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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SIEMENS CANADA LIMITED - TILBURY
- The Employer

-and-

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

AND IN THE MATTER OF a grievance of Darryl Norman

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Erin R. Kuzz	- Counsel
Danielle Gignac	- Siemens
Kimberley Matton	- Siemens
Konrad Boehler	- Siemens

On behalf of the Union:

Robert Jenner	- CAW National Representative
Rick Garant	- President CAW Local 1941
Darryl Twigg	- Chairperson Siemens CAW Local 1941
Shawn O'Donnell	- Vice-President CAW Local 1941
Darryl Norman	- Grievor

Hearing held April 7 in Chatham, and September 17 and October 15 in Windsor.

AWARD

I. INTRODUCTION

The grievor experienced back pain and consulted his family doctor who advised him not to work. While off work the grievor performed repairs to his car. When the Employer learned of the grievor's actions it terminated his employment for missing three consecutive work days without a "satisfactory reason". The primary issue is this:

Did the grievor have a satisfactory reason for his absence?

II. THE EVIDENCE

The Employer operates an automotive parts plant in Tilbury. The grievor has worked for this Employer since January 1993. The grievor is 39 years old, has been employed steadily since he was 16, and has generally worked all available hours.

The grievor suffered a serious back injury several years before he began working for the Employer. On Friday September 11, 1998 the grievor had back pain before work. He had experienced back pain previously but it usually went away. He went to his job; however, the pain became worse during work. The grievor informed his supervisor that he was leaving work and he went to the Hospital Emergency Department. The Emergency Department physician prescribed medication and advised him to see his family doctor. The grievor informed his supervisor of these events. The grievor testified that his supervisor told him to obtain his doctor's approval for his return to work and to bring a doctor's note when he returned.

On Monday September 14 the grievor saw his family doctor, Dr. Aidan Brady. Dr. Brady prescribed pain killers and muscle relaxants. Dr. Brady also advised the grievor to stay away

from work, to get as much rest as he could tolerate, and to return in one week. The Employer was advised that the grievor would be away from work until at least September 23.

The grievor saw Dr. Brady again on September 21, at which point the grievor's condition had improved. However, Dr. Brady concluded that the grievor was still totally disabled. He again advised the grievor to stay off work, and he referred the grievor to a physiotherapist. The grievor testified that he raised the issue of his return to work during this visit. Dr. Brady testified that he had made no note of discussing this issue and that he had no recollection of the visit beyond what was in his notes.

The grievor followed Dr. Brady's advice. He remained off work and obtained treatment from the physiotherapist, Mark Woodall.

On September 21 Dr. Brady completed a Sickness and Accident claim form on which he stated his conclusions that the grievor had been totally disabled from September 14 to 21 and that it would be two or three weeks after September 21 before the grievor could return to work. The grievor delivered the form to the Employer soon after.

Meanwhile, during the week of September 14-18, the Employer was advised by another employee that the grievor did not appear to be disabled. The Employer engaged a private investigator who placed the grievor under surveillance from September 21 through September 24.

The investigator, Mike Glavin, reported twice daily to the Employer regarding the grievor's activities. Of particular relevance, on September 22 the grievor changed his car's water pump and on September 24 he did some brake work on his car. Mr. Glavin videotaped some of the

grievor's activities, including the car repairs. On the videotapes the grievor can be seen bending over his car, jacking up the car, removing a tool box, removing wheel nuts, replacing a tire, lowering the car, lifting with his arms straight, etc. The work on the water pump was done in his driveway at a slow pace and involved periods of talking with acquaintances. At times on the videotapes the grievor walked in an unusual manner, described by Mr. Glavin as "lumbering", although it was not clear whether that was normal for the grievor or due to stiffness. Mr. Glavin testified that while he had the grievor under surveillance he noticed no signs of grimacing or other outward indication that the grievor was in pain.

The Employer halted the investigation on September 24. The Employer viewed the videotapes and decided to terminate the grievor's employment. The Employer sent the grievor a letter September 25 advising him of his termination. His employment was terminated for absence of three or more days (i.e. September 22-25) without a satisfactory reason. The Employer accepted that the grievor had a satisfactory reason for his absence from September 11 through September 21, but decided the grievor did not have a satisfactory reason thereafter.

Mr. Woodall (the physiotherapist) and Dr. Brady (the grievor's family physician) told the grievor in early October that he could return to work.

I heard additional medical evidence from Dr. Brady, from Mr. Woodall, and from Dr. Haider Hasnain who was accepted as an expert in Occupational Health Medicine and has worked with the Employer for about one year. Each viewed portions of the videotape and commented on what was on the tape.

Dr. Brady was surprised by the grievor's actions in working on his car. Dr. Brady said the grievor did not discuss this activity with him in advance. Dr. Brady stated he would not

recommend that activity for therapy, and that the activity might aggravate the back injury. Based on what Dr. Brady saw on the videotape, he indicated he would not assess the grievor as being totally disabled as he had in September. There was no evidence that the grievor misled Dr. Brady.

Mark Woodall, the physiotherapist to whom Dr. Brady referred the grievor, saw the grievor on September 23, 25, 29, October 1, and October 8, 1999. Mr. Woodall testified that he did an assessment on September 23 and that some of his assessment involved objective measures; he did not rely simply on what the grievor told him. He testified that on September 29 the grievor was 70% better than when first seen on September 23. On September 29 Mr. Woodall discussed the grievor's return to work and on October 1 he wrote a note indicating the grievor could return to work so long as he did not have to lift from the floor with straight legs. Mr. Woodall was of the view that the grievor had a back problem and he testified that he had no reason to think the grievor was fabricating back pain.

During his testimony Mr. Woodall also viewed the videotapes of the grievor working on his car. He testified that the brake repair would present no problem for the grievor, but he was concerned about the changing of the water pump. Mr. Woodall believed that the changing of the water pump would hurt the grievor or cause him symptoms, but he acknowledged that he was unable to say that it actually did so and he noted, on the positive side, that the grievor took frequent breaks throughout the time he was working on the water pump.

Dr. Hasnain testified about back pain generally and about the modified work available with the Employer. As for the grievor, Dr. Hasnain had seen the videotapes previously and he reviewed portions of them during his testimony. He expressed the opinion that the grievor showed a range of motion on the tapes which was average for a healthy individual. Dr. Hasnain believed that a number of the grievor's motions and activities on the videotape were

the activities of a normal healthy person. Dr. Hasnain stated that the grievor's actions on the videotape were not those of a totally disabled person.

The Employer has work which can be modified in many ways to suit almost any physical restrictions. Work could have been modified to accommodate the grievor. However, neither the Employer nor the grievor initiated a discussion of this possibility.

III. PROVISIONS OF THE AGREEMENT

The following are the relevant provisions of the parties' 1998-2001 collective agreement:

ARTICLE 10 - Discharge Or Discipline Cases

10:01 The Company agrees that any such discipline administered will be for just cause. . . .

ARTICLE 11 - Seniority

. . .

11:02 Seniority rights and employment of an employee shall cease for any of the following reasons:

> . . .
> (b) If the employee is discharged and such discharge is not reversed through the grievance procedure.
> . . .
> (f) If an employee is absent from the Company for three (3) consecutive working days and fails to provide satisfactory reason for his absence or fails to notify the Company of his absence.
> . . .

IV. POSITION OF THE EMPLOYER

The Employer submitted that it had grounds for the termination of the grievor's seniority and employment under Section 11:02 (f). The Employer reviewed the evidence in detail and

asked me to find that the grievor did not have a satisfactory reason for his absence. On September 21 the grievor obtained a Sickness and Accident claim form on which his doctor had indicated the grievor was totally disabled. But on the same day Mr. Glavin placed the grievor under surveillance and the actions of the grievor were not those of a totally disabled person. The Employer did not accept that the grievor was totally disabled and submitted that it had reasonably concluded that the grievor did not have a satisfactory reason for his absence.

The Employer submitted that it had an option to proceed under Article 11 and did not need to use the just cause provisions in Section 10 as the Union had suggested. Moreover the Employer submitted that under Section 11 the parties had agreed on the consequences of missing work without a satisfactory reason and that, as arbitrator, I had no power or discretion to modify the penalty.

The Employer asked me to dismiss the grievance.

The Employer referred me to the following awards: *Zettel Metalcraft Ltd. and C.A.W.-Canada, Local 396* (1996), 53 L.A.C. (4th) 393 (Tims); *National Automobile, Aerospace And Agricultural Implement Workers Of Canada, (C.A.W.) And Its Local Union 1941 and Siemens Electric Limited (Neuts grievance)* (March 12, 1999), unreported (Watters); *National Automobile, Aerospace And Agricultural Implement Workers Of Canada, (C.A.W.) And Its Local Union 1941 and Siemens Canada (Harper grievance)* (May 13, 1999), unreported (Watters); *The University Hospitals Board and The Alberta Union of Provincial Employees on behalf of Local 54* (October 5, 1987), unreported (de Villars); *Hoover Canada Inc. and United Electrical, Radio and Machine Workers of Canada, Local 520* (December 10, 1987), unreported (Samuels); *Re Ford Motor Co. of Canada Ltd. and United Automobile Workers, Local 1520* (1975), 8 L.A.C. (2d) 149 (Palmer); *Re Kenroc Tools*

Corp. and United Steelworkers (1990), 17 L.A.C. (4th) 416 (M. G. Picher); *Re Guelph General Hospital and Canadian Union of Public Employees, Local 57* (1982), 5 L.A.C. (3d) 289 (Saltman); *Re Ford Motor Co. of Canada and United Automobile Workers, Local 707* (1976), 11 L.A.C. (2d) 406 (Palmer); *Canadian National Railway Company and International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers* (September 20, 1989), unreported (M. G. Picher); *Re Loeb Inc. and Warehousemen, Transportation & General Workers' Union, Local 715* (1995), 47 L.A.C. (4th) 123 (Young); *Re Geiger International and United Brotherhood of Carpenters & Joiners, Local 27* (1990), 17 L.A.C. (4th) 13 (Davis); and *Re Canada Safeway Ltd. and United Food and Commercial Workers International Union, Local 2000* (1998), 71 L.A.C. (4th) 107 (Sanderson).

V. POSITION OF THE UNION

The Union submitted that the Employer was required to show that the actions of the grievor were fraudulent and it was the Union's position that the evidence did not support such a conclusion.

The Union reviewed the evidence and asked me to conclude the grievor had spent very little time actually working on his car, much less than would have been required if he had been at work on light duties. The Union noted that Dr. Brady had concluded on September 21 that the grievor was totally disabled. The grievor saw Dr. Brady and Mr. Woodall on a frequent basis during this period and the grievor was only cleared for a return to work in early October. The Union thus submitted the grievor had a satisfactory reason for his absence.

It was the Union's submission that, if the grievor did not have a satisfactory reason on the two days he worked on the car (September 22 and 24), the absence did not amount to the three consecutive days as was required by the agreement.

The Union then submitted that the Employer was required to use the just cause provisions of the collective agreement. It was the Union's position that the "trigger" for invoking Section 11:02 (f) was different in the earlier cases between the parties and relied upon by the Employer. In this case the Employer could not invoke the Section.

The Union asked that I allow the grievance, reinstate the grievor, direct the Employer to pay full back pay, and remain seised.

The Union referred me to the following awards: *Camco Inc. and Canadian Auto Workers, Local 504* (December 20, 1994), unreported, summarized 37 C.L.A.S. 216 (R. Levinson); *Re Boart Canada Inc and Canadian Automobile Workers, Local 1256* (1988), 35 L.A.C. (3d) 253 (Palmer); *Re Hussman Store Equipment Ltd. and Canadian Automobile Workers, Local 397* (1990), 16 L.A.C. (4th) 19 (H. D. Brown); and *CAMI Automotive Inc. and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) and its Local 88* (March 30, 1998), unreported, summarized 52 C.L.A.S. 169 (Snow).

VI. CONCLUSIONS

I begin with the provisions of the collective agreement. The Employer relied upon the termination provisions of Article 11; the Union submitted the Employer was required to use the just cause for discharge provisions of Article 10.

I have no doubt that the Employer could have treated this as a matter of misconduct and dealt with it under Article 10 and the just cause provision. However, the Employer did not rely on the just cause provision in addressing this issue. The first question is this:

> *As a matter of the interpretation of this collective agreement, was the Employer*

required to use the just cause provision in Article 10 or could it, as it has done here, rely on the termination provisions of Article 11?

While the Union submission has an initial attraction, I cannot accept the argument that the Employer was restricted to dealing with this matter under the just cause provisions; I do not believe that was the parties' intention. I have three reasons for rejecting this submission.

The first reason is based on the language of this agreement. There is no article of the agreement which expressly requires the Employer to use the just cause provision. Moreover, where there are, as here, two or more provisions in a collective agreement which an Employer may use to address an issue, I know of no principle of interpretation which limits the response of the Employer, or which would compel it to rely upon one particular provision. Finally, I can find nothing elsewhere in the agreement which would imply that the Employer has to use the just cause provision in a case which would also fall under the provisions of Article 11, and no such provision was suggested in argument. Looking only at the words of the agreement, it appears that the parties intended that the Employer have a choice upon which provision it relied.

In addition to the words of the agreement, the parties' intention can sometimes be determined from other factors. In this instance I note that arbitrators have over a number of years interpreted similar termination articles as allowing employers to rely upon those provisions in similar fact situations (see, for example, the following cases from the 1970's, 80's and 90's cited by the Employer and referred to above, *Zettel Metalcraft, Guelph General Hospital, Ford Motor and Local 707, Loeb Inc., and Geiger International*). I assume that a large and experienced Union and a large and experienced Employer, as these parties are, would have understood the arbitral jurisprudence and would have known that these termination provisions were used and interpreted in this manner. In agreeing to this termination article

in their collective agreement, these parties would have intended that employees could be terminated under the article for certain culpable absences which the Employer could also have dealt with under the just cause provision.

Finally, the Union submission that the Employer was required to rely upon the just cause provision has already been raised before another arbitrator. The Union also argued this issue in a earlier grievance under this agreement and was unsuccessful (see *Siemens, Harper grievance*, Watters, *supra*). Although Arbitrator Watters did not provide reasons for his decision on this issue, he noted that the Union had made this argument and he then dealt with the question of whether the grievor had a satisfactory reason under Article 11:02 (f). It is obvious from his award that he felt the Employer could use Article 11 and was not limited to using the just cause provision. Consistency among arbitrators operating under the same agreement is desirable and I would only reach the opposite conclusion on this issue if I was persuaded Arbitrator Watters was clearly wrong.

For the above reasons, I reject the Union's submission that the parties intended that the Employer be limited to using the just cause provisions in addressing its concerns about the grievor's absence.

The Union also submitted that the "trigger" for invoking Article 11 was different in the other *Siemens* cases. This point was not fully argued; I understood it to be a submission that, in order for the Employer to invoke Article 11:02 (f), the grievor had to have missed work and neither have a satisfactory reason nor have notified the Employer of the absence. Putting that differently, the Union appeared to suggest that it was sufficient for an employee to notify the Employer of the absence, even if there was not a satisfactory reason for that absence. I cannot accept that interpretation of the provision. In my view, the parties intended that an absent employee must both have a satisfactory reason and notify the Employer. Thus,

assuming that the grievor missed three consecutive work days without both having a satisfactory reason and notifying the Employer, I believe the parties intended for the grievor's seniority and employment to terminate.

The Union also made a submission with respect to the three consecutive work days. The Union submitted that the grievor's absence without satisfactory reasons was, at most, for two days. The Union submitted that, taken at its best, the Employer's evidence demonstrated the grievor did not have a satisfactory reason on the two days he actually worked on his car and thus the grievor did not miss three consecutive days without a satisfactory reason. I cannot accept this submission. The collective agreement imposes the responsibility to provide a satisfactory reason upon the employee; it is not the Employer's responsibility to prove the absence of a satisfactory reason. Moreover, in my view, the period of September 22-25 was one absence of four days and not four absences of one day each. If the grievor did not have a satisfactory reason on September 22 and September 24 when he worked on his car, then I think it clear he did not have a satisfactory reason on the intervening day, as well as on September 25.

I now consider the standard of review. The issues here are as follows:

> *What approach should I take in assessing whether the conditions specified in Article 11:02 (f) existed - must the Employer decision be correct or only reasonable, and can I consider facts not known to the Employer at the time it made its decision?*

Arbitrator Watters has addressed these issues in the two earlier cases between these parties under this collective agreement and, as I noted above, consistency among arbitrators operating under the same agreement is desirable. Arbitrator Watters concluded that he could consider all the evidence and was not restricted to the evidence available to the Employer when it made its decision. In addition he stated that the question was whether "the employee

has provided satisfactory reasons in an objective sense" (*Siemens, Neuts grievance, supra,* p. 20) and "whether, in fact, the employee did offer a satisfactory reason for the absence" (*ibid*). I agree and conclude that whether the grievor had a satisfactory reason is an issue on which I must satisfy myself based on all the evidence; the collective agreement does not indicate that I am to defer to the Employer's decision on this issue, nor that I am limited to the evidence the Employer considered.

I now turn to the primary issue in this grievance:

> *Did the grievor have a satisfactory reason for his absence?*

The consequences which flow from a finding that the grievor did not have a satisfactory reason are very serious for the grievor - loss of employment and seniority. Because of that, arbitrators commonly consider these cases with care and ensure that the situation (in this case absence without a satisfactory reason) which leads to these serious consequences is clearly applicable. For example, in *Zettel Metalcraft, supra,* Arbitrator Tims wrote as follows:

> It is appropriate in my view to interpret the language of a deemed termination clause narrowly and strictly against an employer because of the drastic consequences flowing from its application. (p. 409)

I agree with the general approach of caution in applying this provision.

I note that it is often difficult for an employee and for medical personnel to accurately determine how sick an employee is, or to determine the best course of treatment. This is especially so when it is back pain that bothers the employee. In *Boart Canada, supra,* Arbitrator Palmer commented as follows:

> In my view, there seems little doubt that the grievor suffered a back injury. He suffered some pain from it. The degree of that pain is impossible to determine. What incapacitates one person from a certain type of work may not have the same effect on another. Thus [the grievor] may have a lower pain tolerance that others. A low pain tolerance, however, does not provide grounds for saying that someone is lying. (p. 255)

Because of the difficulty in diagnosing and treating injuries and especially back pain, I think

it appropriate to make some reasonable allowance for the exercise of judgement by both an attending physician in the diagnosis and treatment of an injury and by an employee who chooses to follow his or her physician's advice. What is obvious in hindsight is often not nearly as clear at the time the events occurred.

I turn now to the grievor's situation. I have no doubt that the grievor initially had back pain and that the pain was severe. The Employer accepts that and accepts that the grievor had a satisfactory reason for his absence September 11-21. There is also no doubt that the grievor's condition was improved on September 21 when he saw Dr. Brady again. Dr. Brady testified to that effect, as did the grievor. However, notwithstanding the improvement in the grievor's condition, as of September 21 Dr. Brady was of the view that the grievor was not fit to return to any work. Dr. Brady assessed the grievor as totally disabled. Dr. Brady advised the grievor to stay off work and to see a physiotherapist. The grievor did as Dr. Brady recommended. If that were the end of the story there would have been no termination.

The evidence of Dr. Brady and of the physiotherapist Mr. Woodall, together with the Employer's own conclusion that there was a satisfactory reason for the grievor's absence until September 22, make it impossible to conclude that the grievor was fabricating his illness or his pain in its entirety. I acknowledge Dr. Hasnain's conflicting views about the grievor's condition based on his review of the videotape. However, I find Dr. Hasnain's opinion insufficient to over-ride the other evidence; Dr. Hasnain has neither examined nor treated the grievor and his opinion, based on watching the grievor on videotape, is simply not as persuasive as the opinions of Dr. Brady and Mr. Woodall who examined and treated the grievor. Even considering the grievor's work on his car and Dr. Hasnain's opinions, I conclude the grievor was suffering from back problems during the period in question - September 22-25.

What then should I conclude regarding the grievor's work on his car? In this instance I can easily conclude the grievor was a poor patient whose actions (car repairs) ran the risk of further injuring his back. Perhaps, in part, this occurred because the grievor was used to living with back pain. Whatever the risks of further injury might have been, I note that the grievor's actions did not aggravate his condition; on the contrary his condition improved substantially during this period.

The grievor's supervisor advised him that he needed a doctor's note to return to work. The grievor was under his family physician's care, and the medical advice he received was to stay away from work. Although it seems clear in hindsight that the grievor could have performed modified duties, there is no basis on which I am able to find he had an obligation to seek out such duties, especially given Dr. Brady's advice and treatment regime and his supervisor's advice that he needed his doctor's clearance prior to his return to work. The Employer did not propose modified duties to the grievor, and again I do not suggest the Employer was required to raise this issue.

In summary, Dr. Brady recommended the grievor stay off work, and recommended that the grievor see Mr. Woodall. The grievor followed that advice. The grievor was informed that he needed his doctor's authorization to return to work and he did not get that until October. In these circumstances, even accepting that the grievor should not have done the car repairs, I conclude that the grievor had a satisfactory reason to miss work. In the language of Article 11:02 (f), I cannot find that the grievor "fail[ed] to provide satisfactory reason for his absence".

It follows then that the grievance is allowed. As for remedy, I agree with the Employer - I have no discretion to adjust or modify the penalty under this provision, or to substitute a lesser penalty. The parties have agreed on the consequences of certain actions and I am not

to re-write their agreement. As I have found that the conditions specified for invoking Article 11:02 (f) did not exist in this instance, the Employer is directed to reinstate the grievor without loss of wages, seniority or benefits. I note that the grievor would not have been able to return to work immediately after the termination. In addition, I note that the grievor may be entitled to the payment of benefits - he had claimed sickness and accident benefits but his claim was not processed because of the intervening termination. I leave it to the parties to work out the details of this order.

The remedy may appear to be unsatisfactory, but the remedy necessarily flows from the "all" or "nothing at all" approach which is mandated by the termination article. Had the Employer relied upon the just cause provision, the nature of a just cause consideration allows for a full review of all the circumstances and allows an arbitrator to modify the penalty or substitute a lesser penalty.

Finally, I remain seised to deal with any difficulties which may arise in the implementation of this award.

Dated at London, Ontario this 9th day of November, 1999.

Howard Snow, Arbitrator