IN THE MATTER OF AN ARBITRATION

BETWEEN

MARKE ASSOCIATES

- 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 an individual grievance of Stefan Copia

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

William Vukanovich	- President
Stan Vukanovich	- Operations Manager
Brian Querin	- Production Manager
Robert Shiells	- Supervisor

On behalf of the Union:

Debbie Fields	- National Representative
Scott Goddard	- Plant Chairperson
Stefan Copia	- Grievor

Hearing held in Windsor, Ontario on February 12, 1996.

AWARD

I. INTRODUCTION

Stefan Copia (the grievor) grieves his December 15, 1995 dismissal from his employment with Marke Associates (the Employer) for events which occurred on December 12. The Employer operates a business in Windsor and the plant in which the grievor worked has about ten (10) employees. Those employees are represented by the National Automobile, Aerospace, Transportation, and General Workers Union of Canada (CAW - Canada) and its Local 195 (the Union).

The grievor went to work for the night shift on December 12, 1995 while under the influence of alcohol. There was an incident with a fellow employee early in the shift in which the Employer said the grievor threatened to kill the other employee. Shortly thereafter the supervisor noted that the grievor had been drinking and sent him home. After the grievor left the workplace the supervisor noticed that certain production records were not where they would normally have been and concluded that the grievor took the records. On December 15 the Employer dismissed the grievor and provided the following reasons:

1. Coming to work drunk;
2. Threatening to kill a fellow employee; and
3. Stealing company property.

With respect to the first ground for the dismissal, at the beginning of the hearing the Union acknowledged that the grievor had come to work while under the influence of alcohol. As for the third ground, during closing argument the Employer acknowledged that the evidence had not disclosed the grievor stole any company property and the Employer abandoned this as a basis for dismissal.

At the beginning of the hearing the Employer indicated this was the first time the Employer,

or any of the Employer representatives, had been in an arbitration. As a result, the hearing was conducted less formally than is normal, and on some issues the evidence was not as complete as one would ordinarily expect.

II. THE EVIDENCE

I heard evidence on a number of issues which ultimately do not affect the resolution of this grievance. For example, I heard evidence regarding the theft, a ground for dismissal which was ultimately abandoned by the Employer. Rather than recount the evidence as it was presented I will outline the events and focus on the evidence related to:

1. The grievor's drinking; and
2. The threats made to another employee.

On Monday December 11, 1995 the grievor worked the night shift and arrived home in the early morning. At that time his wife advised him that his brother, who had been in a coma in Poland for several months, had died. The grievor did not sleep that day and before going to work that night he drank some beer. He drove himself to work.

Only two employees worked the night shift. The afternoon shift supervisor stayed for only the start of the night shift and then only the two employees remained. If one of the two employees was absent the other employee was required for safety reasons to leave when the afternoon shift supervisor (Mr. Shiells in this instance) left at two a.m. The grievor indicated that he went to work because he knew that if he did not do so the other worker would be sent home and lose pay.

Early in the December 12 shift the grievor had difficulties with his machine and his supervisor, Robert Shiells, had to assist in fixing the machine on three occasions. On the

third occasion Mr. Shiells smelled alcohol on the grievor's breath. The grievor was then sent home. Mr. Shiells testified that he probably would have noticed the smell of alcohol earlier were it not, as he put it, that "my head was plugged that week". Nevertheless, on the first two visits to the grievor's machine Mr. Shiells had smelled nothing unusual and had noticed nothing unusual to indicate the grievor had been drinking. I heard evidence about events which occurred after the grievor left work and in particular about the grievor being stopped by the police on the way home but, in view of the Union admission and the grievor's own testimony that he had been drinking, I do not find it necessary to review that evidence here.

After sending the grievor home Mr. Shiells spoke to the other employee, Henry Ladouceur, and at this point Mr. Ladouceur advised Mr. Shiells that the grievor had threatened to kill him during a discussion they had earlier in the shift.

At the hearing Mr. Ladouceur recalled the threatening words as "I'll kill you, you son of a bitch, I'll kill you, if you touch me, I'll kill you right now." The report prepared later by Brian Querin, the Production Manager, from a note left by Mr. Shiells indicated that the words were "I will kill you if you say anything". The grievor denied threatening Mr. Ladouceur. While he may not have intended to do so, I conclude that the grievor did threaten Mr. Ladouceur.

Mr. Ladouceur also testified that the grievor was swinging his arms. The grievor testified he was moving his arms in a manner which was normal for discussion. From Mr. Ladouceur's testimony and the demonstration which he provided at the hearing I do not find that the grievor was swinging at Mr. Ladouceur in an effort to hit Mr. Ladouceur, or that he was physically threatening Mr. Ladouceur.

Mr. Ladouceur testified that the incident lasted twenty (20) seconds and indicated that his

response was to try to calm the grievor and to tell him to relax. Mr. Ladouceur did not notice that the grievor had been drinking. Mr. Ladouceur indicated he was caught off guard and was "kind of upset in a sense".

The grievor testified about the incident and on many details his evidence differed from Mr. Ladouceur's. The grievor testified that he thought the incident with Mr. Ladouceur lasted longer than 20 seconds, that they were closer than Mr. Ladouceur had testified and, while he agreed his arms were moving, he denied making any threats.

As noted, I have concluded the grievor did not physically threaten Mr. Ladouceur but that he verbally threatened to kill Mr. Ladouceur. On the issue of the threats I prefer the evidence of Mr. Ladouceur to that of the grievor. Both Mr. Ladouceur in his testimony and the report prepared by Mr. Querin gave the threat as conditional, that is "if ... then" in nature, and, whatever the exact words were, I conclude the threat was conditional.

Prior to leaving work the grievor spoke to Mr. Ladouceur to report what had happened and asked Mr. Ladouceur to speak to Scott Goddard, the plant chairperson, about the grievor being sent home.

Mr. Shiells wrote a note about what had happened and left it for Mr. Querin and for the Operations Manager, Stan Vukanovich. The Employer had two meetings with the grievor and Mr. Goddard, one on December 13 and another on December 15. On December 15 the Employer advised the grievor that he was being dismissed.

During the two meetings the grievor did not expressly apologize or admit being drunk. While there was some disagreement in the testimony I conclude that he did, however, admit to having been drinking. In the December 15 meeting he asked for help and indicated that

his brother's death was one reason for his actions.

I heard evidence about the death of the grievor's brother. From the evidence, I conclude that in September, 1995 his brother went into a coma in Poland and was not expected to recover. When the grievor heard of this he was upset and, with the Employer's encouragement, he took one day off. The following day there was some confusion and the Employer understood the grievor's brother had died and thus told the grievor to take bereavement leave, which he did. The Employer also sent flowers. The grievor's brother did not, however, die until December, remaining in a coma in Poland until then. The confusion as to the date of the death of the grievor's brother did not assist the parties in addressing this situation. The Employer thought the grievor had misled the company in September but I think it was a situation in which there was a genuine misunderstanding and no intent on the grievor's part to mislead. English is not the grievor's first language and his lack of ease in English may have led to some of the confusion.

I also heard evidence about the Employer's rules and the standard of discipline for the breach of those rules. While the collective agreement provides for a just cause standard, it also expressly contemplates that the Employer can make and enforce "Rules and Regulations". The Employer had operated for some time with no rules but in early August, 1995 implemented a new set of rules. Those rules read, in part, as follows:

> Substance abuse on company property (i.e. alcohol, drugs, etc.,) will result in dismissal.

While the rules appear to contemplate only dismissal for substance abuse, the Employer acknowledged that in practice the penalty was viewed as a guideline and that each case was looked at on its own merits.

There have been two prior incidents under this rule in which an employee reported to work

after drinking. Both of those incidents were in August, 1995 shortly after the rules were put in place and both incidents involved another employee. In the first instance he was sent home and paid for part of his shift. In the second situation, which occurred less than two weeks after the first, this same employee was suspended for one week. The Employer's record of the second occasion also noted the following as a reason for discipline:

"wanted other employees to fake that we had electrical problems, so as not to work".

Neither discipline was grieved.

Finally, the grievor had a clear disciplinary record, although there had been a cleansing of all disciplinary records approximately two years ago, and he was a good worker in the sense of meeting production targets.

III. POSITION OF THE EMPLOYER

The Employer submitted that it had cause for the dismissal. Beyond that, the Employer said it was for me to review all the evidence and reach a conclusion as to what had happened. The Employer acknowledged that there had been various accusations and denials and that the Employer could not, and did not wish to, sort out the facts. As noted above, the Employer abandoned theft of Employer property as a basis for discipline. After I reached conclusions as to the facts, the Employer submitted that I should advise as to the correct action.

IV. POSITION OF THE UNION

The Union acknowledged from the beginning of the hearing that the grievor had gone to work while under the influence of alcohol. However, the Union suggested that the grievor was not obviously drunk as Mr. Ladouceur did not notice that the grievor had been drinking

and Mr. Shiells did not notice this until the third visit to help the grievor fix his machine. Nevertheless, the Union accepted that the grievor had gone to work while under the influence of alcohol and that the conduct was deserving of some form of discipline.

As for threatening to kill Mr. Ladouceur, the Union argued it was a momentary flare up, lasting perhaps 20 seconds, and that after the flare up both Mr. Ladouceur and the grievor continued to work for some thirty minutes without problem. When the grievor was sent home he went to Mr. Ladouceur to ask him to help by advising the Union.

The Union also referred to the standard of discipline as evidenced by the discipline imposed on another employee for a similar offence. In the first instance the employee was sent home with part pay. In the second instance of drinking, where there was also a concern about an attempt to deceive the Employer, the penalty imposed was a one week suspension. Based on these earlier instances of discipline, the Union said dismissal for a first offence was too severe.

The Union referred to the following authorities: two extracts from Brown and Beatty, *Canadian Labour Arbitration*, 3rd edition, looseleaf (Aurora: Canada Law Book Inc.) - paragraph 4:1500 (December 1995) dealing with Company Rules and paragraph 7:4400 (December 1995) dealing with Mitigating Factors; *Re Nova Scotia Department of Transportation and Canadian Union of Public Employees, Local 1867* (1988), 1 L. A. C. (4th) 285 (Veniot); *Re Four Seasons Hotel Toronto and Textile Processors, Service Trades, Health Care Professional & Technical Employees' International Union, Local 351* (1989), 8 L. A. C. (4th) 354 (Marcotte); and *Re National Auto Radiator Manufacturing Co. Ltd. and Canadian Automobile Workers, Local 195* (1988), 2 L. A. C. (4th) 346 (Watters).

On the basis of these authorities the Union asked that I conclude the rule had not been

consistently enforced, that the event was an isolated incident which had occurred on the spur of the moment, that the grievor was redeemable and that a fair outcome would be a short period of suspension.

V. CONCLUSIONS

To a very large extent the resolution of this case, like most discipline cases, depends on the particular facts. I reviewed the evidence in greater detail earlier and now simply set out a summary of the situation before me.

The grievor's brother had died and the grievor did not sleep on December 12. He drank some beer and went to work. At the start of the shift he had a brief incident with Mr. Ladouceur in which the grievor did not physically attack or physically threaten Mr. Ladouceur, but he did verbally threaten to kill him. The incident was then put to one side by the participants who both carried on with their work. Some thirty minutes later, the supervisor who had worked with the grievor on two occasions earlier in the shift noticed the grievor had been drinking and sent him home. Prior to leaving, the grievor went to Mr. Ladouceur, the person he had threatened, in order to seek assistance. Soon thereafter Mr. Ladouceur advised the supervisor that the grievor had threatened him.

I have read the authorities cited by the Union and, while I will not review them in detail, many of the considerations which have prompted other arbitrators to substitute lesser penalties are present here.

One of the important features of a system of employee discipline using a just cause requirement under a collective agreement is to establish a standard of acceptable behaviour and to change employee behaviour when necessary so that it conforms to that standard. As

part of the endeavour to change behaviour, an employer and an arbitrator should consider whether the employee can reform or, to put it differently, whether an employee can conform to the expected standard of behaviour, and whether a satisfactory employment relationship can be maintained or restored. If the employee can conform and the relationship can be restored, then discipline less than dismissal is usually in order. If the employee behaviour can not be influenced, or if the employment relationship is beyond repair, then dismissal is a reasonable response. Thus the notion of progressive discipline is commonly used as part of an effort to ensure that employees understand how seriously the employer views improper conduct and in order to induce change in behaviour.

Here my task is, in large part, to assess whether the grievor can change his behaviour and conform to the expected standard and to determine whether the employment relationship can be restored.

As this is a discipline case under a just cause provision, the onus was on the Employer to demonstrate both that the grievor did something which justified discipline and that the particular form of discipline imposed was appropriate.

I note first that one of the three grounds originally relied on by the Employer in its decision to dismiss - the theft - was abandoned by the Employer at the hearing. Thus clearly the grievor's actions were not as serious as the Employer thought when it originally decided to impose the penalty of dismissal.

There were two other grounds for dismissal and they must be examined to determine whether the grievor's actions indicate he is beyond change and whether the actions suggest an employment relationship which can not be restored.

Although the grievor should not have gone to work while under the influence of alcohol, I note the death of his brother and the stress which the death caused him, including preventing him from sleeping. In addition, I note that if the grievor did not work neither could Mr. Ladouceur, and that the grievor went to work in part to try to ensure that Mr. Ladouceur would not lose a day's pay. Finally, I note that neither Mr. Ladouceur nor Mr. Shiells noticed any indication of drunkenness in their first encounters with the grievor. Thus, while the grievor's action in going to work while under the influence of alcohol deserves discipline, there were circumstances which suggest that it might not happen again, especially if the grievor is clearly informed how seriously the conduct is viewed. In addition, this conduct does not seem to suggest that the employment relationship is beyond repair.

As for the threat made to Mr. Ladouceur, it too is deserving of discipline, but I note that it was a spur of the moment incident, and that the threats were conditional in nature and did not seem to upset Mr. Ladouceur very much. While the words were very threatening I do not think Mr. Ladouceur thought that the grievor was serious about carrying out the threat. Mr. Ladouceur's only response was to try and calm the grievor. As perhaps one indication of the seriousness of the threats, it was to Mr. Ladouceur that the grievor later went for assistance. Finally the grievor was under stress from the death of his brother and not sleeping. These factors suggest both that a similar event is unlikely to reoccur and that a restoration of the employment relationship is possible.

Thus with respect to both the drinking and the threat there are factors present in this case which tend to lessen the seriousness with which I might otherwise view the events. While the Employer has met its onus in demonstrating the grievor's actions justify discipline, the appropriateness of dismissal requires careful consideration.

The standard of discipline exercised previously by the Employer seems less severe than that

used here. While obviously I did not receive all the details of the other discipline, it was clear that in a second instance of substance use, accompanied by an attempt to deceive the Employer, the discipline imposed was a one week suspension, whereas here the first instance of substance use, accompanied by a threat (and theft, a ground which was later abandoned), the discipline was dismissal. While an Employer need not be perfectly consistent in its choice of disciplinary sanctions, there is value in consistency for at least two reasons:

1. Employees have a reasonable expectation of similar, even if not identical, treatment; and,
2 Consistency by an employer articulates a clear employer expectation of appropriate behaviour.

The situation here suggests that if the dismissal were allowed to remain it would lead to inconsistent treatment of the grievor in comparison with his fellow employee.

Finally, I note that the grievor had a good employment record. While the disciplinary records were cleared some two years ago, the fact remains that it was an Employer decision to do so and at the time of the hearing the grievor's record was clear. In addition, the Employer witnesses testified that the grievor had been a good worker. These factors are also in the grievor's favour as they suggest that the grievor has met the Employer's expectations and can likely meet them in the future.

When considering the events of December 12 as a whole, I have concluded that the situation was unusual and unlikely to reoccur and that there is every likelihood that if the grievor is reinstated in his employment he will meet the expected standard of behaviour and continue as a good employee. In light of this conclusion, together with the disciplinary sanctions the Employer had previously imposed for drinking and the grievor's good employment record, I have therefore decided that the Employer shall reinstate the grievor promptly after the receipt of this decision.

There remains the question of the grievor's lost pay. While I have concluded that dismissal was too severe, clearly some period of suspension would have been in order. The Union suggested a period of one to two weeks. I think that two weeks is too short in this instance. Apart from attending work while under the influence of alcohol there was the incident with Mr. Ladouceur. I have concluded that a one month suspension without pay should be substituted for the dismissal. Thus the period from December 15, 1995 to January 14, 1996 is to be treated as a suspension without pay. The Employer is directed to compensate the grievor for his lost wages for the period from January 15, 1996 until the date of reinstatement. I will remain seised to deal with any matters which may arise in the implementation of this award.

In summary, for the reasons given above, the grievance is allowed to the following extent - the dismissal is reduced to a one month period of suspension without pay and the Employer is to reinstate the grievor and compensate him for lost wages from January 15, 1996 until his reinstatement.

Dated in London, Ontario, this _____ day of February, 1996.

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Howard Snow, Arbitrator