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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BUTCHER ENGINEERING ENTERPRISES LIMITED
- The Employer

-and-

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), AND ITS LOCAL 195
- The Union

AND IN THE MATTER OF the grievance of Randy Civin

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Arthur P. Tarasuk - Counsel
Tara Meyer - Human Resources Manager

On behalf of the Union:

Chris Hutnik - National Representative
Gwen McFarlane - Plant Chairperson
Randy Civin - Grievor

Hearing held December 13, 2006, and January 25, 2007, in Windsor, Ontario.

AWARD

I. INTRODUCTION

The grievor was dismissed due to his misuse of workplace property and his disciplinary record. The Union alleged that dismissal was too severe a penalty for the grievor's misconduct.

II. THE FACTS

Butcher Engineering Enterprises Limited, the Employer, operates a facility in Windsor Ontario where it packages parts for the automotive industry. The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), and its Local 195, the Union, represent the employees.

Randy Civin, the grievor, has been employed since 1999. At the time of his dismissal, the grievor was a packager working on front bumpers.

There was little dispute as to the relevant facts.

Bulk shipments of auto parts, nearly all of which are destined for the Employer's primary customer, Ford of Canada, arrive at the Windsor facility. Those parts are then checked for quality, wrapped and shipped in accordance with the customer's wishes.

Both cost and quality are major concerns in the Employer's operations. The Employer formerly packaged auto parts for Ford in the United States as well as in Canada. However, in 2005-2006 the Employer could not meet Ford's US cost requirements and the Employer lost the US business, approximately 70% of its total business. As a result of the loss of the

Ford US business, about two thirds of the Employer's staff were laid off.

Quality is very important in the Employer-Ford relationship and, having lost the Ford US business, the Employer was concerned about losing the Canadian business. The Employer has a Quality Policy which is well known in the workplace. That policy notes that the Employer is committed to 100% customer satisfaction.

As noted, one of the items the Employer packages for Ford is front bumpers. The bumpers are plastic and although some scuffs or scratches are acceptable to Ford, others are not. June 2006 Ford tried something new by providing the Employer a sample bumper with scratches on it, with those scratches marked by Ford as either "accept" or "reject." The intention was to place the bumper near the work stations of the employees who check and wrap the bumpers to serve as a visual guide as to what was acceptable. The bumper itself was a large plastic piece with a hole lengthwise across the middle.

With respect to the events which led to the grievor's dismissal, Friday June 30, 2006, the grievor returned early from his afternoon break. He testified that he saw the sample bumper and thought it would look "cool" and "humourous" if he made it look like a "hot rod." He decided to make the hole in the bumper look like a mouth. He took scrap pieces of foam and taped them on the bumper to look like teeth and he took a larger piece of scrap foam, cut it in the shape of a tongue, coloured it pink, and taped the tongue on as well. The result was a "mouth" with fourteen teeth and a tongue. The art work was carefully done and clearly recognizable as a mouth. He said it took about five minutes at the end of his break to do the mouth.

The Canada Day holiday weekend followed. During the lunch break Tuesday July 4, the next work day, the grievor's area manager saw the mouth and the grievor was asked about

it. The grievor readily admitted having done the mouth and, when it was suggested that he remove the teeth and tongue, he did so promptly. He said it took about one minute to completely clean up the sample bumper and no damage was done to it.

Later that day the grievor was called to the plant manager's office. When the grievor was asked whether he did the mouth, he admitted it and he indicated that he had cleaned it up. The plant manager told the grievor that management was not happy and the grievor was suspended until further notice.

At that point there was a disagreement about the meetings which followed. The grievor said he attended only one further meeting with management. It was clear, however, that there were two meetings, July 5 and July 12, and that the grievor attended both.

In the first meeting July 5, the issue of the mouth was discussed. The grievor testified he again acknowledged what he had done. The grievor said that he indicated during the meeting that he realised what he had done was stupid, that when he did it he had not thought about it, and that he had just been trying to "liven up" his area. He testified he apologised during the meeting and indicated that he had not meant to offend.

Gerry Farnham, then the Vice President of the Local Union, attended the July 5 meeting as a representative of the Union. Mr. Farnham testified that during the meeting the grievor was extremely anxious but the grievor appeared to realize the seriousness of his actions, indicated it was a stupid act, said he was sorry, and said he knew he should not have done it.

Tara Meyer, the Employer's Human Resources Manager, testified that she did not recall any apology or admission of wrong at either meeting. When the substance of Mr. Farnham's anticipated evidence was put to Ms Meyer in cross examination, she said she had no

recollection of the grievor making any such statements. Ms Meyer's notes of the meeting do not reflect such comments by the grievor, but she acknowledged that she could not recall whether everything which occurred at the meeting was recorded in her notes.

The Employer has a document termed "Standards of Conduct." The Standards indicate a variety of things for which the Employer may discipline employees, including refusal to perform assigned work, failing to abide by the "clock in and clock out" rules, loitering or sleeping on the job, and disrespectful conduct. Three other infractions, one of which is "abusing, misusing or destroying" property, are said to result in dismissal in most circumstances. In addition, the Standards of Conduct preamble states that every "employee has an obligation at all times to maintain the highest quality standards."

After further investigation following the July 5 meeting, the Employer terminated the grievor by letter given at a meeting July 12, 2006. That letter first notes the grievor's two earlier incidents of discipline - one February 12, 2005, in which the grievor was suspended for the balance of the shift (three and one-half hours), and one June 24, 2005, in which the grievor was suspended for three days. I heard no evidence as to exactly what the grievor did to warrant those suspensions, but both of those earlier disciplinary notices cite violations of the Employer's Standards of Conduct. The February 2005 balance of shift suspension was for refusing to perform assigned work, restricting output, stopping work early, failing to perform work satisfactorily, and loitering on the job. The June 2005 three day suspension was for refusing to perform assigned work, failing to perform work, and disrespectful and disorderly conduct, and it relied upon the February suspension.

The discipline in dispute now, the grievor's dismissal, was for misusing, abusing or destroying property and, as noted, the dismissal relied upon the earlier suspensions.

The dismissal letter indicates that the altered bumper might have been seen by a Ford representative. The letter also notes that a Ford representative was in the plant June 30, the day the mouth was made. A Ford representative is frequently in the plant and, on most visits, tours the facility. The Employer was very concerned about the consequences had a Ford representative viewed the mouth.

III. PROVISIONS OF THE AGREEMENT

The relevant section of the parties' 2005-2008 collective agreement is as follows:

ARTICLE 3
MANAGEMENT RIGHTS

3.01 (a) The Union acknowledges and agrees that the management of the Employer's business is the sole and exclusive prerogative of the Employer including the right to . . . discipline and/or discharge for just cause . . .

IV. EMPLOYER POSITION

The Employer submitted that it had not violated the collective agreement and asked that the grievance be dismissed.

The Employer noted it had an established relationship with Ford. Nevertheless, Ford had withdrawn its US business and it was clear other companies would willingly take on the Ford Canada work if Ford became dissatisfied with the Employer. The Employer said it could not afford the risk of being disrespectful to Ford.

The Employer asked me to find that making a mockery of the Ford bumper would upset Ford. The grievor must have known this and known that he was inviting the wrath of Ford in a tenuous business relationship. Ford representatives visit the facility on a periodic basis and often tour the facility, and the risk, if a Ford representative saw this mouth, was great.

The Employer had the right to insist on minimum standards of behaviour. The grievor knew of the Employer's Standards of Conduct and of the Quality Policy. The grievor must have known of the potential consequences of his actions.

This was a deliberate act, and the fact that Ford did not see it should not be used in the grievor's favour. Dismissal was justified.

V. UNION POSITION

The Union submitted that nothing the grievor did caused any damage. The bumper was a scrap bumper, the mouth was made with scrap foam and, after it was cleaned up, the bumper was the same as it had been initially.

The Union noted that the grievor had always performed his work on a quality basis.

The grievor's two earlier incidents of discipline had been more than a year prior to his dismissal and they were for unrelated infractions. The year between those incidents and the dismissal suggested that the grievor could learn from discipline less than dismissal.

The grievor only realised how serious the matter was when he met Ms Meyer, the Employer's Human Resources Manager, July 5. But even before that meeting, the grievor had admitted what he had done and he had cleaned it up immediately upon being asked. When he met with Ms Meyer he admitted that his actions had been stupid, he was remorseful, and he apologised.

Although the grievor had committed a wrong, the Union submitted this was a case where a review of all the factors suggested that the penalty of dismissal should be reduced. This was a one time event. It was not related to his earlier discipline. It was not premeditated and it was not wilful misconduct. There was no malice.

The Union asked that I substitute a suspension of whatever length I believed to be just and that I remain seised in the event that the parties are unable to resolve the issue of compensation.

VI. CONCLUSIONS

I consider three questions when dealing with discipline grievances.

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

1. Did the grievor's conduct justify a disciplinary response?

This point was conceded by the Union and I agree that the grievor's actions merited some form of discipline.

2. Was the discipline imposed an excessive form of discipline?

I begin with the one factual dispute - what actually took place in the July 5 meeting where the grievor and Mr. Farnham, who attended as a representative of the Local Union, both said the grievor apologised. Ms Meyer said she had no recollection of an apology and her notes

reflect no such comments. However, Ms Meyer did not deny that it happened, she simply did not recall it. Given the grievor's confusion about whether there were one or two meetings, were it only the grievor who recalled an apology, the issue would be more problematic. However, the grievor and Mr. Farnham recalled similar comments. Taken together, their testimony is persuasive. On this issue I accept the evidence of Mr. Farnham and the grievor, and I conclude that the grievor did offer an apology of the nature described by Mr. Farnham.

As there was cause for some form of discipline and the Employer dismissed the grievor, the question is this: Was dismissal excessive?

This collective agreement requires just cause for discipline. There are several general concepts commonly used in assessing just cause.

The purpose of an Employer discipline regime is to *correct behaviour*, not simply to punish an employee. If discipline is to be for just cause, then the discipline should be intended to motivate the employee to modify his or her behaviour. Discharge ordinarily suggests that there is no chance the employee will modify his behaviour.

In order to be just, the discipline must be appropriate for the *particular employee*, given his or her length of service, previous employment record, etc. Because of this, employees with more seniority or with better discipline records receive better treatment, in the sense that what is just for those employees may be a milder form of discipline than that given another employee.

Finally, just discipline must bear a reasonable relationship to the *gravity of that employee's wrong*. A mild wrong ordinarily merits a mild response, and a serious wrong ordinarily

merits a serious form of discipline. On occasion the employee's misconduct alone may be so serious that, regardless of the other factors, the employee simply cannot be allowed to remain employed.

Progressive discipline is premised on the notion that most employees can and will learn from their mistakes when those mistakes are clearly pointed out to them and those employees will *correct the behaviour*. Discipline less than dismissal is a method by which an employer points out mistakes to the employees. At some point, however, an employee may demonstrate an unwillingness or inability to learn from his or her mistakes. Has the grievor shown whether he can learn from discipline?

The grievor had two previous suspensions. Both suspensions were more than one year before this incident. The actions leading to the earlier discipline differed substantially from the actions in this incident, in terms of the sections of the Standards of Conduct which were relied upon. Given that more than a year had elapsed after the suspensions without any discipline, and given the fact that this incident was of a different nature, a review of the earlier discipline suggests that the grievor did learn from his past mistakes and that a lesser form of discipline may suffice to correct his behaviour now.

When asked about the mouth, the grievor readily admitted he had done it and he quickly took it apart. In the meeting the next day he acknowledged it was stupid to have done it, he apologised and acknowledged his mistake. His conduct after the event in acknowledging his actions, cleaning up, and apologizing for it, suggests that the grievor is able to learn from his mistakes.

These factors, which suggest that the grievor can *correct his behaviour,* would support his possible continued employment.

I next consider the *particular circumstances of the grievor*. He has been employed since 1999, or for approximately seven years at the time of the dismissal. He was a relatively senior employee - two thirds of the bargaining unit were on layoff (layoffs made in reverse order of seniority) and the grievor was not on layoff. I conclude that the grievor's seniority was sufficient to entitle him to somewhat better treatment than might otherwise be the case.

As for the *seriousness of the incident*, it seemed to have been done on the spur of the moment. Certainly the bumper had not been in the facility very long. The grievor said the idea came to him at the end of a break shortly before the beginning of the long weekend and that he did the mouth in five minutes. The incident was not planned or deliberate.

But was the grievor's misconduct in this instance so serious that he should not be allowed to remain an employee? The bumper involved was a scrap bumper, although it was being used to show what problems warranted the rejection of a bumper as a useful part. The teeth and tongue were made from scrap. The bumper cleaned up quickly and there was no damage to it. Whatever might have been Ford's view had they seen it, and the Employer was clearly concerned, Ford did not see it.

Looking at the *seriousness of the incident* itself, I do not think it was sufficiently serious as to demonstrate that the grievor simply should not be allowed to remain an employee.

The review of the above factors, that is the potential for the grievor improving his conduct, the grievor's seniority, and the seriousness of the misconduct itself, persuades me that dismissal was an excessive form of discipline in this instance.

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

As I have concluded that the discipline was excessive, it is necessary to determine what penalty should be substituted.

In my view, a substantial suspension without pay would have been adequate to bring home to the grievor the seriousness of his actions. In addition, a substantial suspension would be sufficient to demonstrate to all that the Employer is serious about quality and it would be adequate to deter other employees from engaging in this sort of foolishness. The Union left it to me to select another, lesser, penalty and declined to make any suggestion as to the length of the suspension.

I substitute a one month suspension without pay for the dismissal. I direct the Employer to reinstate the grievor forthwith, with full seniority, and to compensate the grievor for the period from the end of his one month suspension to the date of his reinstatement.

As is the normal practice, I leave the calculation of compensation to the parties.

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

Dated at London, Ontario this 19th day of February, 2007.

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Howard Snow, Arbitrator