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 Holly Yoell

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

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

On behalf of the Union:

Chris Hutnik	- National Representative
Gwen McFarlane	- Plant Chairperson
Holly Yoell	- Grievor

Hearing held May 5, 2009, in Windsor, Ontario.

AWARD

INTRODUCTION

The grievor was permanently removed from all positions involving the operation of a fork lift because of her unsafe fork lift driving. The Employer offered the grievor a lower paid position as a packager and the grievor accepted. The Union alleged that this permanent demotion was too severe a penalty for the grievor's misconduct.

BACKGROUND

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. Holly Yoell, the grievor, has been employed since 1996. At the time of her demotion the grievor was a material handler driving a fork lift, a position she held for some 10 years.

There was little dispute as to the facts. The parties agreed that, with one exception, I should proceed on the basis that the evidence was as set out in their opening statements.

Bulk shipments of after-market auto parts, nearly all of which are destined for either Ford Canada or Ford USA, arrive at the Windsor facility. Those parts are checked for quality, wrapped and shipped in accordance with the customer's wishes. The work is done at long work stations and the parts are brought to those work stations by material handlers who use fork lifts.

The Employer places great emphasis on safety as there is considerable pedestrian and fork

lift movement in a confined area. The grievor received extensive training on the fork lift - how to operate it and how to do so safely. The grievor had received fork lift training and safety certification in January 2000 and she passed a fork lift driving test in February 2000. In March 2002 the grievor had another fork lift training and safety program and she passed another fork lift driving test. In March 2003 the grievor was advised of, and signed for the receipt of, changes in the health and safety training manual, including changes related to the driving of fork lifts. In June 2005, in May 2006, and again in May 2007, the grievor received additional refresher fork lift safety training. In June 2007 she had a practical evaluation of her fork lift driving. Finally in May 2008 the grievor had another refresher training session.

However, the grievor had what the Employer characterized as a "horrific" accident record. The Employer was unable to determine whether the accidents were due to inattention or to a violation of safety practices. The grievor had been warned and was temporarily demoted from her fork lift driver position on three separate occasions before the final accident.

Turning to this final accident, the Employer viewed it as a culminating incident. This incident occurred on August 28, 2008, as the grievor was on her way for a morning break. The plant has travel lanes and safety barriers and it is clear how and where to move in the plant. Among the safety barriers are stand-alone square steel poles fixed to the floor, each pole being three or four feet high. The grievor was driving her fork lift to the location where she normally parked, a place outside a travel lane, and she felt she was driving at a low speed. Before she had come to a stop the grievor was distracted by a noise which caused her to look in the direction of the sound. The grievor's fork lift then hit a stand alone safety pole making a loud noise which drew the attention of a number of nearby employees. At first the grievor was uncertain whether she had hit the pole or the

floor. However, she examined the pole, saw minimal damage and noticed that the pole had not been dislodged from its base. The grievor went on her break. After the break the grievor had intended to talk to the supervisor but, as there were other employees in the supervisor's office, she went back to work.

The only issue upon which I heard oral evidence was whether the grievor perforated the pole when she hit it with the fork lift. The Employer said that the tong from the grievor's fork lift pierced the pole. The Union said it did not know that to be a fact and could not agree to it. Tara Meyer, the Employer's Human Resources Manager, testified that August 28 she had received a report of the accident and that same day she examined the pole and saw what she thought was a new hole in the pole. She said paint was hanging from the hole and she was able to put her finger through the hole in the pole. Ms Meyer said that she was sure the hole was made by the grievor.

I was informed of the grievor's discipline record, beginning in March 2006, as follows:

1. March 2006 the Employer counselled the grievor for having her fork lift racks too high which caused her to hit a large ceiling light, knocking it loose at one end.
2. July 2006 the Employer issued the grievor a verbal warning for driving her fork lift in a restricted area.
3. July 2006 the Employer gave the grievor a written warning after her fork lift hit a desk where a quality assurance employee was working. Most items were knocked off the desk.
4. March 2007 the Employer removed the grievor from the fork lift for three days after she had a near miss with two pedestrians.
5. June 2007 the Employer removed the grievor from the fork lift for five days after she had hit and damaged an overhead gate.
6. March 2008 the Employer removed the grievor from the fork lift for fifteen days after she ran into a stack of skids and pushed the skids into a conveyor, thereby pushing sections of

the conveyor apart. This discipline notice stated that it was a **"FINAL WARNING**."

7. August 2008 the Employer removed the grievor permanently from any position requiring the use of a fork lift after she ran into and pierced the safety pole. The notice stated that the removal was further to "previous disciplinary actions," that is the July 2006 written warning and the three, five, and fifteen day removals from the lift truck, (#3, #4, #5, and #6, above), all of which were driving infractions. This notice of discipline made no mention of the other four previous incidents of discipline (# 1, #2, #8 and #9).

   The Employer did, however, "without prejudice" offer the grievor a packager position and the grievor accepted this offer.

In addition, the grievor's record includes the following discipline:

8. April 2007 the Employer counselled the grievor for operating a fork lift while not wearing a seat belt.
9. February 2008 the Employer gave the grievor a verbal warning for operating a fork lift while not wearing a seat belt.

Other than this grievance regarding #7, above, which is before me for resolution, no grievances were filed with regard to any of the above discipline.

Before her demotion the grievor had been a material handler making $15.97 per hour and after the demotion she has worked as a packager making $13.75 per hour. She has worked for the Employer for some 13 years. She is a single mother with no other source of income and she receives no child support payments.

THE COLLECTIVE AGREEMENT

The relevant sections of the parties' 2008-2011 collective agreement are 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, terminate, promote, demote, lay off and recall employees.

ARTICLE 15
DISCIPLINE, DISCHARGE AND SUSPENSION

. . .

15.06 The Employer agrees not to rely on any . . . discipline in determining the appropriate penalty . . . provided the employee has not received any such form of discipline for a period of eighteen (18) clear months . . .

EMPLOYER POSITION

The Employer reviewed the culminating incident and said that the grievor had hit the pole and perforated it. The grievor was distracted, but being distracted was not a defence.

Although the grievor believed she was travelling at a low speed, she hit the pole and heard a loud bang. Since she perforated the steel pole, it is difficult to accept that she was travelling slowly. This was a serious situation which could have resulted in serious injury if the grievor had hit a person rather than the pole.

The Employer said it was also of concern that the grievor did not report the accident nor did she check for damage to the fork lift. For safety reasons the fork lift should have been checked before being used again.

Instruction, counselling, and corrective action have been unsuccessful in getting a safety message through to the grievor. Considering the extensive driver training and the safety education and the prior corrective actions taken by the Employer, the only conclusion which could be reached is that the grievor knew what was expected in terms of the safe operation of the fork lift. Safety and the awareness of one's surroundings were key

when operating a fork lift and it was clear that the grievor did not maintain an awareness of her surroundings. There was only a short time - five months - between the 15 day removal from the fork lift and the culminating incident. It was reasonable for the Employer to weigh the grievor's record and to conclude that if the written warning, and the three day, five day, and 15 day demotions did not correct the grievor's conduct, nothing would. There had been clear progressive discipline and it was now appropriate to remove the grievor permanently from any position involving fork lift driving.

The Employer responded to the Union submission that the Employer could only rely upon four of the eight previous incidents of discipline. The Employer said that, although the notice of demotion had made specific reference to only four of the eight incidents of previous discipline, it was nevertheless appropriate to consider all the training and all eight incidents in which the grievor had been counselled or disciplined for safety violations. The specific mention of four incidents of prior discipline should not mean that the other four were to be excluded.

The Employer advanced an alternative argument. The Employer said that this collective agreement (Article 3.01, above) allows the Employer to demote an employee when that employee is unsuitable for the position the employee holds. If the grievor was not at fault in her accidents, then the accidents showed that she was not suited to drive a fork lift.

The Employer asked that the grievance be dismissed.

The Employer relied upon the following: Brown and Beatty, *Canadian Labour Arbitration,* (Canada Law Book) 3rd edition, Sections 7:3520, 7:3530, 7:4250, and 7:4260; *Canadian Forest Products Ltd. (Polar Division) and Industrial Wood & Allied Workers of Canada, Local 1-424* (June 12, 2000), unreported (Larson); and *The*

Brampton Hydro-Electric Commission and National Automobile, Aerospace, Transportation and General Workers Union of Canada, (CAW-Canada) Local Union 1285 (August 21, 1997), unreported (Kennedy).

UNION POSITION

The Union noted that the grievor admitted hitting the pole. She had not been reckless, but was instead distracted as she was parking the fork lift in her usual spot prior to her break. The grievor always reported her accidents and had intended to report this one but she returned to work as the supervisor to whom she would report was busy.

The pole the grievor hit was not so badly damaged as to require replacement - it was still in place more than eight months after the accident. The Union submitted that the misconduct was not major, was not reckless, and while some discipline was warranted, a permanent demotion was excessive and unjust.

In imposing this discipline the Employer made specific mention of only four incidents and it would be unfair to allow the Employer to rely on eight incidents. In particular, the Employer had mentioned and had relied upon the July 2006 written warning and the three, five and fifteen day demotions. The Employer should not now be allowed to rely upon the March 2006 counselling, the July 2006 verbal warning or the two infractions for failing to wear a seat belt.

The Union submitted that a permanent demotion was generally not an appropriate form of discipline and made reference to some of the authorities below.

In response to the Employer's alternative submission that the grievor could be demoted

under Article 3 for her inability to drive a fork lift, the Union said there was no evidence of the grievor's inability to perform the job. Similarly there was no evidence of additional steps taken by the Employer to help the grievor improve her job performance. A non-disciplinary demotion would require a high standard and the Employer had not met that standard.

The Union asked me to allow the grievance and substitute such penalty as I deemed appropriate in place of the permanent demotion. The Union suggested that I substitute a demotion longer than 15 days but allow the grievor an opportunity to return to a position in which she would operate a fork lift.

The Union relied upon the following: Mitchnick and Etherington, *Leading Cases on Labour Arbitration,* (Lancaster House) Section 10.8; Brown and Beatty, *Canadian Labour Arbitration,* (Canada Law Book) 3rd edition, Section 7:4250; *Re Rubbermaid Canada Inc. and CAW-Canada, Local 252* (2008), 172 L.A.C. (4th) 187 (Shime); *Re Comox Valley Distribution Ltd. and I.W.A.-Canada, Local 363* (2001), 102 L.A.C. (4th) 216 (Hope); and *Re Canadian National Railway Co. and Rail Canada Traffic Controllers (Rutkowski)* (1993), 37 L.A.C. (4th) 405 (Frumkin).

CONCLUSIONS

Disciplinary or non-disciplinary

I begin with the fundamental issue as to whether the grievor's demotion should be dealt with as disciplinary or as non-disciplinary.

A matter is suitable for discipline if the employee is at fault, that is if the employee could

have done better. However, if an employee is simply unable to properly do the job through no fault of his or her own, that job failing is not suitable for discipline.

Turning to this incident, there was no evidence that the grievor was simply unable to safely drive a fork lift. This incident was treated by the Employer as meriting discipline, and this discipline notice referred to four "previous disciplinary actions" for very similar driving infractions. The Employer clearly treated the grievor's earlier driving incidents as disciplinary and it did so without any objection from either the Union or the grievor. Given the several years in which this sort of conduct was treated by all the parties as a blameworthy problem, and given that there was no evidence to the contrary, I conclude that this incident should be regarded as culpable or blameworthy conduct and I treat this demotion as disciplinary.

What previous discipline can be used?

As for the issue of whether the Employer can rely on all eight earlier incidents of discipline when it mentioned only four at the time of the demotion, in general I believe employers should be held to the reasons they originally advance for imposing discipline. Fairness in the arbitration process suggests that a union should know the basis for the discipline before the hearing begins. While I know that there may be situations in which an exception would be justified, such as when the Employer later becomes aware of facts which it did not know at the time of imposing the discipline, there was nothing which might support an exception here. In fact, the only evidence I had as to why the Employer decided to permanently demote the grievor was the discipline notice itself. In this instance, I conclude that the Employer should be held to its written notice of discipline in which the Employer included only part of the grievor's prior discipline record.

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 excessive? and,
3. If the discipline was excessive, what penalty should be substituted?

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

The grievor ran into a safety pole. I conclude from Ms Meyer's evidence that the grievor pierced the pole with the tong of her fork lift. The pole was sturdy and had thick steel walls. I conclude that the grievor's fork lift hit the pole with considerable force when she pierced it. Moreover, I find that the grievor's action was conduct which justified a disciplinary response.

I note that this question of whether the grievor's conduct merited some form of discipline was conceded by the Union.

2. Was the discipline imposed excessive?

The Employer removed the grievor permanently from any position involving the operation of a fork lift and offered her a packager position, a position which she had previously held. The question is this: Was this discipline excessive?

This collective agreement (Article 3, above) requires just cause for discipline. There are several concepts commonly used in assessing just cause.

Seriousness

Just discipline must bear a reasonable relationship to the seriousness of that employee's wrong. Mild misconduct ordinarily merits a mild response and serious misconduct ordinarily merits more severe 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.

While no person was injured in this instance, safely operating a fork lift in a confined space with numerous other persons moving about requires that the grievor not allow herself to be distracted in such a way that an accident is likely. I conclude that the grievor's running into and piercing the steel safety pole with a fork lift was a matter of serious concern.

Progressive discipline

Secondly, in order to be just, the discipline imposed initially should normally be relatively mild and more serious discipline is appropriate for repeat offences. Some employees learn easily whereas other employees require repetition before they learn. This concept of imposing more serious discipline for repeat offences is often referred to as progressive discipline.

This Employer imposed a written warning and then three demotions of increasing length - three, five, and finally fifteen days. This type of multi-step, increasingly serious, progressive discipline is common and I find that the Employer appropriately used progressive discipline.

Corrective

Thirdly, the purpose of an Employer just cause for 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.

The Union submitted that a permanent demotion was always unjust and cited arbitration awards in support of that view. It is the notion that just discipline is intended to correct behaviour which leads to the suggestion that a permanent demotion is unjust. A permanent demotion does not allow for the possibility of correction since there is no way for the employee to demonstrate that he or she has corrected the improper behaviour.

The same argument can, of course, be made against discharge since there is likewise no way a discharged employee can demonstrate that he or she has corrected the improper behaviour. But clearly, at some point, it is just to discharge an employee. That point is reached when, on the facts, there is no expectation that the employee will learn from further corrective discipline, that is when the earlier discipline has not been successful in improving the conduct and when there is nothing to suggest that imposing further discipline will bring about the desired change.

I can find no basis in this collective agreement, nor in the general nature of just cause for discipline regimes, to conclude that this Employer cannot impose a permanent disciplinary demotion. But I am of the view that any permanent disciplinary demotion

should be scrutinized on the same basis as a discharge and that any permanent disciplinary demotion is only just when there is no expectation that the employee will learn from corrective discipline. Assuming that a discharge from employment would be just in a given situation, I fail to see how it can possibly be unjust if, instead of discharging the employee, the employer imposed a permanent removal from one job but continued to employ the employee in another job. There may be a number of reasons why an employer would be willing to retain an employee in another job - whether it be employer compassion, or the employee's considerable seniority, or the employee's skills in another position.

I have reviewed the authorities on demotions cited by the Union. While there are suggestions in them that demotions, and especially permanent demotions, are unjust, those suggestions were made in situations where discharge was also seen as unjust.

In *Rubbermaid Canada* (above), a grievance involving a six month demotion for a fork lift driver, Arbitrator Shime wrote as follows:

> Generally speaking, "demotion is not in the ordinary sense a proper form of discipline", because it interferes with the seniority provisions of the collective agreement. *Re Gabriel of Canada Ltd. and Int'l Assoc. of Machinists* (1968), 19 L.A.C. 22 (Christie). Under this collective agreement, demotion may interfere with promotion rights, layoff rights, and recall rights. . . .
>
> After duly considering the relevant principles, I find that demotion was not an appropriate penalty in these circumstances. Mr. Aksentic [a supervisor] stated that the grievor is a decent person who "gets along and performs satisfactorily". Accordingly, there is a reasonable inference that the grievor usually performed competently. . . . (at page 191).

The situation before Arbitrator Shime involved a single incident, not a lengthy record of progressive discipline. Arbitrator Shime substituted a six day suspension from employment for the six month demotion from driving a fork lift.

In *Comox Valley* (above), Arbitrator Hope was dealing with a permanent demotion from

driving a truck. He wrote as follows:

> The arbitral authorities do not support the position taken by the Employer that a permanent demotion can be imposed on disciplinary grounds. I agree with the Union that permanent demotions are limited to circumstances in which the facts support a conclusion that the employee involved is incapable of performing the duties that form the position from which the employee was demoted. Here the evidence fell short of establishing that the Grievor was incapable of performing the duties of a driver. . . . (at page 29)
>
> Here the Employer did not view the Grievor's conduct as deserving of dismissal. . . (at page 31)

Arbitrator Hope noted that the grievor was capable of being a driver and that the Employer did not view that grievor's misconduct as meriting discharge. Arbitrator Hope reinstated that grievor in his position one week after the award, making the demotion one of approximately eleven months.

In both awards the demotion was viewed as unjust. I read these awards as simply saying that discharge would have been unjust and so was a permanent, or even lengthy, demotion. In both cases the arbitrators had concluded there was a reasonable expectation that the employee could correct the behaviour, that the employee could learn from discipline less than discharge.

Returning to this grievance, if a discharge would have been an excessive Employer penalty, then a permanent demotion would be excessive. However, if a discharge would not have been an excessive Employer penalty, then I cannot see how the fact that the Employer instead "discharged" the grievor from any position involving the operation of a fork lift while offering her a packager job in which none of the fork lift safety issues would arise can be excessive.

Has the grievor learned from her earlier discipline? This last accident and the other four incidents occurred over some 25 months between July 2006 and August 2008. All were similar, as all involved driving the fork lift and all dealt with accidents or near accidents. Given the relatively brief period of time between the various incidents, and especially the

fact that only five months had elapsed between the 15 day removal from the fork lift and this final incident, I can only conclude that the grievor has not learned from her past discipline. Moreover, her record does not support a conclusion that a lesser form of discipline now might somehow be sufficient to cause her to correct her behaviour. Instead, her record strongly suggests that discipline will not help the grievor learn to drive a fork lift safely.

Based on the grievor's record, I agree with the Employer's conclusion that the discipline was not correcting the grievor's behaviour, that the point had been reached where there was no reasonable expectation that the grievor would learn from further corrective discipline, and that the grievor had not and would not change her driving habits.

Appropriate to the grievor

Fourthly, any 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 discipline for those employees may be a milder form of discipline than the discipline for a more junior employee with similar misconduct.

The grievor has been employed more than twelve years at the time of this incident, and she is a relatively senior employee in this bargaining unit. She is a single mother and the sole support for her child. I conclude that this combination of the grievor's seniority and her personal circumstances are such as to entitle her to somewhat better treatment than might be the case for another employee.

However, in this instance, given the seriousness of the incident, the grievor's record of progressive discipline, and the absence of evidence to suggest that the grievor might learn

from less serious discipline, I find the grievor's seniority and personal circumstances are insufficient reasons to warrant an adjustment in the penalty.

Conclusion

I find this was a serious incident, the grievor is not a safe fork lift driver, the Employer has taken many steps in an effort to make her a safe driver, those steps have been unsuccessful, and, if I substituted a lesser penalty, she would still not become a safe driver. Notwithstanding the grievor's seniority and personal situation, I conclude that the permanent demotion was not excessive.

3. If the discipline was excessive, what penalty should be substituted?

As I have concluded that the discipline was not excessive, I do not need to consider this final question.

The grievance is denied.

Dated at London, Ontario this 3rd day of June, 2009.

Howard Snow, Arbitrator