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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

HYDRA-DYNE INDUSTRIAL CLEANING SERVICES LTD.,
referred to as HYDRA-DYNE HIGH PRESSURE WATER & VACUUM
- The Employer

-and-

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 128
- The Union

AND IN THE MATTER OF a grievance of Mike Scott

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

John Watson	- Counsel
Brian Johnston	- Marketing & Development
Kent Wilkinson	- Applications Engineer
Jim Miller	- Supervisor

On behalf of the Union:

Pierre Sadik	- Counsel
Dale Quinn	- Business Representative
Mike Scott	- Grievor

Hearing held April 15, 1997, in Sarnia, Ontario.

AWARD

I. INTRODUCTION

On January 14, 1997, Mike Scott (the grievor) was one of several employees from Sarnia working in Amherstburg on a job which involved the use of his Employer's high pressure water trucks. The job finished about midday. The grievor drove one of the trucks back to Sarnia but on his return he stopped at the Windsor casino for seven hours, delaying the arrival of the truck in Sarnia.

The Employer suspended the grievor for two weeks because of this use of the truck. In his grievance the grievor sought the removal of the suspension and full compensation.

II. THE EVIDENCE

The Employer's business includes cleaning industrial and chemical waste by means of high pressure water. The high pressure is generated through pumps mounted on the back of trucks; the Employer has a number of high pressure water trucks. While the main location of the Employer's operations is Sarnia, the Employer serves a large area of southwestern Ontario, including Amherstburg which is located near Windsor.

Some of the Employer's business is scheduled in advance; however, much of the work involves short notice. Such work includes emergency response to customers who have experienced a spill and hire the Employer to clean up that spill. Up to 90% of the Employer's business involves emergencies and other short-notice contracts.

As the Employer's operations cover much of southwestern Ontario, employees often left Sarnia and drove the Employer's trucks to the location of the job. They may have been away

with the trucks and other equipment for several days. On many occasions when the employees were away from Sarnia the only transportation available to them was the Employer vehicle.

The Amherstburg work involved in this grievance occurred on a regular basis. It was common for some six trucks and seven or more employees to travel from Sarnia to Amherstburg on a Sunday evening. Work began Monday morning and usually finished around lunch time Tuesday. At that time the employees and the trucks returned to Sarnia.

In this instance the job finished at about 1 p.m. No specific directions were given with respect to the return of the trucks to Sarnia. There was no indication given to any employee that the trucks were needed for other jobs.

On a trip from Amherstburg to Sarnia, an employee might reasonably travel through Windsor, so that the stop at the casino did not require the grievor to drive the truck any additional distance.

There was considerable evidence about the use that employees had made of the Employer's trucks while away from Sarnia. As there were differences in that evidence, and as the employees' previous use of the trucks was central to the grievance, I outline the evidence provided by the various witnesses.

Evidence of Jim Miller:

Jim Miller is a senior supervisor; he was the person who imposed the two week suspension and was the Employer's sole witness. He testified that the Employer had no policy regarding the personal use of vehicles. He indicated that if an employee wanted to use a vehicle for

personal reasons, the use had to be cleared through Joe Dynes, the owner. He understood that Mr. Dynes had given permission to employees for the personal use of the trucks in the past. Mr. Miller had himself given permission to employees when Mr. Dynes had indicated to him that it was appropriate to do so.

Other than in such instances, Mr. Miller suggested that the Employer's trucks were not used for personal reasons. He then acknowledged that when employees were away from Sarnia on business the employees used the Employer's vehicles to obtain a sandwich or a coffee. He indicated that "not much" was said about such use. However he testified that after the out-of-town jobs were completed employees did not use the vehicles unless they had sought and received permission.

Mr. Miller admitted that he was not sure whether the above approach was well known among the employees. He had personally told "perhaps a dozen" of the approximately 70 to 80 employees about these requirements for the use of the Employer's equipment.

Mr. Miller could not remember advising the grievor about the rules for the personal use of the Employer's vehicles. He indicated that he was unsure if the policy was posted anywhere or even whether the policy had been put into written form prior to the grievor's discipline. He further indicated that, prior to this discipline of the grievor, to his knowledge there had never been an employee meeting at which the use of vehicles was discussed, nor was verbal advice provided to all employees about using company vehicles for personal purposes. He stated that the rules regarding personal use were "just common knowledge". In addition to being common knowledge, he regarded the approach as "common sense".

The Union suggested to Mr. Miller that Brian McLauchlin, another employee, had been to the casino in an Employer vehicle without authorization. Mr. Miller indicated that he was

aware that Mr. McLauchlin had been at the casino but testified that if Mr. McLauchlin took a company truck, he had done so without permission. When it was suggested that Mr. McLauchlin had stopped at the casino on the night before an Amherstburg job, Mr. Miller indicated that it "could have been". He testified that he had no idea how employees had travelled to the casino that evening and that he had not asked. He testified further that he had thought about the possibility that employees had used an Employer truck on the way to the Amherstburg job, but no one had said they used the Employer vehicle to go to the casino. When asked why, if he suspected a breach of the policy, he had not made any inquiries, Mr. Miller indicated there was no need for that. He testified that if an employee took a truck and got caught, that would be the employee's problem. Mr. Miller testified further that if employees got caught using company vehicles for personal purposes they would "pay the price".

Mr. Miller also agreed that Wayne Hewitt, another employee, may have told him in the spring of 1996 that he had been to the casino on the way to the Amherstburg job. Mr. Miller testified that he had not suspected that Mr. Hewitt had taken a company truck, but rather he assumed that Mr. Hewitt had travelled in his own vehicle.

Mr. Miller agreed that he had stopped at the casino while using an Employer truck, a truck which was available to him twenty-four hours per day.

Mr. Miller also acknowledged that while driving an Employer vehicle he often stopped at a bar on his way home to Sarnia from work in Mississauga. He indicated, however, that he probably had authorization from Mr. Dynes. He indicated that he had probably received that permission at the beginning of his employment.

Finally, Mr. Miller indicated that he had on occasion given "verbal hell" to employees who

used company vehicles without authorization although he was only able to remember the name of one employee. Mr. Miller indicated that part of the reason for giving that employee "verbal hell" had been the fact the employee had been involved in a minor accident with the vehicle.

Evidence of Wayne Hewitt:

Wayne Hewitt is a high pressure water operator. He frequently drove company vehicles to out-of-town jobs. He testified that prior to January 14, 1997 he had never heard of any Employer policy or rule regarding the personal use of company vehicles.

Mr. Hewitt testified that he and other employees used company vehicles to go to the Windsor casino, as well as to a store, or to buy beer. Mr. Hewitt testified that he, the grievor and Brian McLauchlin had used a company vehicle to go to the casino in 1996. They had stopped on a Sunday night prior to starting work in Amherstburg on Monday morning. The following morning Mr. Hewitt, the grievor and Mr. McLauchlin had breakfast with Jim Miller, their supervisor. At breakfast they discussed their visit to the casino on the Sunday evening. Mr. Hewitt indicated that there had been no attempt to hide the use of the company vehicle. Mr. Hewitt testified that he did not take his own vehicle to the casino. The vehicle which he took to the casino was not a high pressure water truck but one of the company vans.

Mr. Hewitt agreed that once a truck left Sarnia on its way to the Amherstburg job, it was unlikely to be used for any other job prior to its return. Mr. Hewitt also agreed that after the job was completed it was important to return the vehicles to Sarnia.

Evidence of Brian McLauchlin:

Brian McLauchlin is another of the Employer's high pressure water operators who drove company vehicles out of town. He testified that he had never been advised, prior to the discipline imposed upon the grievor, of any rule or policy regarding personal use of Employer vehicles.

Mr. McLauchlin testified that he had stopped at the Windsor casino on a Sunday night while on the way to the Amherstburg job. He was driving one of the Employer's high pressure water trucks. The next morning he had breakfast with Jim Miller and others where there had been a discussion of the visit to the casino. Mr. McLauchlin indicated that there had been no attempt to hide the fact that he had stopped at the casino with the Employer's truck. He further testified that in the last few years there had been few, if any, personal vehicles taken to Amherstburg as there were hardly enough employees to drive all the Employer vehicles.

Mr. McLauchlin said he had used company vehicles without authorization for personal purposes such as going to the beer store, the variety store, or the laundry. He also indicated that he had stopped on his way back to Sarnia in order to get something to eat.

Mr. McLauchlin agreed that it was important to return the trucks to Sarnia following a job. He did indicate that when it was particularly important to return the truck(s), Mr. Miller told the employee(s) involved.

Evidence of Jim Scott:

Jim Scott is another of the Employer's high pressure water operators who drives company vehicles as part of his employment. He, too, indicated that prior to the discipline of the

grievor he had never been advised of, nor seen, any company rule or policy regarding personal use of company vehicles.

Jim Scott testified that he could recall three specific instances in which he had discussed visits to the casino in the presence of one of the other supervisors, Brad Thorner. He testified that in those instances there had been discussion of the fact that the visit to the casino had involved one of the Employer's trucks. He remembered a particular discussion about the difficulty that he had parking the truck as it did not fit into an ordinary parking space. He also testified that on one occasion Larry MacKenzie, another member of management, had observed his return to the shop in a company truck. There had then been a discussion of having stopped at the casino.

Finally, Jim Scott indicated that during some 18 years of employment with the Employer and a predecessor company he had regularly used company vehicles without authorization to visit the beer store, a bar, or a clothing store while out of town on a job.

Evidence of the grievor:

The grievor also testified. He had been a high pressure water operator working for various companies owned by Mr. Dynes for some 21 years during which time he had frequently taken company vehicles for personal use without authorization. He testified that he had never been told he required authorization to use company vehicles. He further testified that, prior to being disciplined, he had never seen or heard of a rule or policy regarding personal use of the vehicles.

The grievor testified that he had seen other employees use Employer vehicles for their personal use. However, he acknowledged it was necessary to obtain permission if an

employee required a vehicle for personal high pressure water work. When he had used high pressure water equipment to cut tree stumps he had obtained permission.

The grievor testified about visits he had made to the casino in company vehicles prior to the visit for which he was disciplined.

The grievor testified that he had been at breakfast in Amherstburg with Jim Miller, the supervisor, where there had been a discussion of the grievor's visit to the casino. He indicated that during that discussion it had been clear that he had visited the casino while on his way to Amherstburg. He testified that he had also been involved in discussions with Mr. Miller at the Sarnia shop regarding stopping at the casino.

The grievor also testified that he had previously stopped at the casino on his way back to Sarnia from Amherstburg. He referred in particular to a visit he had made prior to Christmas 1995. He had finished work at noon, stopped at the casino and arrived in Sarnia at 9 p.m. At the time of his arrival in Sarnia the Employer's Christmas party was underway. The grievor joined the party and discussed his visit that day to the casino with Brad Thorner, a supervisor. The grievor testified that Mr. Thorner had given no indication that it was improper for the grievor to stop at the casino with the Employer's truck. The grievor indicated that Mr. Thorner did not seem at all concerned that the grievor had stopped at the casino while driving one of the Employer's trucks. The grievor agreed that the Christmas party involved drinking but stated that he did not think Mr. Thorner was intoxicated.

The grievor indicated that when a job was finished and a particular piece of equipment was needed elsewhere it was common for the supervisor to tell the person that the machinery was needed for another job and therefore it should be taken directly back to the shop.

The grievor testified that he had never tried to hide his use of the company vehicle. He further testified that if he had any idea that using the company truck to stop at the casino was wrong he would not have done so.

On cross-examination the grievor agreed that he did not ask permission to take the truck when he stopped at the casino. The grievor further acknowledged that much of the Employer's work comes from call-ins which could occur at any time. He agreed that it was important to return the truck directly to the shop if the supervisor told the employee it was needed for other work. He indicated that on some occasions he had been told that it was important to get the truck back to the shop as it was needed for another job.

When asked how the Employer might have contacted him in order to obtain the truck if it had been needed elsewhere, the grievor indicated that he had told a number of people he intended to stop at the casino on the way back to Sarnia. He could not recall whether he had told Mr. Miller, the supervisor, but indicated that he had made no attempt to hide his plans to stop at the casino. The grievor acknowledged that during his stay in Windsor the truck had been taken out of service.

Finally, the grievor had a record of previous discipline. In November 1995 he was given a verbal warning for the manner in which he had communicated with office personnel. In November 1996 the grievor was given a written warning for his failure to either provide a doctor's note or to complete a modified duties form, together with his use of improper language with management personnel over this issue. Also in November 1996 he was given a written warning for careless driving of an Employer truck on the Employer's site which had resulted in a minor accident.

III. THE COLLECTIVE AGREEMENT

The following is the relevant provision of the Collective Agreement:

> ARTICLE 4 - MANAGEMENT'S RIGHTS
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> . . .
>
> b) It is the exclusive function of the Employer to . . . discipline or discharge for just cause . . .
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> . . .

IV. POSITION OF THE EMPLOYER

The Employer submitted that the essential point in this grievance was the fact that the grievor had taken a truck of importance to the Employer's operations without permission and had stopped at the casino, making the truck unavailable for use for a period of some seven hours.

All the witnesses had acknowledged the importance of call-in work to the Employer. While some of the witnesses had used company vehicles for their personal use, that use had occurred in situations where the company vehicle was the only one available to them and that use had not rendered the vehicle unavailable for the Employer's business. When an employee had a company vehicle on an out-of-town job, that vehicle was not available for other productive use by the Employer. In this situation the grievor had taken a valuable vehicle which would otherwise have been available for productive use and had deprived the Employer of the ability to use that vehicle for some seven hours.

The Employer noted the grievor's discipline history. The Employer said there had been a pattern of misconduct and that the grievor's use of the truck in this instance was deserving of discipline. In these circumstances the Employer submitted that a two-week suspension was reasonable.

V. POSITION OF THE UNION

The Union noted that the discipline in this case had been imposed for the grievor's use of the truck. The Union submitted that the Employer must either show that there was a rule regarding this matter which had been brought to the attention of the grievor or, alternatively, that the use was so outrageous that common sense would dictate that it was misconduct. The Union submitted that there was no rule prohibiting such use. There had been considerable testimony regarding employee use of Employer vehicles while away on jobs. In that work environment, the Union submitted there was no reason for the grievor to have known he was doing anything wrong.

The Union submitted that it was unfair to "blind-side" a person in a situation such as this. On the totality of the evidence, and with discipline for this sort of conduct having been previously imposed on only one employee (an employee who was given "verbal hell" in part for having damaged a vehicle), it would be unfair for the Employer to discipline the grievor in this situation.

The Union noted that there was:

1. No posted rule.
2. Only one prior incident of discipline for personal use of vehicles, discipline which had been imposed in part for having damaged a vehicle.
3. Open use of vehicles by many employees, use which was consistent with management knowing about the use of vehicles.
4. Evidence that use of the vehicles had been clearly brought to management's attention on several occasions.
5. Specific evidence that there had been discussions with the supervisor, Mr. Miller, at breakfast in Amherstburg regarding employees stopping at the casino while they were

in possession of company vehicles.

The Union also noted that when vehicles were required by the Employer, employees were commonly advised of this and advised that they should promptly return the vehicle to Sarnia. There was no evidence that the truck was actually needed on January 14 and there was no evidence of any harm suffered by the Employer because the grievor returned the truck at 11 pm. There was clear evidence that the grievor had taken a truck to the casino after work in December 1995 and he had not been told there was anything wrong with having done so.

The Union submitted that the grievor's prior discipline was not remotely similar to the discipline at issue here and that the concern raised in the past had been one of insubordination. There was no insubordination in the grievor's conduct here.

For the above reasons the Union submitted that there were no grounds for discipline, and asked that the discipline be removed and that the grievor be compensated in full.

The Union relied upon several authorities which it submitted indicated an employer rule which had not been enforced could not suddenly be enforced against an employee without prior warning. In this case the Union submitted that if there was a rule it had not been enforced. The authorities were as follows: Brown and Beatty, *Canadian Labour Arbitration,* 3rd edition, Section 4:1500*; Re Air Canada and International Association of Machinists & Aerospace Workers* (1981), 2 L.A.C. (3d) 442 (Shime); *Re United Packinghouse Workers, Local 489, and Robson Lang (London) Ltd.* (1965), 16 L.A.C. 145 (Reville); *Re Four Seasons Hotel Toronto and Textile Processors, Service Trades, Health Care Professional and Technical Employees' International Union, Local 351* (1989), 8 L.A.C. (4th) 354 (Marcotte); *Re United Steelworkers, Local 6500, and International Nickel Company of Canada Limited* (1967), 18 L.A.C. 284 (O'Shea).

VI. CONCLUSIONS

There are three questions to be considered, as follows:

1. Prior to January 14, 1997, did the Employer have a rule regarding the use of company vehicles in a situation such as this?
2. Was the grievor's use of the vehicle in this situation improper?
3. In all the circumstances of this case, was the particular discipline imposed by the Employer just?

I deal with each question in turn.

1. *Prior to January 14, 1997, did the Employer have a rule regarding the use of company vehicles in a situation such as this?*

There was evidence that employees sought permission when they wished to use the high pressure trucks for personal jobs which required high pressure water equipment. However, the situation here was one in which an employee used a vehicle which carried high pressure water equipment, but used that vehicle simply for transportation.

Mr. Miller suggested there was a rule regarding personal use of vehicles. His testimony, however, did not make it clear what that rule was beyond what he referred to as "common sense". Four bargaining unit employees testified and each indicated that, prior to the discipline imposed upon the grievor in this case, they had never heard nor read anything regarding an Employer rule about the personal use of vehicles.

I am unable to find any Employer rule which might cover the use of its vehicles in this situation when an employee returning from an out-of-town job stops for several hours. There

was no suggestion that the vehicle was driven extra distance. The Employer's concern was simply that the vehicle was not available in Sarnia for a period of several hours. In my view the Employer never had a rule, or at least never communicated a rule, which dealt with the situation before me.

2. I now turn to the following question:

Was the grievor's use of the vehicle in this situation improper?

High pressure water equipment is central to the Employer's business. The Employer's business consists in large part of emergency work. The evidence indicated that up to 90% of the Employer's business came from situations where the work was requested on very short notice.

The grievor finished work in Amherstburg about 1 pm. If he had driven directly to Sarnia the vehicle would have been available for other work about 4 pm. The vehicle could have been used by another employee. By stopping in Windsor the grievor delayed the availability of this vehicle for some seven hours. In my view an employee should realize that withdrawing an important piece of equipment from the Employer's operations in this fashion for this length of time could easily lead to lost business. I do not think that the Employer has to promulgate a rule that says at the end of an out-of-town job a piece of equipment as important to the Employer's operations as one of the high pressure water trucks should be returned to the Sarnia operation where it will be available for use by other employees for other jobs.

I conclude that stopping as the grievor did and thus withdrawing the Employer vehicle from other potential use by the Employer was improper and something for which, in the absence of special circumstances, discipline may be imposed.

3. I now address the third question:

In all the circumstances of this case, was the particular discipline imposed by the Employer just?

The Union argued that in circumstances in which,

a) Employees commonly used Employer vehicles;

b) Management knew, or ought to have known, that employees used the Employer's vehicles to stop at the casino; and,

c) In particular, management knew or ought to have known that employees had stopped at the casino on return trips from the Amherstburg job;

it would be unfair to permit the Employer to impose discipline upon the grievor.

It is clear that many employees have used Employer vehicles for "personal" reasons. In most instances this use has taken place while employees were working away from Sarnia. Personal use to go to the store or to buy beer while out of town does not affect the availability of the vehicle for Employer purposes. In my view there is a distinction to be drawn between, for example, stopping at the casino while driving from Sarnia to Amherstburg as compared with stopping at the casino on the return trip, after the Amherstburg job has been completed. Once the trucks leave Sarnia and are on their way to Amherstburg they are not otherwise generally available to the Employer for use on other jobs. An employee who stops at the casino on his way to Amherstburg does not remove the vehicle from potential productive use by the Employer. However, when the work in Amherstburg has been completed and the trucks are ready to return to Sarnia, there is at least the potential that the Employer would be able to put these vehicles to productive use on another job. The use made by employees in buying beer or groceries, or in stopping at the casino on the way to Amherstburg, is qualitatively different from the situation before me and such common use does not in my view make it unfair for the Employer to impose discipline here.

However, there was evidence of one instance where the Employer knew that an employee stopped on the return trip from Amherstburg and the Employer did and said nothing. That one instance was at Christmas 1995 and it also involved the grievor. The information that the grievor had stopped on his return trip to Sarnia was communicated to a supervisor late in a Christmas party. Alcohol had been consumed at the Christmas party. While the grievor did not think the supervisor was intoxicated, nevertheless it seems clear that in this situation the supervisor's attention to the Employer's business concerns would have been diminished. In that circumstance, I do not think that the grievor's stop at the casino on his return to Sarnia was clearly condoned nor that the one incident was enough to make it unfair for the Employer to now impose discipline for stopping in Windsor and depriving the Employer of the use of the truck.

However, many employees have over many years used Employer vehicles for personal reasons. Employees have stopped at the casino on the way to Amherstburg in situations in which, in my view, the Employer knew they were stopping in Employer vehicles. The grievor had previously stopped at the casino on his return. It was understandable that the grievor thought what he was doing here was permissable. Thus, while I do not think that the past use of the Employer's vehicles by employees makes it unfair to impose any discipline, it is a factor which influences my decision as to the discipline which the Employer can reasonably impose.

While I have concluded that the grievor's conduct was improper, the primary purpose of discipline is to change behaviour. The question is what discipline was appropriate:

1) to draw the grievor's attention to the fact that taking a vehicle out of service in this fashion was improper; and,
2) to persuade him not to do it again?

On the first point, a two week suspension was longer than was needed in order to simply

indicate to the grievor that his conduct was improper. As for the second point, the grievor testified that if he had known what he was doing was incorrect, he would not have done it. I found his assertion credible, and I do not think he would have stopped in Windsor if he had realised that his actions were improper.

The fact remains that what the grievor did was improper and the Employer can discipline him for that conduct. Although the grievor had a record of prior discipline, it was unrelated to the situation here. In view of my comments on the purpose of discipline above, together with the following factors:

1. The grievor's discipline record was for unrelated matters;
2 Employees had openly used vehicles for similar purposes; and,
3. The grievor has worked for the Employer and its predecessors for 21 years;

I have decided to substitute a one-day suspension for the two-week suspension originally imposed by the Employer, and I direct the Employer to compensate the grievor for the other days. In the circumstances of this case, a one day suspension would have been adequate to indicate to the grievor that his conduct was improper and to persuade him not to repeat it.

In summary, for the reasons given above, I substitute a one-day suspension in place of the Employer's two-week suspension and I direct that the grievor be compensated for the other days of his suspension. I remain seised to deal with any difficulties which may arise in the implementation of this award.

Dated in London, Ontario this _____ day of May, 1997.

Howard Snow, Arbitrator