor incidents - one of which had led to a verbal warning while the other had resulted in a written warning. The verbal warning was for moving the conveyor. Perhaps that should have been grieved, as the evidence suggested the grievor had all the training the Employer provided for this task and it appeared the real problem was the Employer used a faulty connection, because a check valve would have prevented this problem. The second discipline was for using a cell phone during work hours and that discipline was justified on the basis that the grievor should have been working, not conducting his personal business during work hours. This cell phone incident had nothing to do with safety.

The Union then turned to the grievor’s removal from the lift truck supplement position, the first grievance before me. The Employer had removed the grievor on the basis of a near miss. However, the evidence did not support a near miss. Although there were three employees who had witnessed the event, the grievor was the only one of the three to testify. His testimony did not support any suggestion of a near miss nor of any safety issue. The grievor had been approaching a corner on his lift truck at about the same time as another lift truck was approaching the same corner from another direction. The grievor said he visually

checked the forks on his truck, and came to a stop at the same time the other driver sounded his horn. The grievor said he stopped in the normal way with no skidding or locking of brakes, and that he came to a stop some four feet from the other lift truck. Although the Employer was aware throughout the hearing that the Union did not accept the allegation of a near miss, the Employer did not call the supervisor or the other driver and, in those circumstances, I should accept the grievor's testimony and find that there was no basis for discipline.

Moreover, when comparing the grievor's record as a lift truck operator with the records of others in the plant, the Employer clearly treated the grievor differently. Over the period of the grievor's employment, excluding the five lift truck operators with the worst safety records, there had been some 60 incidents involving lift trucks, with some 30 involving actual property damage or near misses, and some 16 involving injury. However, none of those drivers was removed from the lift truck, although some of them had been provided with further instruction.

Turning to the five lift truck drivers with the worst records, they had another 30 lift truck incidents. Each of those five had multiple incidents, each incident more severe than the grievor's one alleged near miss. The worst that happened to those five drivers was a demotion for a specific period. The grievor, who had the best lift truck driving record, was the only one of the six who was not told the period of time for which he was demoted, nor when he could reapply.

Moving to the termination, the second grievance before me, the Union noted that several safety incident reports had resulted in the grievor being re-instructed. But the safety incident reports are not viewed as evidence of culpable behaviour nor did the Employer tell the grievor that further incidents would lead to discipline. The health and safety reports are

intended to track safety issues, not to create discipline - if they are to be relied upon to justify discipline then employees may cease reporting incidents and that would have a negative impact on the workplace.

The Union submitted that if I felt I should look at the incident reports, I should give them the weight they deserved and the Union noted that the grievor had never had any stitches for his cuts and had never lost any time from work. The Union asked, however, that I base my decision on the grievor's disciplinary record, and that I require the Employer to act consistently.

The Union then replied to a number of the Employer submissions. The Union noted that none of the Employer witnesses had seen the lift truck incident and that their opinions about it should be afforded little weight - the only witness who testified based on first hand knowledge was the grievor and his evidence did not support the Employer theory of a near miss.

The Union noted that in a number of the safety incidents the Employer had provided re-instruction to the grievor some 6 or 7 months after the fact, suggesting that the Employer did not view those incidents as being serious at the time they occurred.

As for the Employer suggestion that other employees had been fired without using normal progressive discipline, there were great differences in the facts - three were cases of harassment and one involved a death threat. Their misconduct was not comparable to the grievor's misconduct.

As for remedy, with respect to the first grievance regarding the lift truck supplement position, the Union asked that I allow the grievance. As for the second grievance regarding

the dismissal, the Union asked that I substitute a suspension for the dismissal, a suspension similar to the suspensions imposed upon the other two employees involved in throwing grommets, that I make the grievor whole for the rest of the time since the dismissal, and that I remain seised.

The Union relied upon the following authorities: *Re Houston Forest Products Co. and International Woodworkers of America, Local 1-424* (1984), 17 L.A.C. (3d) 211 (Germaine); *Re B.C. Transit and Independent Canadian Transit Union, Local 1* (1993), 33 L.A.C. (4th) 49 (Ready); and *Re Corporation of the City of Windsor and Canadian Union of Public Employees, Local 82* (1985), 18 L.A.C. (3d) 332 (Weatherill).

VI. CONCLUSIONS

There are two grievances in this matter. As the grievance regarding the removal from the lift truck position came first, and as that discipline was relied upon, in part, to support the dismissal, I consider it first.

The discipline grievance - removal from the lift truck position

The grievor was demoted from his lift truck supplement position after a "near miss." The incident report about that event had triggered a review of the grievor's entire record and the Employer concluded that the grievor's record was sufficiently poor that he should be removed from the lift truck supplement position.

Discipline for just cause, as is required by this collective agreement, is not simply a form of punishment. Rather, just discipline is corrective in nature. Just discipline is intended to educate employees and thereby to correct the employee's improper behaviour.

Just cause provisions are also commonly viewed as requiring progressive discipline. That is, the Employer should normally begin with a mild disciplinary response and later impose a more serious form of discipline if the employee does not learn from the earlier discipline.

One of the aspects of a system of just cause is that the Employer can impose different forms of discipline based upon an employee's record of employment. If an employee commits an offence which justifies a disciplinary response, the Employer can review that employee's existing discipline record, length of service, etc., to determine the appropriate form of discipline. The just form of discipline for a junior employee with a poor discipline record will be a more serious form of discipline than would be the case for another employee with a clean record or greater seniority.

However, before an Employer can rely upon an employee's record to justify more serious discipline, the Employer must demonstrate that the employee did something which, on its own, would warrant a disciplinary response. It is only where there is a culminating incident which itself justifies discipline that the Employer can then consider the employee's entire record in deciding upon the particular disciplinary response.

In this instance the Employer viewed the lift truck incident as being, in essence, a culminating incident and that triggered an Employer review of the grievor's entire record. But was this incident something which should justify a disciplinary response?

Although the incident report filed by the supervisor was in evidence before me, I note that the details of that incident were disputed by the Union from the beginning of the hearing.

Hearsay evidence is evidence of a statement made outside the arbitration which is offered to prove the truth of the contents of that statement. If the Employer wished to rely upon the

supervisor's report for the truth of the statements included in that report - that is, to prove the near miss with the lift truck - then the report would be hearsay. Hearsay is not normally admitted to prove the truth of the statement unless it falls within some exception.

Thus, if the Employer wished to rely upon the supervisor's report about the lift truck matter for the purpose of proving the details of that incident then, in fairness to the Union and in keeping with the general approach to dealing with hearsay, the Employer was required to call the supervisor as a witness, have the supervisor testify under oath thereby allowing me as arbitrator to assess his credibility, and allow the Union to cross examine the supervisor as to the details of the incident.

The Employer did not call the supervisor to testify and in these circumstances the report itself should not be used as evidence as to the truth of the statements made in that report about the lift truck incident.

Since the supervisor did not testify, the only direct evidence I had about this lift truck matter was the grievor's evidence. His version of events was simple. He was driving his lift truck, acting properly, as he neared a corner. He checked his forks, something Mr. Labonte testified was proper practice. Another lift truck came from a different direction toward the same corner and it stopped at the corner. The grievor put on his brakes at the same time as the other driver sounded his horn. The grievor came to a normal stop before he arrived at the corner. When the grievor stopped, the two lift trucks were some 3 or 4 feet part.

That is the extent of my direct evidence on the near miss. As the grievor's evidence was the only direct evidence on this contested issue, I accept his evidence and reject the supervisor's report as hearsay.

There was no evidence that the grievor should have stopped further from the corner, or that he should have acted in any other way. The Employer's position was based on an incident report which was labelled a near miss, but I am unable to find on the evidence at the hearing that this was a near miss, or that the grievor was driving in a reckless manner, or that there was anything else about this incident which would justify any disciplinary action. Instead, I conclude that the grievor's actions in this instance were not deserving of discipline.

As there was no basis for discipline, there was also no basis under the notion of culminating incident for conducting a full review of the grievor's record. It follows that this first grievance must be allowed. The Employer is directed to restore the grievor to his lift truck supplement position.

At the hearing, considerable time and extensive evidence was devoted to whether the discipline imposed was discriminatory. I heard evidence about many other employees driving lift trucks and the number and types of accidents they had without being removed from the lift truck position. Had I found that the grievor had been involved in an incident which justified discipline, and thereby allowed the Employer to review the grievor's entire record, I agree with the Union that I would have had to consider whether the discipline imposed upon the grievor was significantly different from that imposed upon other lift truck drivers. However, in this grievance there was no cause for any discipline, thus no basis for the Employer to engage in a full review of the grievor's record in imposing that discipline, and no reason for me to assess whether the discipline selected was discriminatory.

The second grievance - the dismissal

As the Union accepted that some form of discipline was appropriate for the grommet throwing incident, the issues before me regarding this grievance are:

1. Was dismissal too severe a penalty in all the circumstances? and,
2. If so, what penalty should be substituted for the dismissal?

Was dismissal too severe a penalty in all the circumstances?

There were some differences in the testimony of the various witnesses, but most of the facts of the incident were not in dispute. The basic situation was as follows. The grievor and two other employees were throwing grommets. They did so throughout the shift. In total, they threw many grommets. Some were thrown over the shoulder backward but others were thrown forward, baseball style. I accept Mr. McGowan's testimony that some were thrown hard, that they were whipped, as he put it, but I do not accept that all were whipped. One of the grommets hit and startled Mr. Boulley. The grommets littered the floor in the production area. On the positive side, I accept that the grievor attempted to see that grommets got in neither the products being manufactured nor in the bin, and that none did.

The evidence was that grommet throwing was not unusual - Mr. Labonte testified to that effect and Mr. Lee testified that the common Employer response to grommet throwing was counselling or a verbal warning, provided the employee had a clear record. Mr. Lee's testimony about the normal response was reinforced by Ms Rehner who testified that she had been hit by a grommet previously and, while she was uncertain as to the discipline, if any, imposed, she was certain the person had not been dismissed and she did not think the person had been suspended.

The grievor, however, did not have a clear record. He had a verbal warning for moving the conveyor and a written warning for using a cell phone. In addition, he had many other

incident reports.

I now consider the incident reports. It was clear the Employer relied upon them in assessing the penalty. I accept that the grievor had more safety incident reports than did any other employee during the time of his employment. However, under a just cause for discipline system involving progressive discipline, I do not accept that the Employer can simply file the reports without imposing any discipline at the time the incident occurred and then assert, months or years later, that the employee was at fault in an incident and rely upon that incident as a basis for imposing greater discipline than might otherwise be merited. If the Employer wishes to rely upon an incident in order to justify more serious discipline, then the Employer should make it clear at the time of that incident that the Employer is treating the incident as deserving of discipline (which it did in two of the situations here, that is the moving of the conveyor and the use of the cell phone). If the Employer wishes to rely upon these reports it should convey to the employee involved in a clear and timely fashion its view and give the employee an opportunity to improve his conduct or, alternatively, to contest the discipline. To do otherwise is unfair to the employee and is not part of a system of discipline for just cause.

Apart from my general conclusions on using the incident reports, I do not see how, for example, the fact that the grievor reported pain in his right arm or wrist on six occasions can assist the Employer's case for dismissal. The grievor's job required repetitive motion. The Employer suggested that the grievor's resulting soreness somehow proved that the grievor was working in an unsafe manner, but I am not persuaded. There was no evidence as to what, if anything, the grievor was actually doing which was unsafe and I do not think it reasonable to conclude simply from the result of soreness in the arm that the manner of the grievor's work was unsafe.

I note that with many of these incident reports, the Employer did not follow up for some time. When the Employer did follow up on reports, there were occasions in which the Employer dealt with several at one time. For example, on January 26, 2004 the Employer followed up on 5 incident reports, one from more than six months earlier. I do not think that this type of follow up can be seen as conveying to the grievor, or any other employee, the view that the employee has committed an offence which could affect future discipline.

In any event, in this case I do not find the incident reports, absent some accompanying discipline, to be helpful in assessing the measure of just discipline in this case.

At the time the grievor was dismissed he had three incidents of discipline. However, I have allowed his grievance with respect to the removal from the lift truck position, so that for my purposes in reviewing the dismissal the grievor has two incidents of discipline, the verbal warning and the written warning.

Part of a just cause for discipline system requires that employees be treated consistently. In this case consistency can be applied in two ways - among employees who, over the years, have thrown grommets and among the three employees involved in this particular incident.

The evidence of the discipline over time was not clear - at best it suggested that the discipline was generally mild. Mr. Lee said that counselling or a verbal warning would be normal for an employee with a clear record and Ms Rehner said she did not think the employee who hit her when throwing a grommet had been suspended.

Three employees were involved in this incident. Mr. Benninger was a long serving employee with a good record but he failed to admit his role. He was given a one day suspension, in part for failing to own up to his role in the incident.

Mr. Haykus was another junior employee with one incident of discipline for failing to wear safety glasses. He was given a five day suspension but lost pay for only one day. In part, this lesser discipline was imposed because he had not initiated the throwing and, in part, because he had shown remorse when he called asking for leniency after he was suspended.

The grievor had similar seniority to Mr. Haykus - both were relatively junior. The grievor had instigated the incident. He did not call during the investigation and show remorse, but on the positive side he was more remorseful ("sorry if I caused you guys grief") than Mr. Haykus when they were each interviewed by Mr. Hodgkinson. Nevertheless the grievor instigated the incident and had a poorer discipline record, and in a just cause system is deserving of the harshest discipline of the three employees.

Accepting that the grievor merited the most severe discipline, the issue remains - is dismissal too severe in all the circumstances? I have concluded that it is. I note firstly that I have allowed the grievance regarding the grievor's removal from the lift truck position, discipline which the Employer relied upon in imposing the dismissal. Secondly, the Employer relied upon the incident reports, something which I have concluded it should not have done. Thirdly, I note, unlike the Employer's practice in harassment cases in which the evidence was the Employer often moves directly to dismissal, the usual discipline for grommet throwing is much less than dismissal. Fourthly, as I indicated earlier, just discipline is intended to correct behaviour and dismissal should be reserved for situations in which the evidence indicates the employee cannot learn from his mistakes. In this instance, the evidence has not convinced me that the grievor is unable to learn from his mistakes.

I conclude that dismissal was too severe a penalty in all the circumstances of this case.

What penalty should be substituted for the dismissal

Given the discipline imposed upon the other two participants in this incident, I conclude that a two week suspension is appropriate in this case. It is twice as long as the suspension imposed on Mr. Haykus and reflects the grievor's poorer discipline record and the fact that the grievor instigated the incident.

I direct the Employer to promptly reinstate the grievor and to compensate him for his losses from the date of his dismissal to the date of his reinstatement, subject of course to the grievor's two week suspension and to the grievor's duty to mitigate his losses.

Summary

With respect to the first grievance regarding the grievor's removal from the lift truck position, I find that the Employer did not have just cause for any form of discipline at the time it removed the grievor from the lift truck supplement position and I direct the Employer to restore the grievor to his lift truck supplement position.

With respect to the second grievance, I find that the dismissal was an excessive disciplinary response and substitute a two week suspension without pay. I direct the Employer to promptly reinstate the grievor. Subject to the grievor's two week suspension without pay and to the grievor's duty to mitigate his loss, I direct the Employer to compensate the grievor for his losses during the period of time from the dismissal to the reinstatement.

I will remain seised to deal with any issues which may arise in the implementation of this award.

Dated at London, Ontario this 29th day of May, 2006.

Howard Snow, Arbitrator